

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

ALEXANDRE KONANYKHINE,)
)
 Petitioner,)

)
 v.) CIVIL ACTIONS
)
)
 UNITED STATES OF AMERICA,) 97-449-A
 DEPARTMENT OF HOMELAND SECURITY,) 04-34-A
)
 Respondent.)

)

REPORTER'S TRANSCRIPT

HEARING

Thursday, January 15, 2004

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: JOHN T. SZYMKOWICZ, ESQ.

For the Petitioner

OFFICE OF THE UNITED STATES ATTORNEY
BY: WILLIAM J. HOWARD, AUSA
KATHLEEN PEPPER, AUSA

For the Respondent

MICHAEL A. RODRIQUEZ, RPR/CM/RMR
Official Court Reporter
USDC, Eastern District of Virginia
Alexandria Division

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PROCEEDINGS

(Court called to order at 11:20 a.m. in
Konanykhine v. Department of Homeland Security)

THE COURT: All right, you may call the
Konanykhine matter

THE CLERK: Civil Action Number 97-449-A and
03-1587-A, Alexandre Konanykhine versus Homeland Security.

THE COURT: Well, there are a number of cases,
but I think we are here under 97-449-A, and perhaps under
04-34-A.

Another caption is 1587, but I am not sure that's
an appropriate one. Well, that's the one in which the stay
was entered, but that really may well have been 97-449-A. All
right.

The record will reflect that counsel and the
parties are present.

Mr. Konanykhine, you may resume the stand. And
you will recall, sir, you are still under oath.

THE WITNESS: Yes, your Honor.

(Witness resumed stand)

THE COURT: All right, Mr. Howard, you may
cross-examine.

ATTORNEY HOWARD: Thank you, your Honor.

ALEXANDRE KONANYKHINE, having been previously
duly sworn, was examined and testified further as follows:

CROSS-EXAMINATION

BY ATTORNEY HOWARD:

Q. Mr. Konanykhine, as you know, this lawsuit is about the settlement agreement and your allegations that the government violated the settlement agreement. So I would like to focus a bit on, on that agreement and ask you some questions in that regard.

One of the government's contentions is that you violated the settlement agreement when you left the New York City area. You may recall, that's Paragraph 1 of page four in the --

THE COURT: I don't mind prefatory remarks, but you have gotten to the point of a speech. Just get to the question.

ATTORNEY HOWARD: All right.

THE COURT: I don't need the stage set. I understand what the facts are and what the points of your question may be.

BY ATTORNEY HOWARD:

Q. Page four of the settlement agreement specifies that you are not to leave the New York City area -- it actually says the Washington, D.C., area, but -- but it specifies that you are not to leave that area without advance permission.

Now --

ATTORNEY SZYMKOWICZ: Objection, your Honor. Present counsel is characterizing the agreement as saying something, when the agreement may have been modified.

THE COURT: You know, this is tried to the bench.

It isn't a matter that is going to escape my attention.

But argumentative questions, Mr. Howard, in which you seek to ask him whether he left -- I mean, he obviously left the New York area. Just get the facts from him. You will have to argue to the Court that the metropolitan area restriction that was in the original agreement carried over to a modification.

ATTORNEY HOWARD: I understand, your Honor.

BY ATTORNEY HOWARD:

Q. Mr. Konanykhine, you testified that you carried with you a letter that authorized you to travel about the United States and also to travel to Canada. Could you please describe that letter to me in greater detail?

A. That letter did not authorize me specifically to travel to Canada. It simply authorized me to travel without having to file for advance authorization. It did not specify any limitations on those travels, or any specific permission to travel to a specific country.

Q. Who signed that letter?

A. It was signed by somebody on behalf of the INS, but I don't remember the name.

Q. And you say you carried that letter with you at all times; is that right?

A. At the times when I was traveling, yes, sir.

Q. Did you carry in the your wallet?

A. No, I carried it with my legal papers, which included the settlement agreement itself, the decision of the immigration judge and certain other papers.

Q. Did you have those other papers with you as well when you were apprehended at the Peace Bridge?

A. Yes, sir.

Q. And where are those papers now?

A. The last I knew, they flew to Moscow.

Q. Who negotiated that agreement on your behalf?

A. Mr. --

Q. That agreement being the letter that you carried with you that gave you travel authorization.

A. At that time I was represented by Mr. John Szymkowicz and J.P. Szymkowicz. During the specific conversation that related to that particular authorization, J.P. Szymkowicz was in and out, mostly dealing with some paperwork, and it was mostly me and John T. Szymkowicz who were present in the room, the conference room.

Q. That was in connection with the tort suit that was brought in this Court, is that right?

A. That's correct, sir.

Q. So, is it your contention that the agreement was reached in the context of a tort suit and not in connection with your immigration proceedings, your administrative proceedings?

A. That's correct, sir. But the tort claim was related to the immigration proceedings. It was -- it arose from immigration proceedings.

Q. When did that letter come to you in relation to the tort suit?

Did it come to you right away.

A. Within --

ATTORNEY HOWARD: Strike the first question.

THE WITNESS: Within pretty short period of time,
but I don't remember how short it was.

BY ATTORNEY HOWARD:

Q. And you say that letter did not give you authorization
to travel to other countries; is that right?

A. There was no specific authorization or limitation.

Q. Is it your --

A. It simply waived the requirement for requesting advance
authorization from the INS. Because according to the original
settlement agreement, I was supposed to file two days in
advance to get written authorization before I could travel
anywhere.

Q. Is it your contention that that modification allowed you
to travel anywhere throughout the world ?

A. It --

Q. Without advance --

A. -- lifted that restriction, and -- because the
settlement agreement did not contain any limitations on the
destinations of travel. And with the letter, I didn't see how
it would impose any limitations on me.

THE COURT: Did you feel that you were limited,
that you couldn't leave the United States?

THE WITNESS: It was never -- at that time it was
never my intent to leave the United States. When I decided to
leave the United States to seek the asylum in Canada, I went
through the papers to make sure that nothing prohibits me from
doing so.

And when I spoke to my attorneys about the law and they confirmed that there was no law which restricts me from doing so, and also told me that it's a typical practice that immigrants are allowed to leave.

THE COURT: Next question.

BY ATTORNEY HOWARD:

Q. Did you travel outside the United States other than to Canada?

A. I have never traveled out of the United States. I only tried once to travel out of the United States, but unsuccessfully, as you know.

Q. That was your attempt to enter Canada?

A. Yes, sir.

Q. You referenced conversation with your attorneys, and I am not clear on your answer to that. Are you speaking of Mr. Maggio in that regard?

A. In which regard?

Q. Well, did Mr. Maggio tell you that the settlement agreement allowed you to go to Canada?

A. No. He simply said that a settlement agreement did not preclude me from going to Canada, that there was nothing in the settlement agreement which he could find as a prohibition for me to travel to Canada.

Q. Did he tell you it would violate the settlement agreement to travel to Canada?

A. Not really. We didn't -- to tell you the truth, we didn't discuss settlement agreement in deep details, because I mostly was asking, there was any law prohibiting me from going

to Canada, and I was also asking about typical practice, whether people in my situation are allowed to go to other countries, to self-deport.

ATTORNEY HOWARD: Yes, I recall your conversation or your testimony yesterday about self-deportation.

THE WITNESS: Yes, sir.

BY ATTORNEY HOWARD:

Q. You said that you talked to Mr. Maggio about self-deportation; is that right?

A. I didn't use that particular term, but yes, yes, sir.

Q. Well, did he use that particular term?

A. I think he did, yes.

Q. All right.

ATTORNEY HOWARD: Now, my understanding then from what you are telling me is that -- is that the two of you did not really talk about the settlement agreement. That seems to be what you are saying.

THE WITNESS: We did, just not like a lengthy discussion of everything. He said that to his recollection there is nothing in the settlement agreement or any other documents which restricts me from going to Canada.

And the context in which settlement agreement was first mentioned was that it -- even though -- he said that even though it gives me permission to remain here during pendency of all direct appeals, he said that it would be wise for me to talk to Canadian attorneys and see if I could start a concurrent process of political asylum in Canada.

BY ATTORNEY HOWARD:

Q. Have you asked anyone else for a copy of the letter that you carried about with you, that gave you permission to travel throughout the United States?

A. No, I didn't need it. I had it on me.

Q. Well, but you testified that it's in Moscow or in your luggage on the way to Moscow. So, since then --

A. Of course.

Q. -- have you asked anyone for a copy?

A. Yes, yes. I asked both J.P. Szymkowicz and Mr. Maggio to look through the files. Unfortunately, they couldn't find either of the letters, either the one that you produced -- kindly gave them during the first day of the hearing, or starting the second day of the hearing.

Q. Okay.

Moving to the next paragraph of the settlement agreement, about your living in New York and moving from there, I understand you had a lease at that time to reside in the apartment you were residing in; is that right.

THE COURT: At what time?

ATTORNEY HOWARD: I'm sorry, your Honor.

BY ATTORNEY HOWARD:

Q. The lease that was due to expire in November 2003 --

A. Yes, sir.

Q. -- you had a lease; is that correct?

A. That's correct, yes.

Q. And was this -- were you renting the apartment from friends of yours?

A. Correct.

If I may clarify, the lease was not in our name. It was in the name of our friends. But our friends, we pretty much were roommates for them, and our friends stayed in Europe eleven months out of twelve. So the lease wasn't in our name, but we were paying half of the expenses and were using the apartment.

Q. And is it the case they were returning to that apartment, to live in the apartment, in December?

A. No, they were not returning. They had a long-term contract in Europe, in Berlin, and they were only coming to New York occasionally.

Q. Was someone else going to live in that apartment in December, such that you had to vacate?

A. No, nobody.

Q. So, you could have remained there if you had wished; is that correct?

A. Correct, yes, it is.

Q. Why did you leave then?

ATTORNEY SZYMKOWICZ: Objection, asked and answered yesterday.

THE COURT: Overruled.

You may answer.

THE WITNESS: They left for the interview on the Canadian side of the Peace Bridge, with the objection to be provisionally admitted as refugees in Canada.

BY ATTORNEY HOWARD:

Q. Mr. Konanykhine, have you ever tried to gain permission from a country other than Russia, to move to that country?

A. Yes.

Q. Tell us about that, please.

A. I filed for immigrant petition here in the United States, and it was approved, in 1994, I believe.

Q. Other than the United States; any other countries?

A. Yes. In Canada.

Q. When was that?

A. 1992.

Q. What happened then?

A. It has been pending for more than two years, and by that time they felt that we were permanently settled here in the United States, and our immigration permission was granted, so we withdraw our application in Canada.

THE COURT: How about Uruguay or Antigua, or any of those?

THE WITNESS: We did have a permanent residence card in Uruguay. Unfortunately, because we had an investor status in Uruguay, we were working for a investment project on behalf of my employer, Minatek (phonetic) Bank from Russia, and they had a special program which allowed investors to get a residence permit and the passport with which we could travel. And we obtained those documents.

Unfortunately, the Uruguayan Embassy, later, in 1996, after my arrest and all the publicity, that I was labeled as an international criminal, advised Michael Maggio that I wouldn't be allowed to live in Uruguay.

THE COURT: All right. How about Antigua?

THE WITNESS: We had a temporary visa in Antigua,

and it long since expired. I never sought permission to live there permanently.

THE COURT: Next question.

BY ATTORNEY HOWARD:

Q. Do you have a travel document that allows you then to reside in any other country, besides Russia?

A. No.

Q. Mr. Konanykhine, you have lived in the United States --

THE COURT: Well, he would have if he had been allowed to go to the Peace Bridge and be interviewed. So I don't know exactly what that question is intended to focus on.

You know, if you -- it comes back to the old story, which is that you want him to go to Russia. So, if he only has travel documents to Russia, that's the only place you can send him, and you can tell the Court that the law requires you to send him to Russia.

But that obscures or overlooks the fact that he might have gone to Canada, if he hadn't been precluded from doing so by INS or the successors.

ATTORNEY HOWARD: Well, but he doesn't have a travel document to -- he did not have a travel document to go to Canada either, your Honor.

THE COURT: No, but he could have -- you precluded him from having the opportunity to see if he could be provisionally accepted.

I can't think of any reason why the U.S. Government would do that, except that it had promised to turn this person over to the Russians. And as I have said before,

everything points to that.

ATTORNEY HOWARD: Yes.

THE COURT: We will have to see whether or not the agreement has been violated. If it hasn't, of course, he gets to remain here until his appeals run out, and then the government can do what it wishes. But if he has violated it, I expect the government may be able to turn him over to Russia.

But I wonder whether that is the admirable thing to do, Mr. Howard. I hope somebody in the Executive Branch is asking themselves that, and I hope the newspapers are asking, too.

ATTORNEY HOWARD: I understand, your Honor.

The point of my questioning was that I had understood from other individuals that Mr. Konanykhine possessed a large number of passports.

THE COURT: Oh, I see.

ATTORNEY HOWARD: And so I wanted to find out whether he did have other passports, and I should have asked him that directly.

THE COURT: Do you have any other passports.

THE WITNESS: We may have couple expired for -- Russian passports in our possession. I am not entirely sure.

If I may clarify to the Court, we were over-issued Russian passports, because Russian passports only have twelve pages for travel. So, like one trip from Budapest to France in a car would take a whole passport. And we traveled extensively, so passports were issued to us every

couple months. So we accumulated certain Russia passports.

We have also applied for a passport in Uruguay and Dominican Republic, as travel documents under the investment program, but those documents are in possession of the INS.

THE COURT: Any other passports?

THE WITNESS: No, sir.

THE COURT: Next question.

BY ATTORNEY HOWARD:

Q. With regard to your requirement that you have to telephone in every 60 days --

A. Yes, sir.

Q. -- is it your contention that you telephoned in every 60 days during 2003?

A. Yes, sir.

Q. Do you recall who you would normally speak with?

A. In 2003, I didn't have a case officer, so I had to talk to the duty officer. And that's what I did.

Q. And was that at the Arlington District Office?

A. Yes. During all times since 1996, I used to the same phone number. It was simply different officers all the time. Like initially I was assigned a case officer, Mr. Curtis. Then my case officer was Michael Burke. And then there were a number of changes, and then finally it was just to call and report.

ATTORNEY HOWARD: I have no further questions, your Honor.

THE COURT: Any redirect?

ATTORNEY SZYMKOWICZ: No, your Honor.

THE COURT: All right, you may step down.

THE WITNESS: Yes, your Honor.

(Witness excused)

THE COURT: Call your next witness.

ATTORNEY SZYMKOWICZ: I would like to call Ms.

Gratcheva.

THE COURT: All right.

ATTORNEY SZYMKOWICZ: I would like the Court to know this will be fairly brief, your Honor.

THE COURT: All right, you may administer the oath to the witness.

(Witness sworn).

THE COURT: All right, you may proceed.

ELENA GRATCHEVA, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY SZYMKOWICZ:

Q. Please state your name.

A. My name is Elena Gratcheva.

Q. Are you married?

A. Yes, sir.

Q. Who are you married to?

A. Alexandre Konanykhine.

Q. And is he the person that just testified?

A. Yes.

Q. Did there come a time when you arrived at the Peace

Bridge between the United States and Canada on December 18th, 2003?

A. Yes; yes, we did.

Q. Who did you go with?

A. I went with my husband.

Q. And why did you go to the Peace Bridge that day?

A. We had an interview scheduled at 8:30 a.m. with the Canadian immigration officer to apply for political asylum in Canada.

Q. With relation to the border, was that on the Canadian side or the American side?

A. The American side; we never --

Q. But the --

A. Oh, you mean the interview scheduled?

Q. The interview scheduled?

A. It was to be on the Canadian side.

Q. Did you ever cross the border into Canada that day?

A. No.

Q. Why not?

A. We were stopped at the American side of the bridge by the immigration officers, and arrested.

Q. What was your immigration status at the very moment you were attempting to travel into Canada?

A. I was -- my political asylum was revoked by the Board of Immigration Appeals, and I was granted voluntary departure, 30 days voluntary departure.

Q. Had that 30 day voluntary departure ended?

A. No.

Q. When was that scheduled to end?

A. On December 20th, 2003.

Q. So, two days later?

A. Yes.

Q. Why did you want to go into Canada?

What was the purpose.

A. I was ordered -- I was ordered to.

Q. No, why did you want to go into Canada?

A. To apply for political asylum there, because, to start -- to apply for political asylum in Canada.

Q. Did either you or your husband discuss your voluntary departure with anyone at the Peace Bridge?

A. Oh, yes.

Q. Who did you discuss this with?

A. I discussed it with the officer in charge, who arrested us. I believe his name is Mr. Phillips, but I might be wrong with the name.

Q. What was the result of this discussion?

A. When I told -- asked Mr. Phillips -- I told him that my -- "I have voluntary departure, and why can't I go to Canada? I would like to go to Canada. I have a right to do so. My rights are being violated."

He said that I cannot go to Canada because he doesn't know anything about our case, he is not our case officer, he have order from the headquarters to arrest us both and bring us to Washington, D.C..

Q. Mr. Phillips didn't have a copy of the voluntary departure order of the Board of Immigration Appeals, did he?

A. He had in his possession order of the Board of Immigration Appeals, and he said that he never had his file, any documents which would prove that our appeal was pending.

And I suggested that he contact our lawyer, Michael Maggio.

And he commented, well -- again, he said, "I am not your case officer, but usually we don't arrest people with appeals pending."

Q. Can you repeat the last sentence?

A. Mr. Phillips commented that they never arrest people whose appeals are pending.

Q. Okay.

Even if the government had the right to detain your husband, what was your position with going into Canada.

A. I was asking the officers, "Why can't I go to Canada?"

Q. So, you wanted to go to Canada, even without your husband?

A. Yes, sir.

Q. Why is that?

A. First of all, I realized that, well, as soon as they arrest us, we will be probably shipped to Moscow, and I thought that I could do much more for my husband if I were free.

Q. Can you repeat that again?

A. I thought that I could do more for my husband if I were free, in a free country, so I could involve press, or to draw attention to the case, so his case wouldn't be going in total silence here, and he would just sit here.

Q. Are you aware if there is an agreement between your husband and the INS regarding his release from detention?

A. Yes.

Q. And that was back in 1997, correct?

A. Yes, that's correct, the settlement agreement.

Q. Do you know if this agreement, including any modifications that might have occurred with that agreement, did that have any effect on you and your immigration status?

A. Yes. My immigration status depends on my husband's immigration status. Our cases were tried, I guess.

Q. So, why would the settlement agreement apply to you as well as your husband then?

A. Because my case depends on his case. My immigration case depends on his case. That is why. I am his wife.

Q. Did there come a time when the settlement agreement was modified to allow for travel without preauthorization?

A. Yes, sir.

Q. And when approximately was that?

A. I was searching my memory yesterday. I don't remember the date. I remember the essence of what, how it was going on, because the settlement agreement was very important to us because, well, my husband was freed because of the settlement agreement, and we didn't want to do anything which would violate the agreement, and so that my husband wouldn't get arrested.

So I remember that -- I don't remember exactly when, but I remember that when we got that permission, that letter, that we could travel free, I remember how happy we

were that at that point things were going in the right direction.

ATTORNEY SZYMKOWICZ: I have no further questions, your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY ATTORNEY HOWARD:

Q. Do you currently have a valid travel document?

A. No, sir.

ATTORNEY SZYMKOWICZ: Objection, your Honor.

This goes beyond the scope of direct examination.

THE COURT: I'll permit it. Overruled. She says no.

Next question.

BY ATTORNEY HOWARD:

Q. Have you applied for a travel document from the Russian Embassy?

A. When I was released --

THE COURT: I can answer that one, Mr. Howard.

You don't want to go to Russia, do you, Ms.

Gratcheva?

THE WITNESS: I don't want to go to Russia, sir.

But when I was released on bond by the INS, there was a provision which the INS representative told me it was not negotiable, so that I would sign the travel permission request.

So I signed that request. And I specifically put

in there that I don't want to go to Russia, because I fear persecution. I am not -- I fear for the safety of myself and my husband, and that I fear persecution from the Russians, and that I don't want to go to Russia. That's all I could do at that point.

THE COURT: Go ahead, Mr. Howard.

ATTORNEY HOWARD: No further questions.

THE COURT: Any redirect?

ATTORNEY SZYMKOWICZ: No, your Honor.

THE COURT: All right, thank you. You may step down.

(Witness excused)

ATTORNEY SZYMKOWICZ: I would like to call an individual named Don Spivak, who is located outside the courtroom.

And just to let the Court know, Mr. Spivak is only going to be testifying as to a very limited issue, and that is Mr. Konanykhine's travel after this modification. Mr. Spivak was in the courtroom up until Mr. Somjen's, and including Mr. Somjen's, testimony, and it is my understanding that the government does not object to this violation of the rule on witnesses.

THE COURT: All right. Have him come forward.

Come forward and the oath, please, sir.

(Witness sworn)

THE COURT: All right, you may proceed.

DONALD SPIVAK, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY SZYMKOWICZ:

Q. Please state your name.

A. Donald Spivak.

Q. Are you employed?

A. I am an independent contractor for KMG I Studios.

Q. What is KMG I Studios?

A. An interactive production studio --

Q. And who owns that?

A. -- and software company.

Q. Who owns that?

THE COURT: You will have to speak up. I can't hear you. So let's begin again.

What's your full name again, please.

THE WITNESS: Donald Spivak.

THE COURT: And where do you live?

THE WITNESS: 435 Share Avenue, Union, New Jersey.

THE COURT: And what is your occupation, sir?

THE WITNESS: A sales rep.

THE COURT: For?

THE WITNESS: KMG I Studios.

THE COURT: Which is engaged in what business?

THE WITNESS: Interactive production and software.

THE COURT: All right.

Next question.

BY ATTORNEY SZYMKOWICZ:

Q. How long have you been employed as an independent contractor with KMGi Studios?

A. About four years.

Q. And who is the owner of KMGi Studios?

A. Alex Konanykhine.

Q. And did there come a time when Mr. Konanykhine began to travel, in 1999 and 2000?

A. Yes.

Q. And how often would he be traveling?

A. Quite frequently. He traveled to potential clients and to clients.

Q. And can you tell me how frequently he would be traveling during that period, those two years?

ATTORNEY HOWARD: Objection as to foundation, your Honor. I may have missed it, but I am uncertain, how did he know?

THE COURT: All right.

See if you can establish the basis for his knowing it, Mr. Szymkowicz.

BY ATTORNEY SZYMKOWICZ:

Q. Do you know if the Konanykhines traveled during 1999 and 2000?

A. Yes.

Q. How do you know that?

A. I was in the office.

Q. And did there come a time that they actually did travel, in the period of 1999 and 2000?

A. Yes.

Q. And where did they travel to?

THE COURT: Did you travel with him?

THE WITNESS: No.

THE COURT: How do you know where he traveled?

THE WITNESS: Because I was in the office, I know the different accounts or states he was going to, to get business or to talk to customers.

THE COURT: In other words, you had conversations with him about where he was going to go?

THE WITNESS: Yes.

THE COURT: So your knowledge about where he went is based on your conversations with him?

THE WITNESS: Yes.

THE COURT: Did you -- what's the relevance of this, Mr . --

ATTORNEY SZYMKOWICZ: The relevance is that he is -- that the Konanykhines were traveling extensively through that period of time.

THE COURT: Well, they have already testified to that. I don't know that Mr. Howard contests that.

ATTORNEY SZYMKOWICZ: All right. There is no other purpose for his testimony.

THE COURT: All right.

ATTORNEY SZYMKOWICZ: Aside from the fact that he has testified that they were traveling --

THE COURT: Well, I think the fact of the matter is that Mr. Konanykhine testified that after he obtained this

modification, he traveled frequently. I don't know that there is any evidence to the contrary. This witness' testimony would be hearsay. But I guess he could testify that he wasn't in the office a lot.

Is that right?

THE WITNESS: He wasn't in the office a lot.

ATTORNEY SZYMKOWICZ: Also, your Honor, I believe --

BY ATTORNEY SZYMKOWICZ:

Q. Are you familiar -- are you aware of any credit card receipts that would come back, indicating that the Konanykhines had traveled?

A. Well, they traveled on American Express, the main credit cards.

Q. And did you ever see the receipts?

A. The receipts came in. I put the mail into the office, so I saw the --

Q. And did you --

THE COURT: Why did you persist?

I mean, there really isn't any dispute that he traveled a good deal, and the receipts are hearsay.

ATTORNEY SZYMKOWICZ: Okay. I have no further questions.

THE COURT: Unless you get them in as business records. And they are not even here.

ATTORNEY SZYMKOWICZ: I have no further questions, your Honor.

THE COURT: All right.

Mr. Howard, you may cross-examine this witness.

ATTORNEY HOWARD: No cross, your Honor.

THE COURT: All right.

You may step down.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Do you have any other witnesses?

ATTORNEY SZYMKOWICZ: The Court's indulgence for one minute, your Honor.

THE COURT: Actually, it's -- I will give you a few moments.

And then we have four witnesses for the government; is that right, Mr. Howard?

ATTORNEY HOWARD: It's three now, your Honor.

THE COURT: Three.

How long will they take?

ATTORNEY HOWARD: Lisa Hoechst will be the main witness, your Honor. She is the headquarters employee who directed the apprehension. And --

THE COURT: All right.

ATTORNEY HOWARD: And after that, we have the two deportation officers. The two of them, I'd say probably 15 minutes each.

Lisa Hoechst, the Court may have many questions for her, so perhaps it could go an hour.

THE COURT: All right.

All right, I have a brief matter at 1:00.

Do you have any -- Mr. Szymkowicz, do you have

any further testimony?

ATTORNEY SZYMKOWICZ: No further testimony, your Honor.

THE COURT: All right. Let's do the short ones, Mr. Howard. How's that? Unless there is some -- if you have some particular reason to proceed in an order, I'll accommodate that. But otherwise, let's do the short ones before lunch.

ATTORNEY HOWARD: The order was chronological. We would call Officer Joe Watson, then, because, your Honor, he does not, to my knowledge, have knowledge of information exchanges with Canada. The other two do --

THE COURT: All right.

ATTORNEY HOWARD: -- and we had raised that issue regarding privilege with --

THE COURT: All right. ATTORNEY HOWARD: -- the Court yesterday.

THE COURT: Come forward, sir, and take the oath, please.

(Witness sworn)

THE COURT: All right, you may proceed, Ms. Pepper.

JOSEPH A. WATSON, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY PEPPER:

Q. What is your full name, please?

A. Joseph A. Watson.

Q. Where do you presently work?

A. The Washington Field Office.

Q. Of?

A. Immigration and Customs Enforcement.

Q. Okay.

What is your present job title.

A. Deportation officer.

Q. What are your job duties with that?

A. To escort, apprehend and detain aliens.

Q. And how long have you been employed by the former INS, now Immigration and Customs Enforcement?

A. Approximately fourteen years.

Q. Has all of that employment been with the Arlington (sic) Field Office?

A. Yes.

Q. Were you ever involved in the case of Mr. Konanykhine prior to the events of November and December of 2003?

A. Yes.

Q. And in what way were you involved with that?

A. Back in '96 or '97, I was a -- when I was a deportation officer, when Mr. Konanykhine was in custody, I was a case officer.

Q. Okay.

And what were your duties as case officer at that time.

A. It was dealing with the detained docket, so I monitored the case, as far as waiting to see what transpired in the

immigration hearing.

Q. And prior to today, have you ever testified in any proceedings before this Court in matters involving Mr. Konanykhine?

A. I went downtown to the Department of Justice to give a statement in reference to Mr. Konanykhine's case.

Q. Is that the only time you have ever testified prior to today?

A. Yes.

Q. After your involvement with Mr. Konanykhine's case in 1996, when did you next have contact with him?

A. That's when we met him at the airport, Reagan National Airport, on, I believe, December the 17th.

Q. And why did you go to the airport?

A. I was instructed to go there to meet Mr. Konanykhine, because there was (sic) officers from Buffalo bringing him back to Washington, D.C.

Q. Okay.

And when you got to the airport, how was -- how did you obtain custody of him from Buffalo.

A. Once the officers -- well, I recognized Mr. Konanykhine. Once the Buffalo officers got off the flight, I identified myself, and we changed custody from Buffalo to Washington Field Office.

Q. Okay.

And did that change in custody involve solely Mr. Konanykhine.

A. Well, we was (sic) only expecting Mr. Konanykhine to be

transferred down from Buffalo, and his wife was with him at the time. So we was (sic) not expecting for his wife to be with him.

Q. Okay.

And what happened when you discovered that it was not just Mr. Konanykhine at the airport; it was he and his wife.

A. We took custody of both.

Q. Okay.

And after you took custody of both Mr. and Mrs. Konanykhine, what did you do.

A. I called my office and spoke to my supervisor, Neil Ackery (phonetic), and let him know that Mr. Konanykhine's wife was with him as well.

Q. And what did he say in response to that?

A. Well, he was surprised as well that Ms. Konanykhine was with --

THE COURT: This is hearsay you are eliciting. So see if you can avoid eliciting hearsay.

ATTORNEY PEPPER: Okay.

THE COURT: You may ask him what he did as a result of the telephone calls with certain persons. He can certainly testify that he had a telephone call with "X," and then you may say, "As a result of that telephone call, what, if anything, did you do?" And that will avoid the hearsay.

ATTORNEY PEPPER: Thank you, your Honor. Okay.

BY ATTORNEY PEPPER:

Q. After you talked on the phone, what did you do next?

A. We took both Mr. Konanykhine and his wife to the Russian Embassy.

Q. And what was the purpose of taking them to the Russian Embassy?

A. To obtain a travel document.

Q. And once you -- who was with you from Immigration at the time that this was taking place? Or was it solely yourself?

A. Officer Fred Green, immigration agent, was with me at the time.

Q. Okay. So, the two of you then took Mr. and Mrs. Konanykhine to the Russian Embassy?

A. Yes.

Q. Were there any other immigration officials at the embassy?

A. Yes, we met Frances Deshaldin (phonetic), who is an acting supervisor. She was at the embassy as well.

Q. What happened once you arrived at the embassy?

A. Ms. Deshaldin dealt with the embassy personnel, and I made various phone calls for Mr. Konanykhine to his attorneys.

Q. Okay. And why did you make the calls for Mr. Konanykhine to his attorneys?

A. He was saying that there was some type of plea agreement, that I had no idea about, so I wanted to check the status of that with his attorney, to see whether they could, if nothing more, provide us that information.

Q. So, now, when you say you spoke to the attorney, do you mean you personally spoke to his attorney, or he spoke to his

attorney and relayed information to you?

A. No, I personally spoke with his attorneys.

Q. And as a result of those conversations with his attorneys, what did you do?

A. I asked them, would they fax a copy of the plea agreement to my office.

Q. Okay.

And did you --

THE COURT: You are using the term "plea agreement." What do you mean by "plea agreement"?

THE WITNESS: Well, I am going by what Mr. Konanykhine -- a term Mr. Konanykhine was using.

THE COURT: You know what a plea agreement is.

THE WITNESS: Yes.

THE COURT: What do you understand the term "plea agreement" to mean?

THE WITNESS: Well, it's an agreement between two parties.

THE COURT: Well, if I tell you that a plea agreement is where a defendant and in a criminal case pleads guilty, that's not what was going on here, was it?

THE WITNESS: No. It was more or less an agreement with the -- Mr. Konanykhine's attorney and the immigration attorney or the U.S. attorneys.

THE COURT: All right.

Next question.

BY ATTORNEY PEPPER:

Q. Did you learn of the -- after asking that the

information be faxed, did you learn of the contents of that agreement?

A. Yes.

Q. And did that affect what happened at the embassy, or did you learn that at a later stage?

A. When I called back later to find out whether they had received it, based on their interpretation, it didn't really change anything.

THE COURT: Who is "their"?

THE WITNESS: My office.

THE COURT: I'm not sure I understand what happened. You are at the Russian Embassy and some official who ranks higher than you is dealing with the officials at the Russian Embassy; is that right?

THE WITNESS: Yes.

THE COURT: You weren't involved in that.

THE WITNESS: No.

THE COURT: You then make a telephone call to Mr. Konanykhine's attorney.

THE WITNESS: Yes.

THE COURT: He tells you there is an agreement.

THE WITNESS: Yes.

THE COURT: And you takes steps to obtain a copy of the agreement?

THE WITNESS: I asked him, could he fax a copy of that agreement to my office.

THE COURT: All right. And I take it that occurred.

THE WITNESS: Yes.

THE COURT: And then you left the embassy?

THE WITNESS: No, I stayed at the embassy. I called my office to see whether -- well, I informed my office that it was coming. I talked to Mr. Neil Ackery, and -- to see whether the document had gotten there.

Well, I called twice. The first time I called to notify him that the document was being faxed. The second time I called to see whether he had received it.

THE COURT: All right.

Go ahead, Ms. Pepper, but don't elicit hearsay.

BY ATTORNEY PEPPER:

Q. After you completed those telephone calls, was your phone used by -- while you were still at the embassy?

A. Yes.

Q. And who used it?

A. Mr. Konanykhine.

Q. And why was he using your phone?

A. He asked could he talk to his attorneys.

Q. And you allowed him to do so?

A. Yes.

Q. When you and Mr. Konanykhine were finished with your phone, were the proceedings taking place with Ms. Deshaldin and the Russian officials already done?

A. No. It was still ongoing.

Q. And how long do you estimate that you were at the Russian Embassy in total?

A. Possibly an hour, maybe a little more.

Q. Did you obtain travel documents for either Mr. Konanykhine or his wife while at the Russian Embassy?

A. No.

Q. Do you know why not?

A. They refused to fill the applications out, the travel document applications.

Q. And what did you do after travel documents were not issued?

A. We waited, because someone from headquarters was talking to the person from the embassy, the embassy personnel.

Q. When you say someone from headquarters was talking to embassy personnel, do you mean somebody arrived at the embassy? Or how were they talking to them?

A. They were talking on the phone.

THE COURT: How do you know that?

THE WITNESS: I was told that.

THE WITNESS: By whom?

THE WITNESS: By Ms. Deshaldin.

THE COURT: It is hearsay.

Let's -- I don't know that any of this is particularly material, but proceed. Just avoid hearsay.

BY ATTORNEY PEPPER:

Q. Where did you go after you left the Russian Embassy?

A. To the Arlington Field Office -- Washington Field Office.

Q. And what did you do there?

A. They were processed, as far as taking the property, giving a receipt, things of that nature.

Q. Is that standard procedure?

A. Yes.

Q. And after they were processed, did they remain at the Arlington (sic) Office?

A. I'll say they probably remained there approximately, maybe a half an hour to 45 minutes.

Q. And where did they go from the Arlington Field Office?

A. Arlington County Jail.

Q. And is that a normal location for detention of persons under jurisdiction of Arlington Field Office?

A. Yes.

Q. And was that the end of your contact with the Konanykhine on that particular day?

A. Yes.

Q. When did you next have contact with the Konanykhines?

A. Two days later. That's when they were brought to the Washington Field Office for us to take to New York, to put them on a flight to Russia.

Q. Okay.

And did they have to be processed at the Arlington Field Office in order to travel.

A. No. Everything was already taken care of.

Q. Okay.

So, about how long were they at the Arlington Field Office.

A. Probably no more than five minutes.

Q. And were you part of the group that then took them -- were you -- were you an escort with them to go to the airport?

A. Yes.

Q. Which airport did you go to?

A. Reagan National.

Q. And do you know about what time you arrived at the airport?

A. No, I don't know the exact time.

Q. Did you arrive in time to make the scheduled flight?

A. Yes.

Q. And did you have any difficulty boarding the airplane?

A. No.

Q. Did you -- was the plane delayed in any kind of manner?

A. No.

Q. Okay.

A. Well, not due to us. I think it was delayed based on taking off.

Q. Okay.

Once the flight landed in New York, what happened.

A. Once the flight landed in New York, I contacted Attorney Bill Howard to let him know we had landed in New York City.

Q. And why did you call Mr. Howard?

A. There were two cases ongoing, the Fourth Circuit, and I believe this Court. We were waiting to get a response from both courts.

Q. And did you talk to either of Mr. or Mrs. Konanykhine while you were at the airport?

A. Yes.

Q. And what did you tell them?

A. I explained to them what was going on. I explained to them that right now there was (sic) two proceedings going on, the Fourth Circuit and this Court, and that we was (sic) waiting to get a response from both courts.

Q. And at any point were you aware that Mrs. Konanykhine -- Ms. Gratcheva had voluntary departure?

A. Yes.

Q. And can you explain why she was in New York to travel to Moscow, if she had voluntary departure?

A. From talking to Neil Ackery, he asked me to ask her whether she wanted to go to Russia. We will pay for her way to going to Russia, and still give her voluntary departure.

Q. And what was her response to that?

A. After speaking with her husband, she said that she did not want to go to Russia.

Q. And did you board the plane to go to Russia?

A. No.

Q. Why not?

A. Well, I explained to her that we just (sic) going to wait and see what transpired as far as whether Mr. Konanykhine will be leaving the country, and that's what we did.

Q. And why did you not board the plane?

A. We were informed by Mr. Bill Howard that a stay had been granted.

Q. Because you -- after that, what did you do?

A. After that, arrangements was (sic) made for the Konanykhines to stay in New York, and we attempted to fly back to Washington.

Q. Did you attempt to retrieve their luggage?

A. Yes.

Q. And what happened with that?

A. After going through the baggage -- well, after going to the baggage area -- I guess we spent about maybe two hours, two and a half hours trying to retrieve their luggage, we retrieved all but two bags of their luggage.

Q. And how many bags of luggage did they have?

A. I think there was (sic) approximately eight, total.

Q. And after you returned back to the D.C. area, did you have any further contact with Mr. Konanykhine --

A. No.

Q. -- or his wife?

A. No.

Q. Now, as part -- you stated at the beginning that part of your duties as a deportation officer are to apprehend, take custody and help remove aliens. Can you be more specific as to what your current job duties are?

A. Well, my current duties are, if anyone that we constitute as being a fugitive or absconder, then we go out and look for them, to attempt to take them into custody.

Q. Okay. And how would you know if they have that type of status?

A. Well, it's based on whether , if they have a final order and they refuse to leave the country, then we will go looking for them to take them into custody. Failure to report, we would then take them into custody as well.

Q. How would you know if -- what their addresses were if

they failed to report?

A. Well, we will look first the address that they gave us, and then there is (sic) various checks that we will do to see whether other addresses would come up under that particular person's name.

Q. And how would you know if they reported, instead -- to determine whether they should be apprehended?

A. Normally, there is a form that's filled out when a person reports in, and that information is entered into the computer.

Q. What happens if a person is allowed to report in telephonically?

A. If a person telephonically reports in, that information is entered into the computer as well while that person is on the phone.

Q. And who enters that information?

A. Well, it could be a the case officer or it could be the duty officer.

Q. Is it required to be one or the other?

A. Yes.

Q. Were you ever responsible -- or the duty officer or the case officer for Mr. Konanykhine when he reported in telephonically?

A. Well, I have been in charge of the order of supervision since August of 2003.

Q. And have you personally been the duty officer or case officer who has received a call from him regarding reporting in since that time?

A. Not that I could recall, no.

Q. And so the information for telephonic reporting in, if I understand you, is typed into the computer.

A. Yes.

Q. Is there any other way that information is reported?

A. No.

Q. And is that information recorded simultaneously or after the fact?

A. It should be simultaneously, because there is (sic) various questions you have to ask so that you can identify that this is actually the person reporting in.

Q. How likely is it that if someone reported in telephonically, whichever officer was receiving the call does not type the information in?

A. Based on my experience, very unlikely.

Q. And have you ever had an alien or alien's representative complain to the office that information had not been properly recorded?

A. Not that I -- not with me, no.

ATTORNEY PEPPER: Your Honor, at this time I would like to present a computer document here, to have Mr. Watson authenticate it and identify it for --

THE COURT: Have you provided it to Mr. Szymkowicz?

ATTORNEY PEPPER: Yes.

THE COURT: No, I mean did you before just this moment?

ATTORNEY PEPPER: No, I did not, your Honor.

THE COURT: Why not?

ATTORNEY PEPPER: Because I received these final copies yesterday morning, your Honor.

ATTORNEY SZYMKOWICZ: We object to the introduction of these, your Honor. This is ambush, and I haven't had a chance to look at it.

THE COURT: Well, she certainly could have avoided the ambush situation.

ATTORNEY PEPPER: You're right, your Honor, I do apologize to you and to counsel. It just -- it slipped my mind to do so yesterday, and I do apologize.

THE COURT: All right. Well, let's -- we will proceed in this fashion, Ms. Pepper: Your apology is accepted. And I am sure in the future you will -- you should always put yourself in the other person's position, and also remember to think about how an impartial fact-finder might view the thing.

I think there is very little to be gained by springing it at the last minute. I know the general population, after watching decades of Perry Mason, think otherwise, but it is not true and it is not really fair.

Let me ask you this, Mr. Watson: If someone is support to report telephonically and they don't do it, how do you know that?

THE WITNESS: Well, that's what we are working on now.

THE COURT: I don't want -- I may be interested in what you are working on now, but I want to know, during the

period of 1997, '98 and '99, if someone didn't report in telephonically, what -- how did you discover or detect that?

THE WITNESS: I can only say based on me being there since August 2003.

THE COURT: Since August 2003, if someone is not reporting in as they are supposed to, how do you determine that, or detect it?

THE WITNESS: We try to see what type of address we can find on that person, and then go out and look for that person.

THE COURT: Did Mr. Konanykhine report in, in August of 2003?

THE WITNESS: Not that I am aware of then.

THE COURT: Did you go get him?

THE WITNESS: No, sir.

THE COURT: Why not?

THE WITNESS: Because there are many cases that we have to do. Each case that we come about, those are the ones we check.

THE COURT: And he wasn't a high priority?

THE WITNESS: He was just a regular case to me, sir.

THE COURT: All right.

Did he report in September of 2003?

THE WITNESS: Not that I am aware of, no.

THE COURT: Did you go get him in September of 2003?

THE WITNESS: No, sir.

THE COURT: Why not?

THE WITNESS: Again, each case that we come upon, is a case that we actually start looking for.

THE COURT: All right, let me put it to you this way: Did you know in August of 2003 that he had not reported in Two Thousand -- in August of 2003?

THE WITNESS: No, sir. You are talking about over 200 cases.

THE COURT: I am not -- 200 is not very many. Mr. Watson. It would be fairly easy to tell with just 200. I would hope you have more than 200 cases to check whether they are reporting telephonically.

But what I want to know is: Did you know in August of 2003, whether or not Mr. Konanykhine had called in?

THE WITNESS: No, I did not.

THE COURT: Did you know in September of 2003 whether he had called in?

THE WITNESS: No, sir.

THE COURT: Did you know on any day up until December of 2003, whether he had called in?

THE WITNESS: No, sir.

THE COURT: And you were about to tell me about some procedure that you are implementing. If you wish to, I'll hear that.

THE WITNESS: Well, what we are implementing is that where we can monitor each month, who is supposed to report in on what specific day.

THE COURT: A sort of computer program; you enter

somebody's name, they are supposed to report in, and if they don't you get a blip on the computer?

THE WITNESS: Yes, sir.

THE COURT: Good system, and I hope you do get it implemented soon.

All right. Anything further, Ms. Pepper?

ATTORNEY PEPPER: Uhm, no --

THE COURT: Oh, these documents.

What I will do, Ms. Pepper, is I'm going to let you proceed with Mr. Watson. And I take it that he gathered these documents?

ATTORNEY PEPPER: I asked the office, his office to gather documents. I do not know who --

THE COURT: Did you have anything to do with gathering these documents, Mr. --

THE WITNESS: No, sir.

THE COURT: -- Watson?

Well, then --

ATTORNEY PEPPER: I was going to ask him if these were the type of printouts that result from what he sees on the computer screens, and does it reflect any knowledge that he has of that.

ATTORNEY SZYMKOWICZ: Your Honor, we would --

ATTORNEY PEPPER: If it does not --

ATTORNEY SZYMKOWICZ: -- object to that, because if he has never seen these documents, there is no foundation for the admissibility.

THE COURT: Well, I will let him answer the

question. Then I'm going to take a recess before you cross-examine him and have lunch, and you can look at them and you can tell me whether you need any more information.

All right, Ms. Pepper, you may hand the witness the documents. He can tell us if he has ever seen them before.

That's the first question, Mr. Watson: Have you ever seen these documents before?

THE WITNESS: Yes, sir.

THE COURT: Where did you see them?

THE WITNESS: These are the standard printouts from what we call our DACS printout. It's the case printout for the various cases.

THE COURT: All right. But my question to you, Mr. Watson, is: Have you ever seen those documents before?

THE WITNESS: No, sir.

THE COURT: All right.

Now, go ahead, Ms. Pepper. You may proceed.

BY ATTORNEY PEPPER:

Q. Mr. Watson, when you have information on the computer screen regarding an alien, in this case Mr. Konanykhine, how -- how do you know that information is related to a specific alien?

A. By the A-number.

Q. And on the printout before you, how do you know that information is from your computer system?

A. Based on the format and the names of the DACS case summary. That's standard for anyone with an A-number that has

been entered into our system.

Q. Now when you say "DACs," what do you mean by that?

A. It's like an Alien Control System, Data Alien Control System, and we break it down to just DACs, D-A-C-S, which is standard for any alien that has been placed in removal proceedings.

Q. And have you ever looked at the information regarding Mr. Konanykhine on the computer?

A. I would say years ago, I have, yes.

Q. Okay.

But not recently.

A. Not recently, no.

Q. Is this printout typical of that that you would get from the information in the DACs system if you wanted a hard copy of the information that's in the computer?

A. Yes.

THE COURT: Let me see it. Have the court security officer -- let me see it, Mr. Watson, if I may.

(Document tendered)

THE COURT: Thank you.

Does Mr. Konanykhine have an A-number?

THE WITNESS: Yes, sir.

THE COURT: What is his A-number?

THE WITNESS: That's the number that is on down on the bottom.

THE COURT: What is it?

Do you know what his is?

THE WITNESS: No, sir.

THE COURT: Ms. Pepper, do you know what his is?

ATTORNEY PEPPER: Yes. It's 74361122.

(Pause)

THE COURT: All right, Ms. Pepper, do you have any further questions of this witness about these documents before the Court recesses?

ATTORNEY PEPPER: No, I don't, your Honor.

THE COURT: All right, Mr. Watson, you may step down, sir. And during the luncheon recess, Mr. Watson, you will have to refrain from discussing your testimony with anyone.

(Witness stood aside)

THE COURT: These are marked as Exhibit 10.

I'll consider your comments about them after the luncheon recess, Mr. Szymkowicz. It does appear that they are the documents relating to -- the witness seems to testify that -- and Ms. Pepper is representing to the Court that these are their documents from their computer.

Presumably it's all of them, Ms. Pepper?

ATTORNEY PEPPER: Yes, so I have been told, your Honor.

THE COURT: All right.

Well, I'll hear from you afterwards.

ATTORNEY SZYMKOWICZ: Your Honor, may Mr. Spivak return to the courtroom? I know he wanted to stay for the proceedings.

THE COURT: Yes, he may do so.

He is not going -- you do have an opportunity for

rebuttal, but if you don't --

ATTORNEY SZYMKOWICZ: We don't intend to recall him.

THE COURT: All right.

Court stands in recess. Now, we will not convene again until quarter of 2:00, because I have another matter at 1:00. Court stands in recess.

(Court recessed at 12:25 p.m. in Konanykhine v. Homeland Security)

(Court called to order at 2:35 p.m. in Konanykhine v. Homeland Security).

THE COURT: Mr. Watson, would you come forward, sir. You were -- is Mr. Watson outside?

All right, let's bring Mr. Watson back in.

(Witness enters)

THE COURT: All right, Mr. Watson, you may resume the stand. You may recall, sir, you are still under oath.

THE WITNESS: Yes, sir.

(Witness resumed stand)

THE COURT: All right, sir. You may be seated. Mr. Szymkowicz, you may proceed .

(Pause)

THE COURT: Now, before you proceed, however -- Ms. Pepper, ordinarily in offering these documents -- there is a problem to some extent with authenticity, in the sense of their completeness.

JOSEPH A. WATSON, having been previously duly sworn, was examined and testified further as follows:

THE COURT: As I understand it, Mr. Watson, you didn't play any role in assembling or collecting this particular set of documents.

THE WITNESS: No, I did not.

THE COURT: So, he can't really testify as to what he did and how he got the documents, whether he got all the documents.

We are going to proceed in that fashion. I am going to let you offer them, and Mr. Szymkowicz can use them. And if Mr. Szymkowicz has a problem with their authenticity or some other aspect of them, I may give him an opportunity to explore that with other witnesses, or take other steps. All right, we'll proceed in that fashion.

Go ahead, Mr. Szymkowicz.

CROSS-EXAMINATION

BY ATTORNEY SZYMKOWICZ:

Q. Prior to December 18th, 2003, did you have the occasion to read the Board of Immigration Appeals' decision overturning the grant of political asylum in my client's case?

A. I did see an order from the board.

Q. It would have been about a 20 page order. Is that the one you are talking about?

A. I don't think it was 20. I thought it was less, maybe 10.

Q. Ten?

A. Yeah.

Q. Did you have a chance to read the 1997 settlement

agreement?

A. No.

Q. And if you didn't read the settlement agreement, you didn't read any of the modifications to that?

A. No.

Q. How big is the INS file in the Konanykhine/Gratcheva case, if you can estimate?

A. Approximately 17 boxes.

Q. How long is the period of time for which this trial -- this file extends?

A. I believe from '96, 1996.

Q. Now, you testified earlier that when you arrived at Reagan National Airport on the 18th of December, that you were only expecting to see Alexandre and not Elena; is that correct?

A. Yes.

Q. Why is that?

A. My orders from Neil Ackery was (sic) to meet Mr. Konanykhine, not his wife.

Q. Did you ask later why she was there?

A. Yes. What was explained to me was that they were together.

Q. And you were the case manager for them, is that correct?

A. I was the case manager for Mr. Konanykhine.

Q. But not Mrs. Konanykhine?

A. No.

Q. Why is that?

A. My understanding, she was under voluntary departure.

Q. And you only took over being the case manager in October?

A. August.

Q. August.

Why did you take -- if they were not under an order of deportation at that point, why did you take over in August, as opposed to October.

A. Because he was reporting in -- was supposed to be reporting in.

Q. Who had the file before that?

A. I believe that it was Walter Ingram, Officer Walter Ingram.

Q. Have you ever had the occasion to escort a potential person with a deportation order to a foreign embassy to obtain travel documents?

A. Yes.

Q. What is the normal procedure for that?

Is the embassy called in advance and you tell them that you are bringing someone over, or does a person from the embassy come to you?

What is the typical procedure.

A. Well, there are two ways that it is done. We notify the embassy in advance and set up an appointment to take someone to the embassy. The other way is where the embassy will also make an appointment with us to come to our office and interview the person.

Q. Do you know if either one of these procedures were utilized in this case?

A. No, I don't.

Q. Do you know if the Russians were expecting you when you got to the embassy?

A. No, I don't.

Q. But you were with them when you got to the embassy, right?

A. Yes.

Q. What was said to the Russian Embassy when you arrived there?

A. The only thing that was said in my presence was that they was (sic) being brought there to obtain travel documents.

Q. And did you say this, or someone else?

A. Someone else.

Q. Okay.

Was that by telephone call, or --

A. No.

Q. That was in person?

A. Yes.

Q. Who was that?

A. Frances Deshaldin.

Q. You stated that you had never read the settlement agreement prior to the 18th of December; is that correct?

A. Prior to -- yes.

Q. Had you ever even seen a copy of that?

A. I seen (sic) a copy, the one that was faxed to my office, but I did not read it.

Q. When was that faxed?

A. I think that was the 17th, 18th of December.

Q. The 18th.

To be clear, that was the -- the 18th was the day that the Konanykhines arrived at Reagan National; is that correct.

A. Yes; that same day, then.

Q. Thursday, December 18th?

A. Yes.

Q. And then they were taken to New York to go up to JFK on the 19th, correct?

A. I think there was at least a day between. So --

Q. What --

A. I know they went up to Reagan on the 19th. So I would have to say the 17th was the actual day they came in on National -- National Reagan from Buffalo.

Q. Okay.

So, assuming that your dates are correct, you didn't get a copy of the settlement agreement until after the Konanykhines arrived in your custody, correct.

A. That's correct.

Q. And that was faxed to you by Mr. Maggio?

A. Yes.

Q. Wouldn't it be unusual for you, as the case officer, not to have the settlement agreement in your file already?

A. No.

Q. But if the settlement agreement related to their reporting requirements, wouldn't that be something that would typically be found in your file?

A. Well, we are talking about 17 boxes, though.

Q. But this specifically -- this document specifically related to reporting requirements. You know, the other 17 boxes may relate to other things.

But wouldn't it be typical to find a document relating to reporting requirements in your personal file that you keep on --

A. It should be, yes.

Q. Prior to the Konanykhines' arrival at Reagan National, you didn't have a copy of the appeal which was filed before the Fourth Circuit Court of Appeals; is that correct?

A. That's correct.

Q. And how did you become aware that there was such an appeal filed?

A. From Mr. Konanykhine saying that an appeal was filed.

Q. You stated that you had previously testified in a Konanykhine matter, and you have said that that was -- that you gave a statement to the Department of Justice. When was that?

A. I believe that was in '97.

Q. Okay.

So that was related to something other than his immediate deportation, correct.

A. That's correct.

Q. How would you characterize the discussions between the INS -- or ICE official, Mr. Clark, and the Russian government officials at the Russian Embassy?

A. I don't follow you. What do you mean?

Q. Were you able to hear any of the discussions between Mr.

Clark of the ICE and the Russian government officials?

A. No.

Q. Do you know if the Russian -- do you know if anyone at ICE was angry at the Russians on -- while you were at the embassy?

A. No.

Q. When you took the Konanykhines to Reagan National for their flight to New York, did you go through the screening process that normal passengers would go through, sticking the luggage through the x-ray machine and going through the metal detectors?

A. Yes.

Q. And where was that?

(Pause)

Was that in the normal area or was that in a back door area?

A. No, it was in the normal door area.

Q. So, you checked in at the counter?

A. Yes.

Q. And then you went through the airport security area, like with the regular passengers, and went through?

A. Are you talking about their luggage that was checked, or are you talking about the actual screening of the --

Q. The actual screening of the people.

A. Okay. No, we did not go through that.

Q. You didn't go through the normal procedure, where normal passengers would go?

A. No.

Q. Why not?

A. We are law enforcement.

Q. What are the procedures when law enforcement officials go through the -- bring a detainee through the -- to board a plane?

A. We normally go to the side. We do not go through the actual -- what the normal passengers go through, because we do not stand in line. We normally go through, sign in the book and then move on down towards the gate.

Q. Did you have any disagreements with any airport officials regarding the transportation of the Konanykhines at the airport?

ATTORNEY HOWARD: Objection as to relevance, your Honor.

THE COURT: What is the relevance of that, Mr. Szymkowicz.

ATTORNEY SZYMKOWICZ: The relevance is that, that there was this big hurry to get the Konanykhines on board the plane.

THE COURT: Well, I don't have any doubt about that, but what's the relevance of that?

Your argument is that somehow the government was trying to moot what this Court was doing?

ATTORNEY SZYMKOWICZ: That's exactly correct, your Honor.

THE COURT: But Mr. Howard has pointed out that he told them they couldn't -- unless they received a green light from him, they couldn't put Mr. Konanykhine and his wife

on the airplane.

ATTORNEY SZYMKOWICZ: But at that hour, at that particular moment, your Honor, I respectfully remember that they had a different order at that point. It was: Go to Russian unless otherwise informed.

THE COURT: Well, I don't know that there is much to this, Mr. Szymkowicz. We seem to be getting pretty far afield. The real issue is whether he violated his agreement.

ATTORNEY SZYMKOWICZ: Okay.

THE COURT: I don't have -- I don't think you are going to have a great difficulty, a great amount of difficulty persuading me that the government wants to show that he did violate it. The government wants him to go to Russia, and the government was going to do everything it could.

But I also think it's clear that Mr. Howard, on the direction of this Court and at that time I issued the order, stopped it, as he should have.

So, he certainly wasn't trying to moot it. I don't have any doubt that someone else might try to moot it. But if answer is, they can't.

ATTORNEY SZYMKOWICZ: With that line of questioning, I just have three --

THE COURT: And if --

ATTORNEY SZYMKOWICZ: -- brief questions.

THE COURT: -- some Executive Branch officer did try to do that at some point, there would be a contempt hearing and sanctions. And that didn't occur here.

ATTORNEY HOWARD: Could I add just one thing,

your Honor?

THE COURT: Yes.

ATTORNEY HOWARD: That hearing that particular day was scheduled to start sometime in the morning, I think at 11:30. And then there were (sic) a series of recesses or delays.

So, it's possible that my instructions changed as the Court -- as the hearing was moved further and further into the afternoon. But by all means the final instruction to them was that they were not to proceed until they had a green light from me.

THE COURT: All right. That's my impression.

Go ahead, Mr. Szymkowicz. You may proceed and pursue this, but make it quick.

BY ATTORNEY SZYMKOWICZ:

Q. When did you receive the order to -- was there an order to travel unless you hear otherwise?

A. Yes.

Q. And when was that order changed to: Don't travel unless you hear otherwise?

A. When I landed in New York.

Q. It was only when you landed in New York, right?

A. Yes.

Q. Okay.

And you were going to accompany the Konanykhines to Russia, correct.

A. Yes.

Q. When was your visa to Russia issued?

A. We didn't have visas.

Q. Why not?

A. We were not staying in Russia.

Q. Isn't ICE policy, or even government policy for that matter, that in order to travel to another country, you need to obtain a visa?

A. No, sir.

Q. The bags that the Konanykhines brought with them, they didn't all return back to the Konanykhines when the Konanykhines failed to board the plane, did they?

A. That's correct.

Q. Some of those bags flew to Moscow; is that correct?

A. Yes.

Q. And they haven't come back?

THE COURT: I am a little confused about one thing, Mr. Watson. When you deport people or remove people, you don't go with them, do you?

THE WITNESS: Yes, sir.

THE COURT: You do?

THE WITNESS: Yes.

THE COURT: Are there many occasions when ICE officers don't go with people that they deport?

THE WITNESS: There are occasions, yes, sir.

THE COURT: Aren't there many such occasions?

THE WITNESS: Uhm --

THE COURT: I just had a sentencing recently where a man was deported, and foolishly put on an airplane that stopped at an American airport, so he got off there. But

ICE didn't know about that. So there must be a number of occasions when you don't go with the person you put on an airplane.

THE WITNESS: Yes.

THE COURT: So, what's the difference whether you go or you don't go?

THE WITNESS: Well, the decision is made by people higher up than I.

THE COURT: All right. And your orders were to go?

THE WITNESS: Yes.

THE COURT: And so you would have flown to Moscow and then caught a plane back?

THE WITNESS: Yes, sir.

THE COURT: I guess you would have had to spend a night or two, to do that.

THE WITNESS: Well, we were going to fly to Moscow; from Moscow, fly back to Frankfurt, Germany, and that's where we was (sic) going to spend the night.

THE COURT: I see. On the same airplane.

THE WITNESS: Either the same one, or the first one leaving.

THE COURT: I see.

Next question.

BY ATTORNEY SZYMKOWICZ:

Q. There are flights that leave to go to Russia from Washington, D.C., area; is that correct?

A. Not a U.S. carrier.

Q. But you could have taken a plane that stopped, for example, in London or Frankfurt en route to Moscow; is that correct?

A. What we try to do is take the most direct route when we are escorting someone out of the country.

Q. But isn't --

THE COURT: Well, did you choose the flight, Mr. Watson?

THE WITNESS: No, sir.

THE COURT: Someone else did.

THE WITNESS: Yes.

THE COURT: All right. Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Did the Konanykhines have travel documents that allowed them to go to Russia when you were attempting to board them on the JFK flight?

A. No, they did not.

Q. Why not?

A. Well, the embassy would not issue their documents.

Q. So if they didn't have travel documents and you weren't able to take them on the day that you were at the Russian Embassy, why did you try to take them the next day?

A. What we had was identity documents that the -- that we use, identifying who they are, what country they were from, and we give -- we show those to the airline, and the airline will send them back to their country.

Q. Didn't you tell the airline to put them on the plane, without the proper documents, without a passport or a visa?

A. No, I didn't tell the airline anything. I showed the airline the documents that I had.

Q. In your experience with INS and/or ICE, have you ever arrested someone or detained someone with an appeal pending before the Fourth Circuit Court of Appeals, or any other circuit?

A. Yes.

Q. How many times?

A. I can't really give you a number, but I can say it is more than 50 to a hundred times.

Q. And when would that have been, what time period?

A. Well, I have been working for the service for 14 years. So it was during that period of time.

Q. So, would that have happened before 1996, or after?

A. Both.

Q. But didn't -- wasn't there an automatic stay of deportation before 1996, with an appeal pending to the Court of Appeals?

A. Are you speaking specifically about this case, or in general?

Q. In general.

A. In general. It's still -- it's discretionary as far as custody.

Q. But I am talking about actually taking them into custody. So they could have been taken into custody and kept in jail pending the appeal; is --

A. Yes.

Q. -- that correct?

A. That's correct.

Q. The government has stated that the Konanykhines have breached their settlement agreement because they have failed to do certain things --

THE COURT: Well, let me ask you this: Is it common practice or policy, to your knowledge, to remove people while they have appeals pending?

THE WITNESS: Not with any case that I have dealt with.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. The government claims that the Konan- -- that Alexandre Konanykhine breached his settlement agreement in four ways. Number one, he moved to New York without permission. Do you know if he ever moved to New York without the government's permission?

A. I have no idea.

Q. Do you know if Mr. Konanykhine changed residences in November 2003 without permission?

A. I have no idea.

Q. Do you know if he consistently failed to report in by telephone?

A. I can only go by August 2003. There may have been something in the paperwork that I have sign where he reported one time.

THE COURT: Do you know how often he needed to report at that time?

THE WITNESS: No -- no, sir.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. I draw your attention to the document provided to me.

Do have you a copy?

A. No, I don't have a copy.

(Document tendered.)

Q. Is this the entire printout of what would typically be found in the computer about reporting and things like that with regard to an alien in the system?

THE COURT: I'm not sure --

THE WITNESS: I don't --

THE COURT: -- what question you're asking.

THE WITNESS: I don't follow you.

BY ATTORNEY SZYMKOWICZ:

Q. What this document -- what this printout is of, is this document an itemization of every particular time the Konanykhines reported in to INS?

THE COURT: If you know.

THE WITNESS: Well, all of this has nothing to do with them reporting. This is based on the actual -- the case itself.

BY ATTORNEY SZYMKOWICZ:

Q. But it says in here --

THE COURT: I think -- I don't know what you are aiming at, Mr. Szymkowicz. Let me -- but I share Mr. Watson's confusion a bit.

Mr. Watson, again, you didn't play any role in assembling this paper?

THE WITNESS: No, I did not.

THE COURT: So, you don't know what the computer was asked to spit out.

THE WITNESS: That's correct.

THE COURT: And you don't know, of what it spit out, how much was clipped together and produced. Some of it may have been put in the trash can.

THE WITNESS: That's correct.

THE COURT: There is no way this witness can know whether this document is complete or not.

ATTORNEY SZYMKOWICZ: If I may, I would like to go through several of the dates that are specified in the report for reporting.

THE COURT: All right, you may do so.

BY ATTORNEY SZYMKOWICZ:

Q. This document says that the Konanykhines reported in on 3/30/99 --

THE COURT: Do you have a copy of it, Mr. Watson?

THE WITNESS: Yes.

THE COURT: All right, go ahead.

BY ATTORNEY SZYMKOWICZ:

Q. Is that correct?

A. Yes.

Q. And then the next time would be 4/30/99, it says that they moved to New York?

A. That's correct.

Q. The next time would be 6/16/99, it says "reported by telephone"?

A. Yes.

Q. The next time would be 8/99, "reported new address"?

A. Yes.

Q. Now -- now we jump one year to 7/27/00, it says, "came in for EAD renewal."

A. Yes.

Q. What happened to the time period from 8/99 to 7/27?

Did they report in during this period.

A. I have no idea. I took over in August 2003.

Q. Okay.

But the documents -- the computer file that this was printed from doesn't reflect any reportings from 8/99 until 7/27 --

THE COURT: Maybe I am not communicating with you, Mr. Szymkowicz. This witnesses can't possibly know what the computer reflects, unless he looked at the computer and developed this document.

Which I think, Mr. Watson, you didn't do; is that right?

THE WITNESS: That's correct.

THE COURT: So you don't know -- do you know, Mr. Watson, whether there is anything in the computer for that intervening year?

THE WITNESS: No, sir.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Did you consider the Konanykhines to be fugitives at the time you picked them up at the airport, Reagan National?

A. Well, if they -- they wasn't (sic) arrested by me. So at the time they just was (sic) considered to be people that was (sic) being detained by the Service.

Q. But 24 hours before that, would you have considered them to be fugitives?

A. I would consider Mr. Konanykhine, yes.

Q. And why is that?

A. He had a final order of removal. And based on the information that -- well, we are getting into third party, from what I heard, he wasn't at the place of residence.

Q. And that would be -- that would be a crime, is that correct?

A. Well, you are supposed to notify us when you change your place of residence.

Q. Did you ever call Elena or Alexandre on the telephone?

A. Yes.

Q. And when did you call them?

A. I called a number that was in the computer. That was sometime in December.

Q. And what number did you call?

A. I have no idea what number that was.

Q. By looking at this document, can you tell what number you called?

A. By looking at this document?

Q. Yes.

A. I would have to say on the second page, the 212-873-2211.

Q. What happened when you called that number?

A. Mr. Konanykhine answered the phone.

Q. That was in December?

A. End of November, December, somewhere around there.

Q. Did you --

A. I don't know --

Q. Did you --

A. -- the exact date.

Q. -- talk back to Mr. Konanykhine when he answered the phone?

A. No. Because all I was calling to see whether the phone was working.

Q. Okay.

So, you verified that that was his voice on the other end.

A. Yes.

Q. Okay.

So that was a valid number.

A. Yes.

Q. Did there ever come a time when you actually tried to talk to him?

A. No.

Q. Wouldn't the normal ICE procedure with regard to an alien subject to a deportation order -- would be to issue a bag and baggage letter?

A. No, you don't have to do that.

Q. You don't have to, but that would be the typical procedure, wouldn't it?

A. No.

Q. What would be the typical procedure?

A. The typical procedure could be any number of things. I mean, we could actually go out and just arrest the person --

ATTORNEY SZYMKOWICZ: Which is what they did here.

THE WITNESS: -- and take the person in custody, or we could send a notice out to them, asking them to come in to the office.

ATTORNEY SZYMKOWICZ: Okay.

But that wasn't done in this case.

THE WITNESS: I have no idea what was actually done. All I know is that I met them at the airport when they was (sic) transferred down from Buffalo.

BY ATTORNEY SZYMKOWICZ:

Q. But you were the case manager. Wouldn't you have known if there was such a request for them to come in?

A. Well, I would have made the request, but like I say --

Q. You didn't make the request, did you?

A. I did not make the request.

Q. Why not?

A. I was dealing with other cases.

Q. How many other cases do you work on?

A. At the time, I was dealing with at least 200 other what I would consider to be fugitive cases.

Q. But how many other, quote, high profile cases were you working on at that time?

A. None.

Q. And you would classify this as a high profile case,

wouldn't you?

A. I classify it as just a regular case.

Q. I direct your attention to the third-to-last page of the document.

A. (Complied.)

Q. Do you agree that Comment 1 says, "High profile case for HQ Fugitive Section"?

A. Yes, that is written here, yes.

Q. So, you weren't really treating it like every other case, were you?

A. I didn't make this entry.

ATTORNEY HOWARD: Objection, your Honor. We don't know what the date of that entry was. What are we talking about?

THE COURT: Well, that's not an evidentiary objection, so it's overruled.

Continue, Mr. Szymkowicz.

BY ATTORNEY SZYMKOWICZ:

Q. So, you were treating this case as a --

THE COURT: And parenthetically, Mr. Howard, you do know what the date is. You have the document in front of you.

ATTORNEY HOWARD: We gave our extra copy to --

THE COURT: Oh, all right. Well, let's have a copy made for you.

ATTORNEY HOWARD: That's all right.

THE COURT: All right. But are the only two copies, then, the two that you -- Ms. Pepper, you didn't bring

any others with you?

ATTORNEY PEPPER: Your Honor, I had --

THE COURT: All right, that's -- I guess you brought three copies. I will have the deputy clerk now make a copy for you --

(Addressing the clerk) Make two additional copies, please.

(Continuing) -- and then you will have your own copy while the questioning is going on.

Go ahead, Mr. Szymkowicz.

BY ATTORNEY SZYMKOWICZ:

Q. Wasn't this case really a, quote, high profile case for your department, your office?

A. I can't speak for my department. I can speak for me being the case officer.

Q. So, you were treating it as a regular case, right?

A. Yes, that's correct.

Q. So the department might have been considering this to be a high profile case, but you had no knowledge of that, correct?

A. No (sic).

THE COURT: What would you have done differently if it were a high profile case -- if it had been, to your knowledge, a high profile case?

THE WITNESS: Well, with me dealing with two other -- 200 other fugitive cases, then if it was a high profile case, that would have been my first priority.

THE COURT: All right. But what would you have

done differently in this case?

THE WITNESS: Well, I would have notified -- I would have checked -- once I received the final order, the decision from the Board of Immigration Appeals, then I would have made every attempt to try to find out where Mr. Konanykhine was living; so, basically just put the other 200 cases to the side and specifically work on that particular case.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Couldn't you have just called Mr. Konanykhine and asked him on the telephone -- he obviously answered the phone -- could have said, "where are you living?"

Couldn't you have done that.

A. We can do that, yes.

Q. Why didn't you do that?

A. Most cases, when we contact someone by telephone, they abscond.

Q. But in the eight or ten years that Mr. Konanykhine has been here, has he ever tried to abscond?

A. I have no idea, sir.

Q. And what do you mean by "absconding"?

Does that mean --

THE COURT: The question is now compound.

BY ATTORNEY SZYMKOWICZ:

Q. What do you mean by the term "absconding"?

A. Run.

Q. Run where?

A. Anywhere.

Q. Anywhere within --

A. Anywhere from --

Q. -- the United States?

A. Anywhere different from the actual address that they have provided us.

Q. Did Mr. Konanykhine breach -- or violate a crime (sic) by going to Canada?

A. I don't know whether -- did he go? I have no idea that he went to Canada.

Q. Or by attempting to go to Canada?

A. My understanding, that he is supposed to have stayed in the New York Metropolitan Area.

THE COURT: You didn't have that understanding though, until after this all --

THE WITNESS: Yes.

THE COURT: -- came about.

THE WITNESS: After the fact, yes.

THE COURT: Right.

Now, I take it if it had been -- if you had known that it was a high profile case, then you would have been familiar with the agreement and any modifications of the agreement.

THE WITNESS: Yes.

THE COURT: And you weren't, until December.

THE WITNESS: Yes.

THE COURT: And therefore when the decision came out, you said you would have called him and located him, but

you would have read the file, including the agreements, and determined whether or not the Board of Immigration Appeals order ended the matter, or whether the appeal had to go through.

THE WITNESS: Right. That's correct.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. You spoke to my client on November 22nd, in the normal course of his reporting duties, correct?

A. November 22nd? I can't remember.

Q. But it was sometime at the end of November.

(Pause)

Would you agree with that statement?

A. I have no idea what the actual date was.

Q. Well, let's talk about general dates. Do you remember speaking to my client in late November of 2003?

A. You mean when I actually called the phone number?

Q. No, not when you called and hung up, but when my client called in to your office.

Are you aware that he called in to your office at the end of November.

A. No.

Q. You are not aware of that?

A. He did not talk to me.

Q. Could he have talked to someone else?

A. Yes.

Q. And would that have been reflected in this report that I have?

A. If a person calls in telephonically, to report, they would either talk to the case officer or they would talk to the duty officer.

Q. Do you know if he talked to the case officer or the duty officer?

A. If it is entered in "comments," then he would have talked to the duty officer.

THE COURT: Well, more precisely, when a person calls in to report telephonically, who that person speaks to is in the control of whoever answers the telephone; is that right?

THE WITNESS: Yes.

THE COURT: So, do you have a receptionist or you have somebody who answers the telephone?

THE WITNESS: Yes.

THE COURT: And I take it that person is instructed that if someone is calling in to report telephonically, that they should be connected to the duty officer or the case officer.

THE WITNESS: That's correct.

THE COURT: All right. And that may or may not happen, because human beings are fallible, right?

THE WITNESS: That's true.

THE COURT: So a person could call up and speak to the receptionist or whoever is there, and that could be the end of it without a case officer or the duty officer speaking, because the person who answered the phone either didn't understand that it was a telephonic notice, or didn't do what

he or she was supposed to do.

THE WITNESS: But normally they ask various questions. And if the person is saying that they are reporting in, they will forward it to one or the other.

THE COURT: All right.

Next question.

BY ATTORNEY SZYMKOWICZ:

Q. I direct your attention to the fourth-to-last page of this agreement. It states, "11/22/03, reported telephonically."

A. (Complied) Yes.

Q. If he did not report telephonically on 11/22/03, would this document have said that he reported telephonically on that date?

A. That's true (sic).

Q. So, he did report telephonically on 11/22?

A. He reported, but he didn't talk to me.

Q. Okay.

You had stated earlier that there were several times that Mr. Konanykhine -- when the records reflect that he didn't call in, correct.

A. I can only go based on him talking to me or what was written in the comment screen.

Q. Okay.

And that would have been on the computer.

A. Yes.

Q. If Mr. Konanykhine was not calling in as he was supposed to, why didn't you just go out -- call him up?

Why didn't you just go out and get him?

Why didn't you do something.

THE COURT: The question is compound. Reask your question.

BY ATTORNEY SZYMKOWICZ:

Q. If Mr. Konanykhine wasn't calling in as required, why didn't you take an action?

A. Well, because I was working other cases.

THE COURT: Well, I thought you told me earlier, Mr. Watson, that you weren't aware, prior to December, whether he was or wasn't calling in.

THE WITNESS: Right. What I'm getting at --

THE COURT: So the answer to "Why didn't you go get him, or do something," the first answer is, you didn't know. The second answer could be that maybe there was priority, and you might not have picked him anyway. But the first reason is, you really didn't know.

THE WITNESS: True.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Have you ever had anyone subject to your review voluntarily leave the country?

A. I don't follow you.

Q. Have you ever -- how many people do you review?

I believe you stated 200; is that correct.

A. Well, it's more than that. I'm talking -- the 200 that I'm talking about are those that I've found that are not reporting.

Q. Have you ever obtained information that some of these people actually have left the United States voluntarily?

A. Yes.

Q. Is that something that happens frequently?

A. I can't say frequently, but I will say it does happen.

Q. And what does the ICE or, before that, the INS do once they receive notice that the person is out of the country?

A. We give -- there is a form that we give that person, to give to them so that they can go to the U.S. Embassy in their particular country.

Q. Okay.

And that's given to them before they leave.

A. If they notify us that they are leaving --

Q. Okay.

A. -- then we will give them that form.

Q. What if they notify you after they are already in that country?

A. Then we still would -- whoever would contact us, we will give them the form to forward to them, so that they would report to the U.S. Embassy, showing -- along with their passport, showing that -- showing the actual date that they entered that country.

Q. And that would be given to their attorney here in America?

A. No.

Q. Never?

A. No. It depends on who contacts us to provide us with that information.

Q. What if their attorney contacted you?

A. Then it would be given to their attorney.

Q. Here in America?

A. Here in the U.S..

Q. And if it was brought to your attention by the people themselves in the other country, it would be delivered to them in the other country, correct?

A. Well, if it's an individual calling in, telling us that, we would just tell them to go to the U.S. Embassy and show proof that you are actually in that particular country.

Q. And then what would happen is the case file would close, wouldn't it?

A. Yes.

Q. You don't know when the document that was given to us today was prepared, do you?

A. No, I don't.

Q. Do you know who prepared it?

A. No.

Q. Do you know why it was prepared?

A. No, I don't.

Q. Did you ever look in your file for the settlement agreement and any modifications to that agreement, after you became aware of the document's existence?

A. Yes.

Q. And did you find it?

A. No.

Q. Why not?

A. Well, that was 17 boxes we looked through, and I didn't

see it in the 17 boxes.

Q. Are you familiar with Alexandre's requirement to notify the INS between '97 and sometime -- sometime in 1999 -- or 1998, rather, that he had to re-request any authorization to travel in the United States?

A. No.

Q. You don't have any knowledge of any --

A. No.

Q. -- travel request?

A. No.

Q. And did your files indicate anything with regard to that?

A. If it's there, that's not one of the things I was looking for.

Q. If Mr. Konanykhine had submitted written requests for travel authorization, would they have been in your file?

A. Yes, they should have been.

Q. And you didn't see any of these written requests?

A. That's not one of the things I was looking for.

Q. Are you aware that Mr. Konanykhine won two judgments against Russian newspapers for defamation in 1999 and 2000?

A. No.

Q. How would you know that Mr. Konanykhine had a requirement to call in every 60 days.

THE COURT: Where were those judgments.

ATTORNEY SZYMKOWICZ: They were both in the Arlington County Circuit Court. One was against Uzveske Newspaper for \$33 million in December 1999, in which I was the

attorney; and again --

THE COURT: How did you get jurisdiction over the defendants?

ATTORNEY SZYMKOWICZ: They published the articles on the Internet, your Honor. In fact, I believe that with regard to the Kommerzant (phonetic) case, where Mr. Konanykhine won \$3 million, which was awarded in January of 2000, that the case that I argued with Judge Kendrick was argued --

THE COURT: You relied on both -- go ahead.

ATTORNEY SZYMKOWICZ: The Kommerzant Newspaper was represented by, I believe it was Chadborn and Park, and they argued that there is no jurisdiction.

We cited cases that stated that there was because they were published on the Internet.

Judge Kendrick agreed with us, and from there we went to trial and two juries awarded Mr. Konanykhine damages.

Unfortunately for us, "A," they weren't collectable, even though the Kommerzant reporter is sitting in the courtroom today. I don't believe he was the reporter in the original case. But we have not collected those judgments.

And the judgment against Uzveske was later vacated for -- because the process was not served via letters rogatory, which was funny because in Kommerzant the same issue was -- they were served via the Secretary of the Commonwealth of Virginia. In the Kommerzant case it was done the same way, and Judge Kendrick found that there was service -- there was proper service.

THE COURT: We will all look forward to the day when those suits can be brought in Russia, and either won or lost legitimately in Russia.

Let's proceed.

BY ATTORNEY SZYMKOWICZ:

Q. Officer Watson, how would you know that Mr. Konanykhine had a requirement to call in every 60 days, if you were unaware of the settlement agreement?

A. I was not aware.

Q. So -- but you were the deportation --

THE COURT: Asked and --

BY ATTORNEY SZYMKOWICZ:

Q. -- officer, correct?

THE COURT: -- answered.

Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Do you know if it was important to the ICE or to the United States to detain Mr. Konanykhine in November 2003 or December 2003?

A. I have no idea. I was told to meet him at the airport, and that's what I did.

Q. Okay.

Who directed you to detain Mr. Konanykhine.

A. I was told to meet him at the airport by Neil Ackery.

Q. Did he tell you why?

A. No, just that they -- that he was taken into custody.

Q. Did he express a time frame for you detaining him?

A. No.

Q. Did you know in advance that officers in Buffalo were going to detain him?

A. No.

Q. Did you know in advance that officers in Buffalo were looking for him?

A. No.

Q. Did you know in advance that Mr. Konanykhine was going to Canada, or was attempting to go to Canada, on December 18th?

A. No.

Q. Are you aware if the Konanykhines were monitored in any way, telephonically, in person or through the use of a tracking device, prior to their attempted crossing of the bridge into Canada?

A. No.

THE COURT: What he is asking is: How did the Service know he was in Canada, or trying to go to Canada?

THE WITNESS: I have no idea.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Do you know who would know the answer to that question?

A. No, I don't.

Q. Do you know anything about what happened to them at the Peace Bridge?

A. No.

Q. Have you reviewed any documents prior to coming to court today?

A. No.

Q. What is your understanding of the allegations against the Konanykhines in Russia? If you know?

THE COURT: What difference does it make what this witness' understanding is of that? It's irrelevant.

Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Were you aware of any deals between the United States and the Russian Government regarding the Konanykhines?

A. No.

Q. Have you ever experienced, in your job as --with INS or ICE, a 48-hour period like December 18th through December 19th?

A. I don't follow you.

Q. This event was out of the ordinary in your experience, correct?

A. I still don't follow you. Out of the ordinary how?

Q. As far as people being brought down by airplane from another place in the United States to Washington, immediately taken to an embassy; after leaving the embassy, then the next day trying to be flown out of the United States.

A. No, that's not ordinary (sic).

Q. "That's not ordinary."

A. I mean, I have seen this done before. We have assisted other districts, where they have to come down to the embassies in Washington, D.C. They come down, pick up a document. We place the person in a county jail, and they fly out of the country the very next day.

Q. But were these people people with appeals pending before

a United States Court of Appeals?

A. Those cases? I have no idea. We just assisted them with obtaining a document and -- well, basically provided transportation to the embassy and back to the airport.

Q. You have had a lot of contact over the years between the Konanykhines, correct?

A. I wouldn't say a lot of contact, no.

Q. But you have been in contact with them as an INS or an ICE official from 1996 or '97 to the present, in various capacities.

A. I will say that I recognize Mr. Konanykhine, if he was standing on a corner; and vice versa with -- him with I.

Q. You have always found him to be respectful, haven't you, to you personally?

A. Yes.

Q. Have you ever had any reason to doubt his veracity for telling the truth?

A. To be honest, I never really gave it a thought.

ATTORNEY SZYMKOWICZ: Okay.

I have no further questions.

THE COURT: All right.

Any redirect?

ATTORNEY PEPPER: No, your Honor.

THE COURT: Thank you. You may step down.

(Witness excused)

THE COURT: Call your next witness.

ATTORNEY HOWARD: Your Honor, our next witness is

Lisa Hoechst.

THE COURT: All right.

ATTORNEY HOWARD: Before that, your Honor, I think we need to address once again the question of exchanges of information with Canada, and whether that information should be excluded, or the courtroom closed, or if something could be stipulated to.

THE COURT: Yes. Well, if you represent to the Court that there is some sensitive information, I may take it at the bench. But let's get there. I may not need --

ATTORNEY HOWARD: Right.

THE COURT: -- to hear any sensitive information. It may be unnecessary.

I assume that it's information in the nature of the Canadian Government telling you after the fact, or now, that, "Don't give him to us. We don't want him. We wouldn't let him stay here on refugee status either."

ATTORNEY HOWARD: I can't speak to what the information is, your Honor. I can tell you, thankfully, though, that Ms. Hoechst will be able to testify as to some information that she did receive, and that she has been authorized to release.

THE COURT: All right.

ATTORNEY HOWARD: And the Court will find that helpful.

THE COURT: All right. Call Ms. Hoechst.

It would probably be, Mr. Howard, hearsay and not admissible, but let's -- when we get to that point I'll tell you whether it's appropriate.

All right, you may administer the oath to the witness.

(Witness sworn)

THE COURT: All right, you may proceed.

LISA HOECHST, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY HOWARD:

Q. Would you state your name and spell it for the record, please?

A. My name is Lisa Hoechst, H-o-e-c-h-s-t.

Q. And where do you work, Ms. Hoechst?

A. I am currently employed in the Removal Division at ICE headquarters in Washington.

Q. How long have you worked for ICE?

A. I have worked for ICE/INS since August 1984.

Q. And in what capacity did you begin working for ICE?

Well, let's call -- when say ICE, it would be both INS and ICE.

A. I commenced my employment working at Niagara Falls, New York, which is under the Buffalo District, at Rainbow Bridge as an immigration inspector.

Q. What year was that?

A. Uhm, 1984.

Q. How long did you do that?

A. I did it from August of '84 until April 1987.

Q. And then what did you do?

A. I transferred from Niagara Falls to Montreal International Airport in Montreal, Canada. At that point I worked as an immigration inspector doing preflight inspections. And I worked in that capacity until October 1990.

Q. And what did you do then, please?

A. At that point, I transferred to the Philadelphia District Office, and I worked as an immigration examiner; two years later, same office, as a senior immigration examiner; and then my title changed to a district adjudications officer.

Q. What is the difference between an inspector and an examiner?

A. An inspector inspects persons coming to the United States to determine their admission to the country, and they may do it at an airport, seaport or land border.

Q. And what does an examiner do?

A. An examiner adjudicates all forms of applications for various benefits under the INA. It may be naturalization, green card interviews, marriage fraud interviews.

Q. How long were you an examiner?

A. Five years.

Q. And so at what time did you assume a new position, and what was that position?

A. In January of 1996, I commenced -- in Philadelphia again, and started as a deportation officer.

Q. How long did that last?

A. I worked Philadelphia deportation until October of 1999, whereupon I transferred to ICE headquarters.

Q. And what did you do at that time?

A. At that point I was a staff detention deportation officer, and I handled removal travel, coordinating throughout the United States, removal travel.

And most recently -- I am very much in the same capacity, however, I am acting chief removal support and coordination of that same division.

The division is not only required to do removal travel; we also handle liaison with over 200 countries, embassies, law enforcement agencies, other immigration agencies, and we are currently involved in a project with centralized ticketing, where we will handle all commercial air travel for deportees.

THE COURT: You said in one of your jobs that you had some kind of adjudicatory function.

THE WITNESS: Yes, sir.

THE COURT: What was that?

THE WITNESS: I basically did everything. As a senior officer, senior examiner, I did interviews all day for naturalization, conducted naturalization ceremonies, adjustment interviews, 751 marriage fraud interviews on conditional permanent residents, adjudicated I-730 petitions for families of asylees and refugees; just about any application I can think of.

THE COURT: All right.

Next question.

BY ATTORNEY HOWARD:

Q. Tell us a little bit about your current

responsibilities, if you could.

I understand you coordinate with some 200 countries, but how many aliens are we dealing with here, for example.

A. My current duties, I supervise 14 people. Four of them are officers who do the liaison portion, doing outreach with embassies, trying to get travel documents.

They also coordinate readmission agreements with various governments who want to enter into agreements with the United States on repatriation of a national.

I have nine contractors which deal with cable traffic. Any time we -- we remove approximately 2,000 aliens via commercial aircraft per month. From that total, approximately 500 a month are escorted aliens, meaning two officers must be assigned to each of those 500 aliens for the removal.

And then the remaining 1,500 are nonescorted aliens. When we remove these aliens, my contractors are required to put together a cable for our various U.S. embassies, to notify them that this alien is being removed either through or to that particular jurisdiction.

And in the case of those aliens that are being escorted, we must ask the ambassador of those various jurisdictions for country clearance for our officers.

Q. Let me ask you this, because it sounds as though you would certainly know the answer: If an alien is being removed from the United States, but he is passing through another U.S. city where that flight stops before he moves on to leave the

country, would he have an escort officer? And if not, why not?

A. We can go either way, depending upon each individual case. If a person is -- if a person is being escorted due to criminality, then definitely, we have an escort standard which indicates people that are convicted of crimes of violence or difficult behavior, they must be escorted.

And whether it's from place to place within the United States, we may detain them in one location and switch them to another location, they have to be escorted for purposes of public safety and carrier safety with the aircraft.

If they are being deported, let's say they were to travel from Dulles to Los Angeles, Los Angeles to China, the person is a noncriminal, there is no anticipated sense of violence, what we can do is arrange what's known as a meet and greet, where we will call the district that has jurisdiction over the airport or the transit point, and ask that they send officers out to meet the alien plane-side and to take them to the next plane. And in that case, nobody goes with the alien.

Another thing we can do is a departure verification, where we will do a partial escort, put an alien on a plane and verify that the alien does depart foreign.

Q. Is it fair to say that, given your responsibilities as chief of removal and support coordination, that your responsibilities begin when you are given a removal order?

A. My responsibility begins when the alien is in custody and ready for removal.

Q. Are you familiar with the Alexandre Konanykhine matter?

A. I am familiar to the extent of being told he was ready for removal.

Q. When did you -- when did Alexandre Konanykhine first come to your attention?

A. On November 21st, my boss sent me an e-mail with an attachment from another e-mail, indicating that Mr. Konanykhine's case had been dismissed and he is ready for removal. And my boss indicated: Get ready to remove this person.

Q. Is that exact- --

THE COURT: Did you know anything about any agreement that allowed him to pursue his judicial appeals?

THE WITNESS: I did not know anything about the agreement until I sat in this courtroom on December 22nd.

THE COURT: Next question.

BY ATTORNEY HOWARD:

Q. Describe a little bit more, if you could, the e-mails that you received, the instructions you received at that time, and the two -- you mentioned there was -- there was one e-mail and with an e-mail attachment; is that right?

A. The e-mail from my box had an e-mail from another person attached as a first e-mail, saying that -- there were three cases listed as having appeals dismissed, and Mr. Konanykhine's case was -- Mr. Konanykhine's name was on that e-mail.

Q. Now, when it said "appeals dismissed," does that mean board appeal, or was it more specific than that?

A. It was more specific. It was from general counsel, and it said: The cases have been dismissed. They are ready for removal.

Q. And when you say "general counsel," what office are we referring to?

A. ICE general counsel.

Q. So did the direction then ultimately come from the general counsel's office that Mr. Konanykhine's appeal had been dismissed and he was ready to be removed?

THE COURT: Well, that's hearsay.

ATTORNEY HOWARD: Okay.

THE COURT: You are now leading --

ATTORNEY HOWARD: I understand, your Honor.

THE COURT: -- and it's hearsay. All she knows and can testify to is that she received an e-mail from her boss --

Is that right?

THE WITNESS: Yes, sir.

THE COURT: -- and that said: These people are ready for their -- for removal.

THE WITNESS: Correct.

THE COURT: And she was unaware of the agreement.

Is that right?

THE WITNESS: I had no idea about the agreement.

THE COURT: And so you thereafter began to take steps to effect the removal?

THE WITNESS: Correct.

THE COURT: Next question.

ATTORNEY SZYMKOWICZ: Your Honor, we object to this testimony at all, because it doesn't relate to the breach of contract issue. She doesn't have any testimony that she was even aware of the settlement agreement until after we were in court on the 22nd of December.

THE COURT: Well, you have elicited a lot of testimony about how -- what happened. And while I am somewhat sympathetic with your objection, I don't -- she can only testify as to what she did. Nonetheless, I think as a matter of completeness, I am going to give Mr. Howard the opportunity to elicit the testimony.

But at the same time, Mr. Howard, as in the case of the last question you asked, you shouldn't try to overlay your hand.

ATTORNEY HOWARD: All right, your Honor.

I am trying to make sure the Court has the benefit of as much information as it could want.

THE COURT: Well, if you really wanted to do that you would have the detector of ICE here to tell me what's really going on. This person clearly doesn't know.

ATTORNEY HOWARD: Well, all right, your Honor.

THE COURT: So, I would be careful about representing to the Court that you really want me to know everything.

ATTORNEY HOWARD: All right, your Honor. Very well. All right.

BY ATTORNEY HOWARD:

Q. So, then it was brought to your attention that

Mr. Konanykhine had a final order of removal; is that correct?

A. Correct.

Q. What did you do then?

A. Shortly afterward, my boss spoke to myself and Chuck Zethan (phonetic), who is the chief for fugitive operations -- we are both under the same division -- and asked that we coordinate Mr. Konanykhine's removal.

The first step would be to locate Mr. Konanykhine and then, once we were able to locate him, obviously effect the removal. There was an indication that Mr. Konanykhine was of high interest due to --

THE COURT: I think it's pronounced Konanykhine.

THE WITNESS: Konanykhine, I apologize.

(Continuing) -- Mr. Konanykhine was of special interest to the government due to an issue of fugitive -- a fugitive issue from Russia, as well as the extensive litigation that the government has been into with previous litigations.

So, therefore --

THE COURT: Well, let me stop you right there. I'm going to give you a chance to come back and tell me what you are going to say about "therefore." But you said that he was of special interest, you were told, because of what again?

THE WITNESS: Because he was wanted in Russia on a criminal offense.

THE COURT: And?

THE WITNESS: And that's basically all I was told. I had no file --

THE COURT: Well, I thought you said, then, "and because of his previous history with the government."

THE WITNESS: Extensive litigation. They wanted us to attempt to remove him before any additional suits could be filed against the government.

THE COURT: Let me have the court reporter read that back. I think I understand it, but if I do, it's astonishing.

Read it back, Mr. Rodriguez, please.

(The reporter read the record as follows:)

Answer: Extensive litigation. They wanted us to attempt to remove him before any additional suits --

THE COURT: No, right before that. Read me her whole previous answer, please.

(The reporter read the record as follows:)

Answer: Because he was wanted in Russia on a criminal offense.

The Court: And?

Answer: And that's basically all I was told. I had no file --

The Court: Well, I thought you said, then, "and because of his previous history with the government."

Answer: Extensive litigation. They wanted us to attempt to remove him before any additional suits could be filed against the government.

THE COURT: Next question.

ATTORNEY HOWARD: Your Honor, that's consistent with the opening argument, the representations the government made at that time.

THE COURT: Well, isn't that: Let's get him out of the country before he causes us any more problems and sues us any more. Let's get him out of the country because the Russians want him?

ATTORNEY HOWARD: Yes.

THE COURT: Well, if you really wanted him out of the country you should have let him walk over the bridge into Ontario.

All of this is quite astonishing. You know, it's difficult sometime for people -- and I appreciate this. When I litigated, Mr. Howard and Mr. Szymkowicz, I was always deeply involved in my cases, and I -- as you all are, and I was deeply involved with the witnesses and so forth. And I never think I appreciated adequately how matters look to somebody who is impartial and doesn't care one whit one way or the other.

I commend to you to try to achieve that perspective now and again when you look at your case, because there are things that are striking to someone who really isn't deeply immersed in it.

I try -- in a case where there isn't a jury, I try to let you know what I am thinking so that you can address what I am thinking, even in the course of witnesses, so that you can ask questions that may be -- if I haven't asked, that

you think I am concerned about, that you can ask.

And I am not interested in catching either counsel or any witness or anything of that sort. It is important that the truth, to the extent that people can remember it and say it, that it comes out, and we proceed on that basis.

You may ask your next question.

BY ATTORNEY HOWARD:

Q. What did you do next, please?

A. I have to get my train. Excuse me.

At that point, Mr. Zethan and I spoke about the date for potential location for Mr. Konanykhine. Like I said, it's a two-part issue to removal. The first part would be to locate him and pick him up.

The second part would be the travel issue, making reservations, sending cables out to get country clearances, calling our office in Moscow due to the short turn-around nature of the country clearance time, making sure they were aware that we had officers, going forward, in order to get the okay from the ambassador, that they may enter Moscow.

THE COURT: So that in -- am I correct that in late November -- did you tell me the date earlier?

THE WITNESS: I first found out November 21st.

THE COURT: So that on November 21st or 22nd, I take it, it was your objective or goal to locate Mr. Konanykhine, arrest him, put him in custody and remove him.

THE WITNESS: It was Mr. Zethan's objective to locate him. It was my objection -- object to remove him.

THE COURT: And that would involve putting him in custody and removing him.

THE WITNESS: The custody portion would be on Mr. Zethan's house, and the actual travel plans would be on my side of the house.

THE COURT: Well, was it the intention, on the 22nd, to find him and arrest him and give him -- and remove him.

THE WITNESS: It was the Service's objective, yes.

THE COURT: All right.

Go ahead, Mr. Howard.

BY ATTORNEY HOWARD:

Q. Who did you then instruct to make efforts to locate and apprehend Mr. Konanykhine?

A. That was Mr. Zethan, instructed the New York District to locate.

THE COURT: Well, do you know that, other than by talking to Mr. Zethan?

THE WITNESS: Other than by talking, no.

THE COURT: All right, it's hearsay.

BY ATTORNEY HOWARD:

Q. Do you know what happened next in terms of detaining Mr. Konanykhine, or locating him?

A. I received an e-mail on or about December 8th from the New York District, Mr. Cyril Lopez, indicating that they had attempted to locate Mr. Konanykhine --

THE COURT: This, too, is hearsay.

You can say that she received an e-mail, and ask her what, if anything, she did as a result of receiving it. Otherwise, you are seeking to admit that statement for the truth of the matter asserted.

BY ATTORNEY HOWARD:

Q. What did you do in response to that e-mail, please?

A. Nothing at that point.

Q. What did you do next?

A. The next day I overheard someone say that the Konanykhines intended on applying for asylum in Canada.

Q. What actions did you take next with respect to detaining or removing Mr. Konanykhine?

A. The day after that --

Q. What day was that, please?

A. Okay. The day I overheard it was around close of business on the 9th. The next morning I called contacts in Ottawa with whom I deal with (sic) frequently -- I meet with them about four times a year -- and asked them if they had any information regarding any appointments with Canada Immigration.

Q. Now, I understand that there is some information that you have been authorized by Canada to share with the Court. Why don't you go ahead and tell us what that is, what has been authorized, and then the Court can respond.

A. Canada Immigration has told me that --

THE COURT: Well, before you do that, that would be hearsay.

ATTORNEY HOWARD: Yes, your Honor.

THE COURT: And I think it would be inappropriate, unless she did something as a result, which you can elicit from her.

But I permitted her to say she had overheard that they were going to try to claim asylum in Canada, because it was offered not for the truth of the matter, but for the fact that it was said and she acted on it.

However, let me ask you, Ms. Hoechst, from whom did you overhear this?

THE WITNESS: Sir, I have -- I cannot recall. I work in a cubicle. I have people running by my desk all day. Comments made, "This is the latest update," and I honestly cannot recall who I heard it from.

THE COURT: So, would you have any information on how the Service came to learn or to know that they had these plans?

THE WITNESS: No.

THE COURT: Next question.

Now, as far as what the Canadian Government told her, I think that's generally hearsay. But she can --

I take it you did receive some information from Canada.

THE WITNESS: I received information from Canada that Mr. Konanykhine was --

THE COURT: Well --

THE WITNESS: -- scheduled for an interview.

THE COURT: All right.

And did you -- what did you do as a result of that?

THE WITNESS: I advised my boss, Neil Clark, and there was some discussion as to what would be done.

And at that point, Mr. Zethan was out of the office on sick leave. So, I asked one of my employees, who is from Buffalo, to contact her district to see if anyone could attempt to locate Mr. Konanykhine locally.

THE COURT: Go ahead, Mr. Howard.

BY ATTORNEY HOWARD:

Q. What did you do next, if anything, with respect to Mr. Konanykhine and your attempts to locate and apprehend him?

A. At that point, the feedback from Buffalo was that they were still trying to locate, and that they would attempt to find him if he were to stay in any hotels locally the night before the interview.

So on the 15th of December I advised the Washington District to set an itinerary in order to effect the removal, based on the intended pick-up date of the 18th.

THE COURT: So, you had information that it would be on the 18th?

THE WITNESS: We had information that the interview would be on the 18th.

But I would also like to correct something, your Honor, if I may.

THE COURT: Yes. Go ahead.

THE WITNESS: When the initial request went to New York to locate, we had Washington do an itinerary for Mr.

Konanykhine to depart. My belief was the intended pick-up date was the 10th, so I instructed Washington to purchase a single ticket for the 10th for Mr. Konanykhine, assuming that he would be encountered at his place of residence. But that did not occur.

THE COURT: All right.

Next question.

BY ATTORNEY HOWARD:

Q. Did you eventually give instructions to the Buffalo District Office, then -- I'm sorry, I believe you just testified, you then asked your subordinate to contact the Buffalo District Office to do what, please?

A. I asked my subordinate, Mary Loizelle (phonetic), to contact her coworkers from Buffalo, their fugitive team, to see if they could locate Mr. Konanykhine prior to his interview on the 18th.

Q. And was Mr. Konanykhine later located?

A. Yes, he was.

Q. How do you know that?

A. Ms. Loizelle, who sits right next to me, received a phone call on the morning of the 18th, and said that they had picked Mr. Konanykhine up.

Q. And did the --

THE COURT: Excuse me, Mr. Howard.

ATTORNEY HOWARD: Okay.

THE COURT: I take it they were looking for him well in advance of the 18th.

THE WITNESS: Yes, sir.

THE COURT: And they -- this fugitive team was out looking at him at hotels and motels?

THE WITNESS: Yes, sir, as far as I know.

THE COURT: You might want to, in this day and age, pull the straps up on this fugitive team. It doesn't sound to me like they did a very good job, since they didn't get him until he was on the bridge, when they knew he was going to be, and they didn't get him before that when they were looking for him before that.

But putting that to one side, I take it their objective was to find him and arrest him and place him in custody.

THE WITNESS: Correct.

THE COURT: All right, Mr. Howard.

I guess we can hope the fugitive team does a better job if the fugitive is really dangerous.

Next question.

BY ATTORNEY HOWARD:

Q. As I understand it now, you have learned Mr. Konanykhine is in detention. When did you first learn that?

A. When they called Ms. Loizelle to say they had found him. At that point, he is considered detained.

Q. That was on December 18th; is that correct?

A. December 18th.

Q. About what time did that knowledge come to your attention?

A. I think about 8:30 in the morning, approximately.

Q. And did you then have any direct conversations with

Buffalo ICE officials in regard to apprehension and detention?

A. I did not myself, no.

Q. Did you give instructions to your subordinates in that connection?

A. Ms. Loizelle indicated that they had also taken the wife into custody, and they were asking for instructions on how to -- what we wanted to do with her, because our intent was not to pick her up at that time.

Q. Why was it your intent not to pick her up at that time?

A. She was under an order of voluntary departure, and it was our hope that she would depart the United States.

Q. And Would it have been sufficient had she been allowed to go over the Canadian border, in terms of voluntarily departing?

A. Well, what -- at that point, when I heard she was in custody, there were two things that I wanted to know in order to determine if she could have effected a departure to Canada. And the first thing was, does she have a travel document? And the response was, yes.

Q. What is a travel document?

A. A travel document can be many different documents. It can be a sheet of paper issued by an embassy or government allowing a person to be readmitted to a country.

It may be solely a document of identity which allows a person to travel, but that person -- such as a Palestinian travel document, the person has a document which allows them to travel, but the thing would be to put the visa in the passport, to allow him to enter a location. Or it

could be a passport. There are many different parts that would constitute a travel document.

Q. What would Ms. Konanykhine would have needed in terms of a valid travel document to cross the border into Canada and voluntarily depart the United States legitimately?

A. In order to -- and make an admission into Canada, the Canadian law requires that she be -- there are different documentary requirements, depending upon the person's nationality and immigration status.

THE COURT: At this point -- excuse me, Ms. Hoechst.

At this point, I am not sure Ms. Hoechst is an expert on Canadian law and what Canadian law would require.

ATTORNEY HOWARD: Well, I could phrase the question in terms of what the United States law requires, though, in order for her to effect a valid voluntary departure. She could speak to that.

THE COURT: All right --

ATTORNEY SZYMKOWICZ: Your Honor --

THE COURT: -- well, let's just put it directly.

Suppose she shows up and she says, "Look, here, I have been ordered to depart voluntarily. Here are all these documents showing who I am. And I have an appointment to talk to somebody in Canada about asylum. And I want to go over and talk to them about asylum."

Why wouldn't she be allowed to do that?

(Pause)

If you know.

THE WITNESS: Oh, I know. I'm just thinking of a way to explain it in an manner, because there are many different things that play out here.

A person can go -- a person has a document, they can go at any point in time to the Canadian border to request asylum. Their laws are similar to ours in some ways, as far as admission --

THE COURT: Never mind their laws. Let's assume that they would be hospitable to her. Is there anything in American law, to your knowledge, that would prevent Ms. Konanykhine from going across that bridge that day and being interviewed for asylum in Canada?

THE WITNESS: Nothing would prevent her from going across for being interviewed.

THE COURT: Next question.

BY ATTORNEY HOWARD:

Q. Would she effect a valid voluntary departure, though, had she been allowed to cross the border?

A. No, she wouldn't.

Q. Why is that?

A. In order to be admitted to Canada, she would have required a valid passport and a valid visa. Her passport --

THE COURT: Suppose Canada says, "We will provisionally admit you for purposes of adjudicating your asylum request." That's a perfectly appropriate departure, is it not?

THE WITNESS: No, it isn't, sir.

THE COURT: Why not?

THE WITNESS: Because she hasn't been admitted.
She has only been --

THE COURT: She is provisionally admitted. She is given a card. She is permitted to use their health service. That's not enough?

THE WITNESS: What I have read on asylum applications is they are refused admission, and they are put into a parole status. What is reported in the record is a refusal of admission. They cannot enter without a visa, a valid visa and a valid passport.

THE COURT: And suppose they are ultimately accepted -- they can remain in Canada during that period of time, as far as Canada is concerned; isn't that right?

THE WITNESS: If they are paroled in, they can remain in Canada.

THE COURT: All right. And if they remain in Canada and their alien -- or their asylum petition is adjudicated, then that means that they can stay in Canada, doesn't it?

THE WITNESS: If it's granted.

THE COURT: Yes. Now if it's not granted, they are returned to the United States.

THE WITNESS: Yes, sir. Because it's as if they never left the country.

THE COURT: Now, if she had gone to Canada, been provisionally admitted and ultimately succeeded, then she would have departed, legitimately, voluntarily; isn't that right?

THE WITNESS: If she ultimately succeeded.

THE COURT: Right.

And if she didn't, she would be returned to the United States.

THE WITNESS: Correct.

THE COURT: And then she would have forfeited her voluntary departure because the time would have lapsed, probably.

THE WITNESS: Correct.

THE COURT: All right. Next question.

BY ATTORNEY HOWARD:

Q. If that -- if all of that is so, then, Ms. Hoechst, why didn't you allow her to voluntarily depart to Canada?

A. Voluntary departure has a requirement where a person must be willing to depart and to be immediately able to promptly depart, such as -- and the view that was taken was she did not have a valid document to enter that country.

THE COURT: When you say "the view that was taken," what are you referring to?

THE WITNESS: Well, under the act, 8 CFR 244 of the old --

ATTORNEY HOWARD: I have a copy --

THE COURT: Whose -- just a moment.

Whose interpretation are you talking about?

THE WITNESS: Whose interpretation?

THE COURT: Yes.

Or is that just your reading of the regulation.

THE WITNESS: That's my reading of the

regulation.

THE COURT: All right.

So in effect the regulation, as you read it, would preclude anybody who has been granted voluntary departure from seeking asylum in Canada by going to Canada and seeking an interview.

THE WITNESS: No, sir.

THE COURT: How do you get to Canada to get your interview, then?

THE WITNESS: She could have gone to Canada to get her interview.

THE COURT: How?

THE WITNESS: Had she gone -- had she gone forth, she could have gone. Had she gone -- had she been allowed to go on, obviously, yes, she would have gotten her interview.

I did not see allowing her to go on as her making an effective departure from the United States, because she did not have the appropriate documents to enter that country.

THE COURT: Does that mean that people in the United States who are aliens, who have voluntary departure privileges, they have been removed and there is an order of removal, and they -- does that mean they can never go to Canada to seek asylum?

Is that what you are saying?

THE WITNESS: No, I am not.

THE COURT: They can do to Canada --

THE WITNESS: They can go --

THE COURT: -- to seek asylum.

THE WITNESS: -- to Canada to seek asylum.

THE COURT: Well, then, what's the difference between that and Ms. Konanykhine?

THE WITNESS: It was not our belief that she would be formally departing the United States in a timely manner, because it was not our belief that the Canadians would have admitted her to Canada.

THE COURT: I see. So you were making a decision based on your judgment as to what the Canadians would ultimately have done with respect to her asylum petition.

THE WITNESS: Not whether or not they would approve or deny, but based on the decision, would they parole or refuse admission. They could have paroled her, they could have detained her, or they could have refused admission and make her wait in the U.S. for a decision.

THE COURT: Well, you don't know which they would have done.

THE WITNESS: No, I don't.

THE COURT: So, why preclude her from going?

THE WITNESS: It was a judgment call, and that was my decision. I did not think she was making a meaningful departure from this country.

THE COURT: Well, let me ask you whether if, today, the Court asks you -- Ms. Konanykhine still has the right to voluntary departure, doesn't she?

THE WITNESS: At the moment, yes.

THE COURT: All right. Suppose she gets an interview tomorrow afternoon or whenever, and she wants to go

and have this interview. Would the ICE permit her to go?

THE WITNESS: In that I know she does have voluntary departure still, we would permit her to go. However, we also take into account how much time is left in the voluntary removal period.

As I said initially, Mr. Konanykhine was the only person scheduled to depart based on the pick-up in New York. We knew that she had more time with which to effect her departure.

She was down to a 48-hour limit, and the likelihood of her making a meaningful departure from the country in a 48-hour period, when they were just only filing their asylum claim, made me make the decision that we would take her in custody and try to get her out during this 48-hour period under safeguard.

THE COURT: At that time, had you read the administrative law judge or the Board of Immigration Appeals' decisions concerning them?

THE WITNESS: No.

THE COURT: So, you didn't know one way or the other whether either one of them faced any serious risk of persecution or risk to their life if they were returned to Russia?

THE WITNESS: I'm not an asylum officer, sir. No, I did not read anything on that.

THE COURT: All right. Well, let me -- I want to understand clearly that if she wanted to depart voluntarily now, in terms of -- by that, I mean to go to Canada now to be

interviewed for asylum, that you would allow her to go.

THE WITNESS: We would allow her to go. We know she has more time on her voluntary departure, on the eligibility, as far as dates.

The main issue, as I said, was the short time frame with her having to leave the country, the concern she could not enter Canada at such a short time. We were taking her husband into custody. And often we do take people into custody to insure voluntarily departure under safeguards.

Additionally, it was my assumption that she would like to stay with her husband, because our intent was to remove him.

THE COURT: All right. And were you under any instructions or had you been given any information or direction by anybody in ICE concerning any arrangement or deal or agreement that this country has with Russia to insure that Mr. Konanykhine is returned to Russia and not permitted to go to any other country?

THE WITNESS: I know of no deals, sir.

THE COURT: And you have not been given any directions of that sort at all?

THE WITNESS: No. The removal order is to Russia, and based on that order we are in pursuit of removal.

THE COURT: Well, earlier when you answered my question, you said something about knowing that the Russians wanted him.

THE WITNESS: I was aware that the Russians had a warrant of arrest on him, yes. However, that was not the

basis on why I was removing him to Russia. I was removing him on the basis of the order from the judge ordering him removed to Russia.

THE COURT: All right. And as you said, you received no directions or instructions regarding removing him only to Russia, other than what was in the Board of Immigration Appeals order.

THE WITNESS: I received no instructions. I go in accordance with what 8 CFR says as far as countries of removal.

THE COURT: And you -- no one in the ICE has said anything to you about any dealings or arrangements --

THE WITNESS: No, sir.

THE COURT: -- with Russia concerning removing Mr. Konanykhine only.

THE WITNESS: Absolutely not.

THE COURT: Have you discussed this matter with the head of the ICE?

THE WITNESS: No, I have not.

THE COURT: With whom have you discussed this matter?

THE WITNESS: As far as removing him to --

THE COURT: Above you. Yes.

THE WITNESS: I discussed it with the special assistant to the removal director, as far -- was any discussion made to removing him to other countries, and the issue was, the final order was to Russia.

THE COURT: But this was before; is that right?

THE WITNESS: This is since his arrest, not before his arrest.

THE COURT: All right. Since that time?

THE WITNESS: Since that time, I have heard of no agreement with the Russians, no.

THE COURT: And you have not discussed this with any officials in ICE?

THE WITNESS: No, sir.

THE COURT: And it is your -- is ICE, as far as you know, willing to consider other countries to which this person can go?

THE WITNESS: At this point in time, it is ICE's wish that -- well, the government intends the removal to be to Russia. The government does not wish to reopen proceedings in any way, unless Mr. Konanykhine agrees to waive any litigation regarding this issue; that the country agrees to accept him; and as with normal procedures, the country is aware that he is wanted in another country.

Our proceedings with the cable process were very forward. We -- when we send the cable out, we indicate the deportation grounds, including the deportation grounds would be crimes. We will include if there are special interests involved with various aliens. It could be terrorist related crimes --

THE COURT: Well, he doesn't have anything of that sort, does he?

THE WITNESS: I don't know, sir.

THE COURT: All right. Well, assume he doesn't,

that there are no terrorist crimes or deportation crimes or anything of that.

THE WITNESS: But if he is wanted in another country, normal procedure would be to put it in the cable.

THE COURT: Put it in --

THE WITNESS: To put it in the cable. We send a cable to the U.S. embassies overseas.

THE COURT: Oh, all right.

THE WITNESS: Embassies generally notify local authorities.

THE COURT: That affects whether another country might accept him.

THE WITNESS: Right.

THE COURT: I understand that.

THE WITNESS: The government would not be amenable to opening the final order to amend the country of removal without an agreement to waive all litigation, cease all litigation. He accepts this other country. The other country agrees to accept him, and they are aware of the warrant in the foreign jurisdiction.

THE COURT: We are back, Mr. Howard, Mr. Szymkowicz, where I was six years ago, seven years ago. It seems to me that it is not unreasonable for this country to say, "Mr. Konanykhine, you've got to go elsewhere. You've got to leave here. Presumptively, you've got to go to Russia."

But unless there is some deal, which I hope there isn't, that he could go somewhere else if he could get admitted somewhere else. And I hear this witness telling me

that one of the things the Service wants to be over is all this litigation.

Isn't that right? All this litigation.

THE WITNESS: Correct. And very quickly, too, is another amendment to that.

THE COURT: I understand that.

ATTORNEY HOWARD: I do too, your Honor.

THE COURT: I applaud that. I support it.

Now, so we are back now to where we were seven years ago.

Mr. Szymkowicz, I may be beginning to believe that Mr. and Mrs. Konanykhine -- I know they don't want to leave, but are there -- have you explored with other countries whether they would be willing to accept Mr. Konanykhine?

ATTORNEY SZYMKOWICZ: My father was previously the attorney for several foreign governments, and he has -- he has made inquiries with Mr. Konanykhine about getting authorization to talk to them. And those negotiations sort of stopped once he was awarded political asylum in 1999.

THE COURT: You mean by the administrative law judge.

ATTORNEY SZYMKOWICZ: Exactly; in February 1999, Judge Bryant.

From the -- from November 2003 forward, the Konanykhines have only indicated an interest in going to Canada, to my knowledge.

THE COURT: Well, it's a dynamic world. Things happen. You might want to explore this matter with your

client, because the issue before this Court is whether he has violated the agreement.

He has an appeal to the Fourth Circuit where he has a favorable administrative law judge's decision saying that he is entitled to asylum in this country, and he has a Board of Immigration Appeals decision that rejects that, and orders him back to Russia.

And Ms. Hoechst has pointed out that that, under the law as she administers it, that's where he has got to go, unless that order is changed.

Yes, Ms. Hoechst?

THE WITNESS: The government is not amenable to his removal to any countries that are -- that are barred according to 8 CFR 241.25, and that includes contiguous territories.

THE COURT: And that's because --

THE WITNESS: It's regulations.

THE COURT: Because it would be easy to return from contiguous territories.

THE WITNESS: And it's --

THE COURT: Well, that may be so, Ms. Hoechst, but frankly, you are not in a position to know whether that can be waived. You know, if there is another country that would accept him if it were contiguous, it's in the power of the United States to say that's okay, isn't it?

It's just not in your power.

THE WITNESS: Not in my power, sir.

THE COURT: Exactly.

Now, it is in the power of the United States to do that. So -- but the point that Ms. Hoechst makes is a good one, which is that he has got to at least make an effort to demonstrate that he can be removed somewhere else.

Now, Mr. Maggio is here. You have moved to reopen --

ATTORNEY MAGGIO: Yes, your Honor.

THE COURT: -- the Board of Immigration Appeals.

ATTORNEY MAGGIO: Yes, your Honor.

THE COURT: Is part of your ground there that you want that order broadened to say not just Russia, but elsewhere?

ATTORNEY MAGGIO: No, your Honor. We are asking to go back to Judge Bryant based upon new and previously unavailable evidence.

The board's decision rests largely upon their statement that there is no evidence -- and of course, we disagree -- in the original record to show that the Russian criminal justice system is used for political prosecutions and persecution.

And the Kutakovski (phonetic) case, which has elicited a great deal of response from the United States, which is characterized as an example of the Russian criminal justice system being used for political persecutorial purposes --

THE COURT: But that's not really an issue today for this Court, and I don't sit in judgment of the Russian criminal system. It's not this Court's duty or task to

explore that.

But what I am asking you -- obviously, I am doing this to explore whether there is some other reasonable basis to resolve this matter.

The Service very reasonably says, "We don't want any more litigation." Now, that's a reasonable -- and I understand that -- position.

ATTORNEY MAGGIO: We would -- (inaudible, not at podium) -- that, too, your Honor.

THE COURT: Especially if there is no deal to return him to Russia.

ATTORNEY MAGGIO: Absolutely.

THE COURT: If there is no deal to return him to Russia, and the government says, "We don't want any more litigation, but we want Mr. Konanykhine and Ms. Konanykhine, gone" --

ATTORNEY MAGGIO: Why can't --

THE COURT: -- appropriately gone --

ATTORNEY MAGGIO: Why can't he be put back on the bridge, your Honor?

They stopped him from leaving -- he would have ended all this litigation. If he were not grabbed on the 18th --

THE COURT: Well --

ATTORNEY MAGGIO: -- we wouldn't be here today.

THE COURT: -- the problem with that --

ATTORNEY MAGGIO: He would be in Canada.

THE COURT: -- as Ms. Hoechst has pointed out,

that his admission to Canada would be a provisional admission, provided he answered all of the questions.

And the government is not going to be amenable to that, because you heard hints from Mr. Howard That the Canadians don't want him, either. That's the hint.

Now, whether that's true or not, I think if we are going to resolve this matter in some reasonable way, that gives Mr. Konanykhine the opportunity to go somewhere else to live, gets rid of him from here, Canada is probably not the best choice.

ATTORNEY SZYMKOWICZ: Your Honor, if I may be heard on that issue?

The biggest fear my clients have -- and it has sort of been realized, I believe, by the discussions that seem like it has been going on between the United States and Canada -- is that the United States is still going to try to follow through on their deal with Russia to send him back by interfering with Antigua, Venezuela, Uruguay, Canada, wherever they are.

Then, they may be --

THE COURT: Well --

(Simultaneous discussion)

ATTORNEY SZYMKOWICZ: -- admitted into these countries, but then --

THE COURT: -- I don't know. Let's --

ATTORNEY SZYMKOWICZ: -- might be sent back six months later.

THE COURT: You all haven't done anything. You

need to get about doing something.

ATTORNEY SZYMKOWICZ: We have tried, your Honor. My office has tried. But the United States Attorney's Office --

THE COURT: Well, what --

(Simultaneous discussion).

THE COURT: -- I am saying to you, Mr. -- what I am saying is that you are going to have to do -- if you want to resolve this thing, Mr. Szymkowicz, and you want to put the government to the test of its statement that it really doesn't have some deal with Russia to return him there, you need to provide, promptly, with the place to go, immediately, and permanently, away. And it isn't likely to be Canada.

And if there is a deal, and the government, the Executive Branch does try to interfere and won't find another place, then at least during that period, if we are going to resolve this matter promptly, at least for that period he would remain here, and I would still have before me the issue of whether or not he has violated his agreement.

I don't have to make a decision, if there is a good chance that it could be resolved. So, I am suggesting to you that you and Mr. Maggio move heaven and Earth to give Mr. Howard some option other than Canada.

ATTORNEY HOWARD: May I be heard, your Honor?

THE COURT: Yes.

ATTORNEY HOWARD: I want to go back to my opening statement, because I am concerned that there be no misunderstanding. I don't know everything about this case,

either, and neither does Ms. Hoechst. There is an extensive history to this case.

But it does seem to me that if you look - if you read the 18 page board decision, single spaced, it gives you a very good sense of that history. And part of that history is that, as the board discusses, there were letters rogatory from the Russian Government. They wanted him, and we acted in response. I think that's clear from the board decision.

So, my presumption is that that is still why we are proceeding along those lines --

THE COURT: Oh, I understand that.

ATTORNEY HOWARD: We are not to the Dougherty point.

THE COURT: You don't have to return him to Russia.

ATTORNEY HOWARD: That is true. We don't have to, no.

THE COURT: You don't have to.

ATTORNEY HOWARD: And Dougherty didn't have to be returned to Great Britain. Okay?

In this case, it just so happens --

THE COURT: Well, there is a difference there. Suppose you were accused of a crime. Would you prefer the English legal system or would you prefer to go to the Russian?

ATTORNEY HOWARD: Uhm --

THE COURT: All right, that's a rhetorical question. You don't have to answer.

ATTORNEY HOWARD: Okay.

THE COURT: My point is, the United States has the power not to return him to Russia. Of course, there is reason to return him to Russia. You can always say, yes, in the interest of relations and all the rest, return him there. Who knows? I don't know all of the ins and outs.

All I am interested in, before I have to adjudicate this matter, I would like to know whether there is -- and I tried before -- whether there is any conceivable place that this government would let him go, but -- I'm not going to ask the United States to consider that until they have done the work to say, "Mauritania is willing to accept him tomorrow." And then all the litigation would go away. They would depart, and Mr. Konanykhine and Mrs. Konanykhine could deal with the next country and Russia, if it still wanted him. That would be something worth exploring.

Now, Mr. Szymkowitz says they quit exploring it after they got the favorable decision. I can understand that. But they should have put it into high gear after the Board of Immigration Appeals.

I am not here to decide whether the immigration judge was right or the Board of Immigration Appeals was right.

ATTORNEY HOWARD: Yes, your Honor.

THE COURT: I am here to decide whether Mr. Konanykhine gets a chance to have the Fourth Circuit decide which of the two is right.

You all agreed with him that he could have that opportunity, but you say he forfeited that opportunity by violating the agreement. And I am here to decide whether he

violated the agreement.

Now, prior to that, I would like to see if this matter can be resolved in a way that solves your problem, which I understand to be this -- these people are here and you want him removed, and you don't want any more litigation from him. I second that.

And if you don't have a deal with Russia that he can't be returned anywhere else, then let's see whether he can go somewhere else.

ATTORNEY HOWARD: Well, your Honor, I think I have made this point before, that it's the Fourth Circuit that has the jurisdiction to decide --

THE COURT: Yes.

ATTORNEY HOWARD: -- whether the immigration judge is right or the board is right.

THE COURT: That's correct.

ATTORNEY HOWARD: And it's this Court's jurisdiction to decide whether the settlement agreement was violated.

THE COURT: That's right.

ATTORNEY HOWARD: I think the evidence -- we can address that in closing argument. But no part of that settlement agreement has anything to do with whether this Court ought to stay Mr. Konanykhine's removal pending the Fourth Circuit's decision on whether --

THE COURT: Oh, I quite agree. I quite agree. I'm going to decide this thing.

But you know something, Mr. Howard, I may not

decide it immediately.

ATTORNEY HOWARD: All right.

THE COURT: That must have occurred to you.

ATTORNEY HOWARD: Thank you, your Honor.

THE COURT: So -- but I am going to decide it.

And I am going to hear oral argument, and I am going to get the evidence taken.

All I was doing was suggesting -- and the burden really is on you, Mr. Szymkowicz, not on Mr. Howard. The burden on you is to present the Government of the United States with an option.

ATTORNEY SZYMKOWICZ: Your Honor, the option that I would like to have presented to them a few days ago -- and they were very courteous and respectful at all times, but they specifically stated their answer, n-o.

The option --

THE COURT: Canada won't do.

ATTORNEY SZYMKOWICZ: The option that we wanted to give them is, as Mr. Somjen testified, the Canadians would at least give them an interview.

What we would like them to do, go to -- allow them to schedule an interview, go to Canada for the interview. If they are accepted, they are accepted that day. If they are not, they are returned back in the United States --

THE COURT: Can they be interviewed at the Canadian Embassy here in D.C.?

ATTORNEY SZYMKOWICZ: Well, as Mr. Somjen testified, that -- you need five sponsors, and it could take

a long time.

THE COURT: All right.

ATTORNEY SZYMKOWICZ: That is a possibility, however, your Honor, and they could remain in the United States pending that.

THE COURT: Well, that's not good enough. I think what Mr. Howard would find attractive, assuming there is no deal with the Russians, but assuming there is no deal with the Russians, what Mr. Howard and the United States might find attractive if it happens quickly.

ATTORNEY SZYMKOWICZ: I understand, your Honor. And with that said --

THE COURT: Because not only do they not want litigation here, they don't want it in the Fourth Circuit.

ATTORNEY SZYMKOWICZ: I understand, your Honor. And with that said, if they are returned by Canada, it would be within two weeks that they would be granted admission back into the United States for a period of 14 days, where Mr. Maggio and I would get together and find another country.

If they can find that country, then that's perfect. If they can't, then I don't know what we are going to do. But in any event, it would be --

THE COURT: Well, they are not --

ATTORNEY SZYMKOWICZ: -- over within a month.

THE COURT: They are not going to be able to go to Canada right now. Because what this Court has before it, the jurisdiction is to decide this contract issue.

You've filed another lawsuit, a federal tort

claims act, and in due course we will come to that. But that's what is really before the Court now. And nothing in this suit right now, I think, authorizes this Court to allow him to go to Canada absent the agreement of the United States, and I understand they are not going to do that. So, that isn't an option.

You've got to -- you've got to figure out something else, some other offer you can make, if he don't want that offer. He is not going to be amenable to Canada, because he has got information.

Now, there may be some deliberate blindness here -- and I am not blind to that myself -- where Mr. Howard may not know about any deal, the details of it. But I think he understands -- or I think I said to you that I understood you to be saying that there was an arrangement of some sort with the Russians.

Now, how strong that arrangement is, is worth testing. And I have indicated that the fact that there is an arrangement with the Russians ought to be reflected on by our people, to see whether they are really proud of themselves for it.

I'm not sure this witness has much more to offer. She did her duty, as she saw it --

I think, Ms. Hoechst.

THE WITNESS: Thank you.

THE COURT: She is a good and faithful servant, and she looked at her regulations and she did what she thought was right in the circumstances, and she doesn't have any

information about any deal.

Do you have anything else you want to elicit from her?

ATTORNEY HOWARD: Well, I think in view of the Court's comments, I don't think it's important to.

And counsel's concern that I was straying from the parameters of the settlement agreement, I don't think I need to, your Honor.

THE COURT: Well, I will say this, Mr. Howard, that one of the arguments that Mr. Szymkowicz will ultimately make -- it's kind of a strange argument -- is that the government breached first, if there was any breach by the Konanykhines.

He will argue that the government breached by going out to arrest him -- not very competently -- going out to arrest him on the basis of the Board of Immigration Appeals order which, under a fair reading of the agreement, might not have been enough, because he was entitled to stay here until the judicial appeals were done.

And he might say that the fact that they didn't arrest him at that time doesn't mean that they didn't breach, because they certainly intended the breach.

You would argue that he breached before that because he didn't report before that. You might go back and reflect on your nonreporting evidence, and who has the burden and all of that.

The central issue is whether going to Canada was a violation of the agreement. I don't know how much more

evidence I can hear on that, and I don't know what Ms. Hoechst can offer more on that. But I want to give you an opportunity --

ATTORNEY HOWARD: Yes.

THE COURT: -- to elicit more. And as I said, I tell you what I am thinking so that you can be sure that when you release a witness you haven't addressed something you think you should.

ATTORNEY HOWARD: All right.

(Direct examination continues)

BY ATTORNEY HOWARD:

Q. Let me ask you this, then, Ms. Hoechst: When you are given instructions to effectuate the removal of an alien, how do those instructions come to you, normally?

A. It can be verbally. It can be by e-mail.

Q. Do these instructions typically come to you accompanied by a copy of the board decision?

A. No.

Q. How many --

A. Not typically.

Q. -- deportations do you have to effect each month?

A. Two thousand.

Q. So it wouldn't be practical for you to have to read through 2,000 board decisions each time; is that correct?

A. It would be impossible.

Q. All right.

THE COURT: And when you considered this case, you certainly made no determination at all about whether it

would be a good thing for Mr. Konanykhine, or a bad thing for him, to go to Russia.

THE WITNESS: Absolutely not, sir. I had no case files. I had nothing, other than this person is ready to go. And then my --

THE COURT: It's not --

THE WITNESS: -- unit kicks in.

THE COURT: -- part of your job.

THE WITNESS: No, sir.

THE COURT: Next question.

BY ATTORNEY HOWARD:

Q. When you have to effect an alien's deportation, what do you absolutely have to have to do that, in terms of an order from the, either an immigration judge or the Board of Immigration Appeals?

A. In order to effect their removal, we need a valid travel document.

Q. All right.

Now, when would you deport an alien if he had a stay of removal from a Federal Court.

A. Absolutely not.

Q. Either a Federal District Court or a Federal Court of Appeals?

A. Absolutely not.

Q. Do you have a way of inquiring or assuring that this alien does not have a stay?

A. We generally call the U.S. attorney working on the case to see if an actual stay has been issued.

Q. Did you make an inquiry of that nature in this case?

A. Yes. We were in contact with this office.

Q. Did you make any effort to remove Mr. Konanykhine from the United States despite the issuance of a stay by this Court?

A. It was my understand- -- before any action was taken, I contacted our general counsel to discuss when a stay is issued and when it is not.

And what was explained to me -- and this was while Mr. Konanykhine was in New York waiting the departure plane -- was unless a judge actually grants a stay, even though he may be hearing the case, it is the Justice Department's opinion that no stay has been issued.

Q. Do you know whether the Fourth Circuit has issued a stay?

A. I have no idea.

Q. Do you know whether they have denied a stay?

A. I don't know.

Q. But what you know is that this Court has issued a stay, is that right?

A. That is my understanding.

Q. Are aliens required to register their addresses with ICE?

A. Yes, they are. Let me -- aliens who are in the United States longer than 30 days are required to register their address.

Q. Are they required to register changes of address?

A. Within ten days of changing.

Q. Is that by statute or regulation?

A. Regulation -- and statute, too, I'm sorry.

Q. Now, if an alien decides that --

THE COURT: Let me see if I -- when did that statute get passed?

THE WITNESS: Section 265 of the Act requires registration, sir.

THE COURT: Now, there are roughly 10 million illegal immigrants in this country0 n --

THE WITNESS: I'm sorry, 262 requires registration, change of address --

THE COURT: All right.

(Simultaneous discussion)

THE WITNESS: -- 265.

THE COURT: We have roughly 7 to 10 million illegal immigrants.

THE WITNESS: Correct.

THE COURT: Is there some registry somewhere where I can go and find their address?

THE WITNESS: There are forms at the Post Office that they are --

THE COURT: No, that isn't what I asked you.

Is there a registry somewhere, where I can go and find their names and addresses.

THE WITNESS: Nothing that would be public that I would know of. It should go in the file if they do register.

THE COURT: You mean the United States Government, for all the illegal immigrants we have in this

country, knows where they all are and who they are?

THE WITNESS: Absolutely not. That's why we have 10 million illegal aliens.

THE COURT: Exactly.

Well, you are not arguing, Mr. Howard, that Mr. Konanykhine's address requirements or residence -- address requirements or reporting requirements are anything other than the agreement he had with the government.

ATTORNEY HOWARD: No, I am not, your Honor.

His --

THE COURT: All right.

ATTORNEY HOWARD: His address requirement are set forth in the settlement agreement.

THE COURT: All right. Well, then, let's proceed.

ATTORNEY HOWARD: All right. But what I am trying to get a sense of, your Honor, since --

BY ATTORNEY HOWARD:

Q. Well, if an alien, generally speaking, changes his address, and in changing his address the statute requires that he notify the INS, what happens if the alien doesn't have a fixed address?

Is he required to keep in contact with the -- with ICE, or somehow let them know where he is?

A. I don't know.

ATTORNEY HOWARD: Your Honor, I have no further questions at this point.

THE COURT: All right.

Any cross-examination?

ATTORNEY SZYMKOWICZ: I have a few questions,
your Honor.

CROSS-EXAMINATION

BY ATTORNEY SZYMKOWICZ:

Q. Did ICE monitor the Konanykhines in any way between the
20th of November, 2003, and the 19th of December, 2003?

A. Did they monitor them?

Q. Did they tap their phones?

A. Not that I know of.

Q. Did they send agents to physically track them?

A. I'm not sure if I'm getting into hearsay evidence, to
discuss the e-mail, as far as the attempt to locate; but as
far as tracking, I don't know.

Q. But aside from an attempt to locate by going to the
physical address, they didn't make any other -- take any other
actions to try to find them, correct?

A. The Buffalo office did, locally, with hotels in the
area.

Q. Would it surprise you that the Konanykhines stayed at
the Best Western hotel in Buffalo the night before they
attempted to cross the bridge?

A. I do not know that.

Q. You are from Buffalo, correct?

A. Correct.

Q. Is that a big hotel?

A. Which Holiday Inn?

Q. I believe it was the Best Western.

A. Best Western? In Buffalo?

Q. Yes.

A. I don't know offhand. If you gave me a street, I might know --

THE COURT: There must be many Best Westerns --

THE WITNESS: There is (sic) probably a lot. I mean --

THE COURT: -- in Buffalo. But let's go on. It doesn't matter.

BY ATTORNEY SZYMKOWICZ:

Q. It wouldn't have been that hard to find them --

THE COURT: Mr. --

BY ATTORNEY SZYMKOWICZ:

Q. -- would it?

THE COURT: -- Szymkowicz -- Mr. Szymkowicz.

Well, all right, I'll permit you to ask it.

I don't know what difference it makes, whether it would have been difficult or not. They tried. They didn't succeed.

At least, you are under the impression they tried.

THE WITNESS: As far as I know, they tried several hotels. I don't know their methodology as far as where they tried them, and it's been 16 years since I lived in Buffalo, so it could have been built since I left.

BY ATTORNEY SZYMKOWICZ:

Q. How did you know that the Konanykhines wanted to seek asylum in Canada?

A. I called Canada Immigration. I did -- as I indicated, the day before I called Canada Immigration, I heard someone say that they are going to apply for asylum in Canada.

When I called Canada Immigration, they told me that they had been scheduled for an interview on the 18th at 9:00 a.m. however, nothing in their record shows that the intent was to apply for asylum; it was solely for an interview.

Q. And was that Ms. Tennier of the Canadian immigration authorities?

ATTORNEY HOWARD: Objection, your Honor. We are getting into communications between Canada and the United States, which are governed by a bilateral agreement of mutual understanding in sharing of information.

THE COURT: What difference does it make, Mr. Szymkowicz?

BY ATTORNEY SZYMKOWICZ:

Q. If immigration (sic) is granted by the United States Immigration Court --

THE COURT: Well, answer my question. It wasn't -- that wasn't rhetorical. If it doesn't make any difference, then let's go on.

It doesn't, does it?

ATTORNEY SZYMKOWICZ: No, your Honor.

THE COURT: All right. Let's go on.

BY ATTORNEY SZYMKOWICZ:

Q. If asylum is granted by the United States Immigration Court, are aliens still required to report their addresses?

(Pause.)

A. I'm trying to remember Section 262. I would have to review it. I can't honestly say yes or no.

Q. If I give you the opportunity to review it, would you be --

THE COURT: Well, if it's --

BY ATTORNEY SZYMKOWICZ:

Q. -- able to review it?

THE COURT: -- a matter of law, you can argue it to the Court, if it's American law. There is no need to elicit that.

What is your position on that? That if they did get asylum --

ATTORNEY SZYMKOWICZ: Well, an alternate argument that we have is that once they were awarded political asylum, they didn't have any reporting duties. Mr. Konanykhine said that -- I believe he testified that --

THE COURT: Well, if they are granted asylum, they are gone.

ATTORNEY SZYMKOWICZ: No, asylum here in the United States. They were granted asylum on February 19th, 1999. We could make an argument that their reporting duties ended then.

THE COURT: I see what you mean.

Well, was the administrative law judge's decision

stayed pending appeal, automatically?

ATTORNEY SZYMKOWICZ: I don't know. I don't believe so.

THE COURT: So, your argument is that even if he failed to report, he didn't have to because --

ATTORNEY SZYMKOWICZ: He didn't have to.

THE COURT: -- he had been granted asylum.

ATTORNEY SZYMKOWICZ: He still did, you know, every 60 days, as he was required. But the alternate argument that we have is that even if there was the settlement agreement still in force, that he didn't have to abide by it because he didn't have to. He still did on --

THE COURT: All right --

ATTORNEY SZYMKOWICZ: -- every occasion, but he didn't --

THE COURT: -- let's --

ATTORNEY SZYMKOWICZ: -- have to.

THE COURT: -- let's go on.

I think the heart of the matter is what happened in November and December, not what happened earlier.

BY ATTORNEY SZYMKOWICZ:

Q. Is there a law preventing someone from leaving the United States and going to Canada, if they are subject to an order of deportation?

A. There is a law -- there is a regulation that indicates countries to which an alien may be deported to (sic), and a person may not be deported to a contiguous territory or adjacent island unless they are a citizen or national of that

contiguous territory or adjacent island, or a resident of that.

ATTORNEY SZYMKOWICZ: I understand all that, and I don't think that's in dispute here.

BY ATTORNEY SZYMKOWICZ:

Q. What the question was, was: INS -- strike that.

INS would not be able to deport him to Canada, correct? ICE.

A. Actually, the regulation doesn't say whether it's ICE doing the removal or the alien doing the removal. When I read the regulation it says a person cannot be deported to. It doesn't say who is doing the deportation --

Q. But --

A. -- whether they are self-deport or government deport.

Q. But there is no -- there is nothing clearly stated in the law that says that an alien subject to an order of deportation can't just walk across the bridge and travel to Canada, correct?

A. It doesn't say that.

Q. Isn't it ICE policy to only care about the aliens when they are in the territory of the United States of America?

A. Not always, no.

Q. So, there are occasions where ICE has an interest in an alien once they have left the United States; is that correct?

A. Or even prior to their entry into the United States.

Q. Well, I'm not talking about prior to entry. I'm talking about an alien that was once present in the United States, but then leaves. Once they have left the territory of the United

States of America, INS and ICE jurisdiction has terminated; is that correct?

A. Not necessarily. You would have to define "left."
Have they made -- have they been admitted to another country?

If they have not been admitted to another country, then, yes, we would still be concerned. Just physically departing a territory may not constitute a departure.

Q. Well, let's suppose someone was in the United States, left, traveled to Canada pursuant to an asylum interview, was granted the asylum interview and then paroled into the -- Canada.

The person could then go to the United States Embassy and sign the form saying that they are in Canada, and that would end the INS's or the ICE's jurisdiction over them, correct.

A. Are they in proceedings or are they out of proceedings? If they are still in proceedings and the form does not arrive back timely for the court, the court can still make a decision, you know. We can get a phone call saying that they deported, but unless we get a form from the embassy and can present it to the court on time, the court will still render an order of deportation, which is still in effect, even though the person may have deported before the order.

Q. But the order of deportation would no longer be -- it would be moot, because they wouldn't be here in the United States for the ICE to execute on that, correct?

A. They would not be allowed in. They would have

considered to have self-deported, because they did not present themselves to the court in a timely manner. They left the country without letting the court know and, therefore, the order --

Q. So they --

A. -- extends.

Q. -- may not be allowed to come back to the United States --

A. And if --

Q. -- but --

A. -- they do come back, then they could be prosecuted as a reentry case.

ATTORNEY SZYMKOWICZ: That's correct.

BY ATTORNEY SZYMKOWICZ:

Q. But there is nothing that ICE could do, once they were out of the jurisdiction of the United States -- out of the territory of the United States.

A. If you are asking, will we go out and arrest them, no, we --

Q. Yes.

A. -- would not go out and arrest them.

THE COURT: But I think you are saying that if Mr. Konanykhine had gone to Canada, gotten the interview, been paroled into Canada pending adjudication, and gone to fill out forms, that if the order would have still have remained in effect until the ICE had received an indication from Canada that it had granted asylum.

Now, at that point ICE would cease to have an

interest and the case would close; isn't that right?

THE WITNESS: We would cease to have an interest unless he attempted to make an entry.

THE COURT: Right.

Now, if he failed to achieve asylum, then the Canadians would return him here and he would then be subject to the deportation order that was already in effect.

THE WITNESS: Correct.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. What if the Canadians -- in the Konanykhines' case specifically -- were to go, as required, to the interview in Canada -- couldn't the Canadians just send him to Russia on their own?

They didn't have to send him back to the United States --

THE COURT: The question --

BY ATTORNEY SZYMKOWICZ:

Q. -- did they?

THE COURT: -- is compound. And it involves asking her what the Canadians can or should do, and she is not an expert on Canadian law.

Next question.

BY ATTORNEY SZYMKOWICZ:

Q. Have you ever heard of any other instances where someone who has been granted voluntary departure was stopped by the United States at the Canadian border and they were stopped from going into Canada?

A. No.

Q. How many cases do you have at any given time?

A. I don't handle the docket, sir. At any given time -- well, during the course of the year, the INS historically removed 180,000 people from the United States. But as I said, I do only commercial traffic, meaning about 25,000 cases a year.

For example, if you have a case in Mexico, or where you have an alien with a final order going down towards Mexico, gets picked up by the patrol because he is near the border, even though he has a final order, or -- he has a final order, somebody else with him going voluntarily, would they stop him? Maybe, yes, no. I don't know. There could be other things involved in the case. It's hard to say.

Q. How much did it cost the government to arrest the Konanykhines at the border, then fly them back to D.C. accompanied by agents, then keep them in D.C., then fly them up to JFK Airport, and then finally attempt to fly them to Moscow?

ATTORNEY HOWARD: Objection, relevance.

THE COURT: Well, if you know, you may answer. I'll overrule the objection.

THE WITNESS: I don't know.

THE COURT: A substantial amount of money?

THE WITNESS: A substantial amount. As I said, I am dealing with \$100 million of travel a year.

THE COURT: All right.

BY ATTORNEY SZYMKOWICZ:

Q. And that's your department that would handle the cost, correct?

A. At this point, Washington does it locally. They will be online with a centralized portion probably by this time next week.

THE COURT: Well, your department doesn't take into account the cost involved in --

THE WITNESS: It's a nonissue, sir.

THE COURT: -- agents and that sort of thing. What you take into account is the cost of tickets.

THE WITNESS: Well, even then, I mean, we know the removal issue is expensive. We have rented charters for a quarter million to remove --

THE COURT: That's not --

THE WITNESS: -- a few people.

THE COURT: I understand that. But what I am getting at is that the costs that are you really familiar with are costs like that, or airline tickets.

THE WITNESS: Correct. But there is an average --

THE COURT: It's not -- you don't quantify the cost of agents' --

(Simultaneous discussion)

THE WITNESS: No, not at all.

THE COURT: -- time or anything of that --

THE WITNESS: No, sir.

THE COURT: -- sort, or the amount of cost that it might have taken to do anything up in -- you don't quantify

any of that.

THE WITNESS: No, sir.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. As the person responsible for effectuating the removal of aliens, isn't it odd that you would stop deportable people from leaving at their own expense?

A. Not if they are, "A," considered a fugitive. "B," as I indicated earlier, there was a special interest, in that he is wanted in Russia. And "C," he was going to a country which we would not normally allow a removal to because it's a contiguous territory. No.

If it had been -- if we had set up -- if the CBP had set up a departure lane -- which they do sometimes -- at the border, and they had encountered an alien that they had questions about, and were to find out the person was an absconder, such as was Mr. Konanykhine, whether it's Mr. Konanykhine or any alien who has a final order of removal, who we believe is headed in the wrong direction, we would arrest that person and deport him to the country he was ordered removed to.

Q. Was Mr. Konanykhine a fugitive, in your opinion?

A. Yes.

Q. And why is that?

A. Because he was under final order of removal.

Q. Even though he had an appeal pending?

A. It was my understanding he was under a final order of removal.

THE COURT: You weren't --

THE WITNESS: His case --

(Simultaneous discussion)

THE COURT: -- aware of --

THE WITNESS: -- had been --

THE COURT: -- appeal pending.

THE WITNESS: No, sir.

BY ATTORNEY SZYMKOWICZ:

Q. And you weren't --

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. -- aware of the settlement agreement, either.

A. Absolutely not.

ATTORNEY SZYMKOWICZ: I have no further questions.

THE COURT: All right.

Any redirect?

ATTORNEY HOWARD: No your Honor.

THE COURT: Thank you. You may step down.

(Witness excused)

THE COURT: Does that complete your evidence?

ATTORNEY HOWARD: We have one more, your Honor, Officer Mike Phillips from the Buffalo Field Office. He was present on the bridge, part of the interception team --

THE COURT: All right.

ATTORNEY HOWARD: -- and also, shared information with the Canadians, or received information from the Canadians.

THE COURT: It's not clear to me, even assuming the hearsay issue is overcome, why that would be relevant. Can you -- if you can persuade me that it might be relevant for some significant reason, maybe I can evaluate the hearsay.

ATTORNEY HOWARD: Well, your Honor, in terms of what is properly before the Court, which is whether the settlement agreement was violated or not, I do not think it is relevant, because the issue before the Court is, you know, it's whether -- it's whether Mr. Konanykhine had a final order of removal, whether the agreement was still in effect, whether he tried to go underground, abscond. And those are things that Mr. Phillips would not testify to.

But I was very interested in providing the Court with all the information it needed to determine that the United States had acted above-board and in full conformity with all the statutes, all the regulations and the -- and the agreement --

THE COURT: Well, as I told you earlier, Mr. Howard, I may ultimately determine that the agreement was violated and that the law allows him to be -- or allows him to be sent back to Russia.

Simply because the government may be acting in accordance with the law doesn't mean it's right or admirable --

ATTORNEY HOWARD: I understand that, your Honor.

THE COURT: -- and it doesn't -- I mean, there could be an agreement, as I told you -- well, there is an agreement. There is -- let's not be obtuse about it, or

blind. There is a strong interest by the Russian Government to have this man. There is an interest, obviously, in this government to return him to Russia to satisfy that interest. And what you are focusing on is whether the letter of the law is met in allowing this government to do it.

And what I have said to you repeatedly is, even if the letter of the law is appropriate, or is met, is that really admirable and the right thing to do?

You know, one of the things to consider -- and I will just mention this -- well, how long is this witness going to take?

ATTORNEY HOWARD: Ten minutes for myself, fifteen minutes at the most.

THE COURT: All right. We will hear him, so that we are done with the evidence.

Mr. Wood, are counsel out there in the Hernandez matter?

THE MARSHAL: I believe so.

THE COURT: I might suggest to you -- and I am not an expert in this area, Mr. Howard, but we have extradition treaties with various countries. One of the reasons we do that is, of course, so that we have an arrangement where we can get people we want and they can get people they want.

But one of the considerations in whether we enter into an extradition treaty, I hope, is whether we are happy in sending people to that country. For example, we would never, in the darkest days of the Cold War, deport people, let's say,

to -- well, let's say now, we wouldn't deport somebody, maybe, to North Korea. Or we wouldn't deport somebody to some country where we thought they would not be treated, just as Mexico doesn't like to send people here if they are accused of capital crimes.

In other words, an issue, an issue in extradition treaties is whether you are satisfied that where you are going to send them, they are going to be treated reasonably fairly. That's why, as I say, Mexico won't agree to send some people who are accused of capital crimes here, because Mexico does not agree with capital punishment.

And so one of the reasons that we may not have an extradition treaty with Russia yet is, maybe, maybe we are not fully satisfied with the due process available there. I don't know that, but that may be.

And so, even though it may all turn out to be right, and Mr. Konanykhine by law may have to go to Russia, I hope somebody in the Executive Branch is asking themselves whether that is really the right thing to do in this case.

It certainly -- in 1996 or '97, I even heard testimony, or I think I received some information, that part of the quid pro quo was to establish an FBI office in Moscow; that in return for Mr. Konanykhine, they could have an FBI office in Moscow.

I certainly hope the Executive Branch of our government doesn't operate that way. We shouldn't be trading people like that. Extradition treaties require that there be some proof of guilt. When you go to extradite somebody, you

have to put up a prima facie case. And then when they get extradited, they have to have some semblance of due process where they go.

That doesn't mean the Bill of Rights, it doesn't mean a jury, it doesn't mean -- but it does mean what reasonable people might consider fair, even if they are from different cultures. Our way of doing things is certainly not only the fair way of doing things. Indeed, many people would argue it's not even the fair way of doing things.

But all I am saying is, I hope somebody in your client is thinking about this.

Now, call your last witness, and we will hear him.

ATTORNEY HOWARD: Your Honor, I have reviewed my notes, and in view of some of this things that have been said, in particular the Konanykhines' concession that they were treated well and professionally by the agents in Buffalo, I think all that Agent Phillips could speak to would be communications, information sharing with Canada. So if the Court doesn't think it needs to hear that, then we don't need to call him, your Honor.

THE COURT: Well, I don't think it's relevant.

Do you, Mr. Szymkowicz?

ATTORNEY SZYMKOWICZ: I don't think it's relevant.

THE COURT: It would be hearsay, in any event. You wouldn't be able to test the validity of it or the reliability of it through these witnesses. And it isn't

relevant.

I don't think Mr. Howard can assume that they would have been rejected, and I don't think you can assume that they would have been -- other than the testimony that you've presented as to what they have -- that, you can argue, that if they answered certain questions, what would happen. I think you can rely on that.

But as to what ultimately would have happened, neither you know nor Mr. Howard knows what ultimately would have happened.

ATTORNEY SZYMKOWICZ: The only thing that we know would have happened --

THE COURT: Now, if the Federal Government wants to say that they know -- they knew then and they know now that he wouldn't have even been -- he would have been denied the interview because they looked into it and they were about to greet him and say, "You don't get an interview," well, produce some representative of the Canadian Government to say that, who can be adequately cross-examined.

ATTORNEY SZYMKOWICZ: That's what I was going to suggest, your Honor. The only testimony we have on that issue is from Mr. Somjen, who clearly testified --

THE COURT: Yes, I understand.

ATTORNEY SZYMKOWICZ: -- that if they can --

THE COURT: I just recited that. You don't need to repeat it.

ATTORNEY SZYMKOWICZ: That's the only thing we know here, your Honor.

THE COURT: All right.

So, do you see any reason, Mr. Szymkowicz -- do you have any reason to call Mr. Phillips?

ATTORNEY SZYMKOWICZ: No, not -- none at all, your Honor.

THE COURT: I mean, your clients did testify that they were treated humanely and decently by the authorities.

ATTORNEY SZYMKOWICZ: As all of the INS employees at all times have treated the Konanykhines with respect, since December 18th, 2003, including Mr. Watson, Special Agent Joe Watson.

THE COURT: All right. Well, there you have it. Do you still want to call him?

ATTORNEY HOWARD: No, I don't, at this point. That's fine, your Honor.

THE COURT: Now, I do want to hear argument on the violations. However, I have another matter scheduled at 5:00, and I am wearying.

ATTORNEY SZYMKOWICZ: Your Honor, my client just wanted to testify, just very briefly, to the -- on rebuttal, if he could.

THE COURT: All right.

Come forward, Mr. Konanykhine. You will recall, sir, that you are still under oath.

MR. KONANYKHINE: Yes, yes, your Honor.

(Witness previously sworn)

THE COURT: All right, you may proceed.

ALEXANDRE KONANYKHINE, being previously duly

sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY ATTORNEY SZYMKOWICZ:

Q. Mr. Konanykhine, you heard the testimony of Mr. Watson, correct?

A. Correct, yes.

Q. And you heard that there was some evidence presented that may have shown that you did not report your normal reporting of your home address --

A. Correct.

Q. -- during certain periods from 1998 forward?

A. Yes, I heard it.

Q. Is that true?

A. No, it is not.

Q. Why not?

A. I mean, it's true that I heard it, but the documents which I received show that they are very incomplete.

Q. And why is that?

THE COURT: When you say it's true that you heard it, you mean it's true that you heard Mr. Watson say that.

THE WITNESS: No, actually, I saw the documents which were presented by the government. As I understand, Mr. Watson had nothing to do with those documents.

THE COURT: All right. Did you -- how often did you call and report in?

THE WITNESS: At least once every 60 days. In fact, I called more frequently, because sometimes I get

absent-minded because of business. I can get absent-minded with dates. So when the time was approaching, I would call a few days in advance, just to be sure not to miss a day and -- a date.

And I can demonstrate that the record which was presented by the government is very incomplete.

THE COURT: Next question.

BY ATTORNEY SZYMKOWICZ:

Q. And was there ever a time that you failed to report to the United States Government for more than a 59-day period?

A. No. No.

Q. So, it's your testimony that --

THE COURT: You are leading.

BY ATTORNEY SZYMKOWICZ:

Q. Did you ever -- did you always maintain proper contact with the government?

A. Yes, sir, I did.

ATTORNEY SZYMKOWICZ: I have no further questions.

THE COURT: Any cross-examination?

ATTORNEY PEPPER: No, your Honor.

THE COURT: Thank you. You may step down, sir.

THE WITNESS: Thank you, your Honor.

(Witness excused)

THE COURT: All right.

FURTHER PROCEEDINGS

THE COURT: Now, I need to hear arguments and

resolve this matter. By no means do I intend to delay this matter so that the Fourth Circuit can decide it. I am going to decide it in the ordinary course of this Court's business.

You should be thinking, Mr. Szymkowicz, about two things.

First, you need to do what you can, if you think it appropriate, you and Mr. Konanykhine and your legal associates, to see if you can present Mr. Howard and Ms. Pepper with an appealing proposition -- and again, I tell you, don't bother with Canada, unless you've got a final word from the Canadian Government -- and that would test the government's position that they don't have an immutable deal with the Russian Government.

Secondly, you should be prepared to consider what you'll ask the Court to do if I decide this matter against your client, and you want to appeal what I have decided to the Court of Appeals for the Fourth Circuit, about whether it would be appropriate to stay the vacation of the stay, pending your opportunity to appeal that.

Now, obviously if I decide the matter in favor of the petitioner in this case, then of course you will have an appeal to the Fourth Circuit. But the stay would remain in effect pending that.

And that would, in effect -- well, the effect of that is obvious.

Now, tomorrow I have a full docket into the afternoon. Monday is a holiday. The Court has trials -- there is a chance I could squeeze it in on the 22nd. But on

the 26th, I can clearly hear it at 2:00 o'clock, and hear it fully at 2:00 o'clock.

And if I did it on the 26th, that would also give the parties an opportunity, if they wish, to continue to make Mr. Rodriguez a rich man and ask him for an expedited copy of the transcript. He has a large home and several large, luxurious automobiles to maintain --

(Laughter)

the court: -- so he will welcome any request for transcripts. And he is feeling much better today.

THE COURT: So, unless counsel have preexisting court dates or some other good reason why, I would plan to set this matter for 2:00 o'clock on the 26th.

Is that date available, Mr. Szymkowicz?

ATTORNEY SZYMKOWICZ: What day is that, your Honor?

THE COURT: That's a Monday.

ATTORNEY SZYMKOWICZ: That would be fine for me.

ATTORNEY HOWARD: Yes, your Honor.

THE COURT: All right.

ATTORNEY SZYMKOWICZ: Your Honor?

THE COURT: Yes.

PROCEEDINGS RE: MOTION FOR RELEASE

ATTORNEY SZYMKOWICZ: We would ask that the Court release Mr. Konanykhine today, pending the 26th court date. He would -- he has informed me that he would be staying with his wife, where she has been staying for the past two or three

weeks, in a home that -- I believe that her friend, Mrs. Panov, is present in the courtroom. She lives in, I believe it's Falls Church.

MS. PANOV: Here in Virginia.

ATTORNEY SZYMKOWICZ: And my client has been here for the past twelve years. I don't believe --

THE COURT: Well, here is the problem with that, Mr. Szymkowicz: The government can reasonably be concerned about his trip to Canada.

However, what I will allow you to do is to discuss it with Mr. Howard, because he can be placed on electronic monitoring and GPS monitoring. And it seems to me that that would be a possible option, given the fact that he has been in the country for ten or twelve or thirteen years now.

Mr. Howard, you can satisfy yourself as well, although, let me ask --

Would the person in whose home he would be living come forward, please.

MS. PANOV: Yes, your Honor.

THE COURT: Come forward to the podium.

Mr. Howard, what I'm going to do provisionally is just to qualify this person as a third-party custodian. But really, what I am suggesting is to see whether the government will agree. I'll consider it as well, but not tonight. But I want to find out.

What is your name, please?

MS. PANOV: Marina Panov.

ATTORNEY HOWARD: Your Honor, could we ask Ms. Hoechst to come into the courtroom?

THE COURT: Absolutely.

(Pause)

THE COURT: Ms. Hoechst, come in, because what we are about now, Ms. Hoechst -- you can come forward and in the front, or you can sit at counsel table, if you wish.

(Ms. Hoechst complies)

THE COURT: Mr. Konanykhine's counsel has made the request that he be, in effect, paroled pending the argument in this case on the 26th of January.

I have indicated that I can understand -- Mr. Howard didn't even have to respond. I said: Well, the government has reason to be concerned because, after all, he went off to Canada.

On the other hand, you are conscious of your budget, and you've got to keep people incarcerated and you pay money for that.

Suppose he were placed in the custody of a third party, this person I am going to ask questions of now, and was placed on electronic monitoring and GPS monitoring, with no time out, that he has to stay in that house.

Now, that's for the government to think about, and Mr. Howard said you would be one of the decision-makers in that regard.

So, let me ask your name, please.

MS. PANOV: Marina ...

THE COURT: And what is your relationship with

Mr. and Mrs. Konanykhine?

MS. PANOV: They are just friends.

THE COURT: How long have you known them?

MS. PANOV: Probably for about seven to eight
years.

THE COURT: Are you an American?

MS. PANOV: Yes. I am an American citizen, yes,
sir.

THE COURT: And where do you live?

MS. PANOV: The exact address?

THE COURT: Yes.

MS. PANOV:

THE COURT: And what is your full name, please?

MS. PANOV: Marina ...

THE COURT: What is your occupation?

MS. PANOV: I am a consultant with ...

THE COURT: With the what?

MS. PANOV: ...

THE COURT: ...?

MS. PANOV: That's correct.

THE COURT: Do you work, then, at an office or
out of your home?

MS. PANOV: I work in an office.

THE COURT: And where is that office?

MS. PANOV: ...

THE COURT: And where do you live?

MS. PANOV: I live in ...

THE COURT: And I take it you have a home that's

large enough to accommodate the Konanykhines.

MS. PANOV: Yes. It's a town house, but it's, yeah. There is a guest bedroom where they can stay.

THE COURT: Do you live there alone?

MS. PANOV: With my son.

THE COURT: And you have telephone, I am sure, in the house?

MS. PANOV: Yes.

THE COURT: And would you have any problem with that telephone being altered so that it could be -- it could be arranged to monitor, electronically, Mr. Konanykhine's whereabouts?

MS. PANOV: No, I won't.

THE COURT: Now, if you were made the third-party custodian, I would have you make an oath that you would report any violations of his release; that is, he would have to remain in your home.

MS. PANOV: Understood.

THE COURT: And if you failed to report those violations, you would be in contempt of court, and you may be fined or imprisoned. You would understand that.

MS. PANOV: Understand.

THE COURT: Now, you are gone most of the day; is that right?

MS. PANOV: That's right.

THE COURT: All right.

And this would apply only to Mr. Konanykhine, because I think Ms. Konanykhine is free to go and come as she

pleases.

ATTORNEY SZYMKOWICZ: I believe that, again, as we said yesterday, her parole was extended from Christmas Eve until yesterday, and then it was extended again from yesterday until today. But --

THE COURT: All right. Well, Mr. Howard can address that. I don't think that's a problem. I think his legitimate concern is Mr. Konanykhine, and -- all right.

I assume -- and this obviously can be verified, but I am sure, Ms. Panov, you have never been convicted of any crime.

MS. PANOV: No, I have not.

THE COURT: It seems to me, Mr. Howard, that she would be an appropriate third-party custodian, and that if the electronics can be hooked up and he can be monitored, it's just as well that he be in that home as be incarcerated somewhere.

What I am going to do is allow you and Mr. Szymkowicz and Ms. Panov and Ms. Hoechst to discuss it. I'm going to deal with this other matter. When it's over, you can tell me whether you have been able to reach any kind of agreement about it.

Is there anything, Ms. -- well, Ms. Hoechst, if there are any questions you have of Ms. Panov, you can certainly ask her out there, or any particular concerns that you would have or the Service might have or Mr. Howard might have, you can ask about it.

All right?

So, we will recess this matter while I hear the Hernandez matter.

All right, I thank you for your cooperation.

(Court recessed in Konanykhine v. Homeland Security)

(Court called to order at 5:45 p.m. in Konanykhine v. Homeland Security)

THE COURT: Did the parties reach some agreement on the way in which this can occur, Mr. Howard?

ATTORNEY HOWARD: No, we did not, your Honor. Ms. Hoechst talked to her colleagues at headquarters, and the answer was no, they are not amenable to an arrangement such as this.

Part of the problem is that they do not have electronic monitoring capabilities in this city. They have offered it as a pilot project in three other cities, Anchorage, Miami and Detroit. They do not yet have that capability here.

But even if they did, I think their answer would be no, that they would not want to take the risks, given the history here of Mr. Konanykhine's efforts to evade INS enforcement.

THE COURT: You mean the December trip to Canada?

ATTORNEY HOWARD: That is correct.

THE COURT: Everything else, he has been here for thirteen years.

ATTORNEY HOWARD: Yes, that is true, so far as I know.

THE COURT: So, you are telling me that the ICE does not have electronic monitoring in Northern Virginia?

ATTORNEY HOWARD: That is correct, your Honor. Yes. Only three cities. Now, it will be eventually spread nationwide, but at this point they only have it in the three localities.

THE COURT: Well, there are only two reasons why he should not be released. One is that he would be a threat to the community, which I don't think he is. I don't even think the Service would seriously suggest that he is a danger to the community or to any individual. Is that right?

ATTORNEY HOWARD: Well, actually, your Honor, this is not a bond issue. This is a parole issue under the Immigration Nationality Act. And there, the considerations are: Is there a significant public benefit to paroling him out of custody, or is there an urgent humanitarian --

THE COURT: Now, this isn't parole. He has an agreement, and I have a case before me, whether he ought to be released. So it isn't a matter of parole. You have already reached an agreement with him.

I agree that if the agreement isn't -- if he is correct, and he hasn't breached the agreement, then he is entitled to be paroled. The only question is whether he should be released pending the Court's adjudication of the agreement.

As I see it in the circumstances, it isn't then the typical parole decision. That's already been made as a result of the agreement that you have entered into with him.

The only thing that's changed, other than the argument that he has violated the agreement, his argument that you all have violated it, that's all that has changed.

And it seems to me there are only two reasons why he shouldn't be paroled. One is that he is a danger to the community, and that's never been argued to the Court or to anybody.

The other that he is a risk of flight. And that is a significant consideration. He does not want to go to Russia. He fears -- and it seems sincere to me; whether it's accurate or not is another matter -- he fears he will be severely mistreated or tortured in Russia, in order to have him confess to things he says he didn't do, so that this fellow, Kotorovski (phonetic), is gotten. That's at least the allegation.

The point is, that's an incentive for him to flee. The question is whether the Court could impose conditions that would reasonably assure the Court that he couldn't do so.

It wouldn't do him any good to flee within the United States, because he would be caught, he would forfeit every opportunity he then had -- he would forfeit everything if he fled. Everything. It would imperil his asylum claim. It would doom this claim. And so, he has incentive not to flee as well, particularly if I impose conditions.

So, I don't see it as a parole decision. I think that's been superseded.

But I do think the Service can take that into

account when they decide whether to agree to something. I think they can agree, they can look at it as a parole decision for the Service to make. They don't -- the Service doesn't have to agree. But that doesn't eliminate the Court's power to do it.

Now, there are practical problems. I am astonished to hear that there isn't service in Northern Virginia, but be that as it may, that's the fact.

I don't know, Mr. Szymkowicz, whether the Pretrial Services Office in this Court appropriately can or should -- well, it can do it. But whether it's appropriate for it to do, whether this Court's resources should be devoted to that, I am sure your client stands ready to pay for all costs.

ATTORNEY HOWARD: Your Honor, may I raise one point?

THE COURT: Yes.

ATTORNEY HOWARD: It doesn't seem to me that it is a flight risk or a danger to the community issue. What is before the Court is an INS or ICE detainee, and the question is, is whether the Agency ought to be made -- and he is not in marshal's custody. He is in INS custody.

THE COURT: That's true.

ATTORNEY HOWARD: So the question is whether he ought to be ordered out of that INS custody.

THE COURT: I think you are correct, Mr. Howard.

It may be that I need to decide this issue right away, and simply release him under the agreement and let you

all reargue the consideration a week from now. That may be the right way to go. I may have to consider the evidence and hear brief arguments now, and issue -- that may be -- that would work, wouldn't it, Mr. Howard?

ATTORNEY HOWARD: Well, that would be consistent with what's before the Court and with the law.

THE COURT: Yes, it would.

ATTORNEY HOWARD: It's a parole issue, your Honor.

ATTORNEY SZYMKOWICZ: We feel, your Honor, that this is a breach of contract issue, so that would be the appropriate way to handle it.

THE COURT: No, I think he is correct that he is in custody of the INS. And until I decide the contract issue, it isn't a matter for the Court.

If I decide the contract issue adversely to the government, maybe that goes into your Federal Tort Claims Act case. Maybe that's increased damages. I don't know.

But it seems to me that except for the trip to Canada, the Service has already made a decision that it's okay to release him, because they entered into an agreement to do so.

All that matters -- and I can tell you now, Mr. Howard, that I am not impressed with the evidence that he didn't report regularly. I think you can -- unless you show me something fairly striking.

I think the real issue, as I said before, is whether going to Canada or attempting to go to Canada is a

violation of the order. That's the central issue. If it is not a violation of the order, then the government breached.

And what consequences flow from that? I don't know. We will hear.

ATTORNEY HOWARD: Well, there is one other point, your Honor, and that is that the agreement speaks not only of the specified conditions that the petitioner had to undertake, but also other circumstances that would warrant revocation of parole.

THE COURT: Such as?

ATTORNEY HOWARD: Well, such as if he went out and committed a crime, or presumably if he attempted to abscond; anything, according to the language of the agreement, that was left -- according to the parties and this Court -- to the discretion of the district director to decide upon. That's the final paragraph in the agreement.

THE COURT: All right. Well, that may be, and I'll hear argument about that.

Is that unfettered discretion?

ATTORNEY HOWARD: It should be, your Honor.

THE COURT: It isn't.

ATTORNEY HOWARD: Well--

THE COURT: That should be repugnant to any person.

ATTORNEY HOWARD: I'm sorry, your Honor. When I say "unfettered," no, it's clearly not unfettered.

THE COURT: All right.

ATTORNEY HOWARD: And I have already conceded

this Court has jurisdiction to look at the enforcement --

THE COURT: The last thing in the world we want in this country is executive officers with unfettered discretion, and judges with unfettered discretion.

ATTORNEY HOWARD: Yes. And my brief, your Honor, argues under the Court's own case, in Haddam, that the standard is that of facially legitimate and bona fide, the standard the Fourth Circuit has adopted in the Court's Haddam analysis.

THE COURT: Standard for what, Mr. Howard?

ATTORNEY HOWARD: For parole revocation, your Honor.

I mean, there are two issues before the Court. One is the habeas petition, the other is the violation of the settlement agreement.

If the Court were to make it through the five different jurisdictional obstacles to habeas jurisdiction, ultimately what the Court has to wrestle with is if the parole revocation, Neil Ackery's letter of March --

THE COURT: Well, that wouldn't -- that wouldn't allow the Service to deport him, though. And the reason for that is obvious, because it says in the agreement that it clearly -- this says that: We can revoke your parole. But it doesn't say it ends his right to remain in the country until he finishes his appeals. Otherwise, the agreement is really completely ephemeral. It's whatever the district director decides.

ATTORNEY HOWARD: No. You are correct, your

Honor. It does say the agreement ends when there is a final enforceable --

THE COURT: And then if the Court determines that --

ATTORNEY HOWARD: Yes.

THE COURT: -- let's say that he exercised his discretion -- and maybe the director would like to come to court and tell me that in person. Is it Mr. Carroll?

ATTORNEY HOWARD: Mr. Carroll is, I think, long gone. Now it is --

Who is the district director?

MS. HOECHST: There is no director; the Service has changed --

THE COURT: Oh, it has, yes. So, there is not even a district director any more.

MS. HOECHST: No.

THE COURT: All right.

(Pause)

THE COURT: Paragraph 1 of the agreement says: Respondent agrees to parole petitioner pending final resolution of his immigration proceedings, including any direct judicial appeals thereof, so long as petitioner engages in no conduct, or so long as no other circumstances arise, which warrant revocation of his parole under 212.5.

ATTORNEY HOWARD: Yes.

THE COURT: You might tell whoever is the new district director that in my view -- and we may have to have

that argued -- that that limits the discretion under Paragraph 5 of page 5.

In other words, Paragraph 1 says that:

...so long as petitioner engages in no conduct, or so long as no other circumstances arise, which warrant revocation of his parole under 212.5.

So, the decision would be governed, presumably, if he decided that he had engaged in conduct, I would want to know what conduct that he engaged in -- and I am sure that would be the trip to Canada -- and why does that warrant revocation of the parole?

ATTORNEY HOWARD: Yes, your Honor.

THE COURT: Especially if I end up ruling -- now, obviously, if I rule that he had no right to try to go to Canada and that that's a breach of the agreement, then that might well -- or it might not, but it might well end the agreement.

And you should be ready to argue what consequences flow from that, Mr. Szymkowicz.

But if what you are saying, Mr. Howard, is that if I find that there has been no breach of the agreement, it is still up to the director to keep him in the slammer, I don't think so.

ATTORNEY HOWARD: No.

THE COURT: All right. Just so we are clear about that.

ATTORNEY HOWARD: Yes, your Honor.

THE COURT: But I think Mr. Howard is correct,

Mr. Szymkowicz, that at the moment I haven't adjudicated that. At the moment, what has happened under the agreement is that the district director, or his successor, has determined that he has discretion -- or has determined that he has engaged in conduct -- and I think, Mr. Howard, you are saying it's the trip to Canada. Is that right?

ATTORNEY HOWARD: That is certainly our principal argument, your Honor.

THE COURT: What else, other conduct, has he engaged in?

ATTORNEY HOWARD: That we had -- let's see. Reporting, I understand the Court's concern about the evidence on that.

THE COURT: Well, if anybody concludes to the contrary, that wouldn't be a sensible exercise of discretion. The man in charge of it wasn't even aware whether he had reported or not reported for several months.

ATTORNEY HOWARD: Yes. The trip to Canada, there were two circumstances going on there, your Honor. One was that he had left the 25-mile radius of the New York Metropolitan Area. Now, we have heard assertions by the other side that --

THE COURT: Twenty-five miles -- where did that come from?

ATTORNEY HOWARD: The 25 miles is in the agreement, your Honor, at page two, at the bottom of the page.

THE COURT: That's the Metropolitan D.C. Area, and that's -- the argument there, if I found that --

ATTORNEY HOWARD: Yes.

THE COURT: -- if the modification didn't change that, then you are correct.

ATTORNEY HOWARD: Yes.

THE COURT: On the other hand, as you know, he contends that he received permission to travel.

So, presumably, if I decide that, that ought not to be a basis for the district director's decision. But for now, I can understand that it can be.

ATTORNEY HOWARD: Yes.

THE COURT: Go on. It's the trip to Canada.

ATTORNEY HOWARD: Then the second issue is the departure from his last known address without apprising the INS of his new address.

THE COURT: Well, the state of the evidence on that, so that everyone is clear, as I understand it, is that this was an apartment of friends, that they stayed in it, that they paid rent while they were there. It's the address that they gave --

ATTORNEY HOWARD: Yes.

THE COURT: -- and that when they left it was for the purpose of going to Canada, and even when they came back from Buffalo on one occasion, they stayed at the apartment.

ATTORNEY HOWARD: They stayed at another apartment, your Honor.

THE COURT: All right, they stayed in another apartment. I think you are correct.

But they didn't -- their position is that they

only had to report permanent addresses, and they didn't have a permanent address.

ATTORNEY HOWARD: Yes.

Your Honor, I think that's -- my office has referred to that as the Winnebago defense.

THE COURT: Yes.

ATTORNEY HOWARD: The point --

THE COURT: I can see that.

But then on the other hand, given the way that your office keeps track of people, I don't think it matters much.

ATTORNEY HOWARD: My office?

THE COURT: It may not be material.

Not your office, but their office.

ATTORNEY HOWARD: Okay.

THE COURT: But you are stuck with what your client does in this business, Mr. Howard. That was always what I was told, in any event.

So, I understand that.

I think, Mr. Szymkowicz, that it's appropriate for the successor of the district director to make that determination at this point, unless, until the Court decides otherwise. And I frankly am not ready to decide the matter tonight.

If the Court decides that the agreement has not been breached, or that the government breached first, or at least attempted to breach first, then the district director, whoever it is, gets to make a new decision.

But I would be releasing him at that point. And if the district director made a new decision to incarcerate him, it might be a violation of the agreement, we would come back to court and we would litigate some more.

On the other hand, if the Court decides that there is no breach of the agreement by the government, and that he did breach the agreement, then you and Mr. -- your cocounsel in the immigration matter had better be clear about getting a rehearing of the failure to stay, or what have you, as quickly as you can.

All right. So, he will have to remain in custody. And again, if there is a breach of the agreement by the government because they arrested him at the bridge, and he has been kept in custody, we will consider what damages flow from that. And I am sure that the government considered that in making this decision tonight.

Is that right, Mr. Howard?

ATTORNEY HOWARD: That is correct, your Honor.

THE COURT: All right.

All right, then I will see everyone a week from this coming Monday. Court stands in recess.

(Court recessed at 6:04 p.m. in *Konanykhine v. Homeland Security*)

CERTIFICATE OF REPORTER

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, in the Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the hearing in the cases of ALEXANDRE KONANYKHINE v. UNITED STATES OF AMERICA DEPARTMENT OF HOMELAND SECURITY.

I further certify that I was authorized and did report by stenotype the proceedings in said hearing, and that the foregoing pages, numbered 1 to 199, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this _____ day of _____, 2004.

Michael A. Rodriguez, RPR/CM/RMR
Official Court Reporter