

Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of the Chief Counsel
606 S. Olive Street, 8th Floor
Los Angeles, California 90014
(213) 894-2805

Kevin Riley
Deputy Chief Counsel

Elena Kusky
Assistant Chief Counsel

THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

Man Der Hout, Brig
Nightingale

IN THE MATTERS OF:)	A19 262 560
)	A30 660 528
KHADER MUSA HAMIDE and)	
)	In Deportation Proceedings
MICHEL IBRAHIM SHEHADEH,)	
)	
Respondents.)	
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ICE MOTION TO VACATE FILING DEADLINE, MOTION TO SCHEDULE EXCHANGE OF EVIDENCE, AND RESPONSE TO RESPONDENTS' MOTION TO EXCLUDE EXHIBITS 30, 31, C AND D

In light of the Immigration Judge's Order dated July 7, 2005, canceling the hearing dates in the above captioned matter, the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), respectfully moves the Immigration Judge to vacate the prior document submission date. ICE further requests the Immigration Judge schedule a court hearing date for the exchange of evidence as stipulated to by the parties in the Joint Stipulation on Factual and Legal Issues. ICE also requests a status conference to discuss the issues described below. Finally, ICE submits the following response to the Respondents supplement to their motion to exclude exhibits 30, 31, C and D.

**MOTION TO VACATE PREVIOUS ORDER REGARDING
SUBMISSION OF EVIDENCE**

At the May 5, 2005 teleconference, the Immigration Judge ordered ICE to produce its proposed evidence by May 19, 2005. This filing date was predicated upon the hearings scheduled to commence on July 13, 2005. Indeed, on May 19, 2005, ICE timely submitted all of its documentary evidence in compliance with the Immigration Judge order. Subsequently, the Immigration Judge cancelled the scheduled hearings in a written order, dated July 7, 2005. There is no future hearing date scheduled at this point.

In light of the cancellation of the hearing date, the rationale for the May 19, 2005, filing date is no longer germane. The postponement of the hearing dates has provided the respondents with even more time than previously anticipated to review the evidence submitted by ICE. Based upon the cancellation of the hearing date, ICE respectfully requests that the Immigration Judge vacate his earlier order on the submission of evidence and provide a new date by which the parties have to submit their evidence in anticipation of the hearing.

Additionally, ICE requests a status conference to discuss setting a date for the open court exchange of evidence between parties per the joint stipulations; setting a deadline for any objections regarding the evidence; and setting a date for a hearing.

MOTION TO SCHEDULE EXCHANGE OF EVIDENCE

On November 10, 2004, the respondents and ICE filed an amended Joint Statement of Undisputed Facts. Included in Article III, Paragraph 5 of the Joint Stipulation, the parties agreed "to an exchange of evidence in open court." The Immigration Judge has accepted this stipulation and accordingly, ICE requests that the Immigration Judge schedule a date by which all parties can comply with their agreed stipulations.

RESPONSE TO RESPONDENTS' JULY 21, 2005
SUBMISSION REGARDING MOTION TO
EXCLUDE EXHIBITS 30, 31, C AND D

The respondents submitted a motion in limine to exclude exhibits 30, 31, C & D prior to the hearing. Since that time, the respondents submitted two additional briefs replying to ICE's brief in opposition to their motion and supplementing their motion. Although the respondents combine their motion to terminate and motion in limine regarding the exhibits, ICE submits this response solely in response to the motion to exclude exhibits, because the issues do not overlap. A review of evidence submission, efforts to address issues regarding the evidence, and the law clearly demonstrate that the respondents' motion should be denied.

A. Law on current motion in limine

The Government herein incorporates all the arguments and law cited in their initial response to the respondents' motion in limine. The respondents claim in their response to the Government's opposition that notwithstanding the limitations on the Immigration Judge's authority contained in the regulations cited by ICE, that the Immigration Judge still retains some sort of "super" authority in the catch-all phrase in 8 C.F.R. §1240.41(a) because it states that an Immigration Judge has the authority to "take any other action *consistent with applicable law and regulations* as may be appropriate. The Immigration Judge's authority is created and limited by statute and regulation. The Board has held on several occasions an Immigration Judge cannot exceed his regulatory authority. See, e.g., Matter of Correa-Garces, 20 I & N 451 (BIA 1992)(IJ exceeded regulatory authority by extending time for appeal and by simultaneously issuing a deportation order and a stay.); Matter of Silva-Rodriguez, 20 I & N 448 (BIA 1992)(no statutory authority for Immigration Judge to grant provisional waiver of inadmissibility). The section of the regulation cited by the respondents simply means that the Immigration Judge is not limited to just those specific actions listed in that part of the regulation and recognizes there are other sections of statute or regulation that give the Immigration Judge other specific authority. The Government agrees that throughout the statute and regulations, the Immigration Judge has a variety of authority granted to him to perform certain duties. However, nothing in the statute or regulation grants him specific authority to exclude the Government's evidence on removal or deportability. The respondents do not cite any specific regulatory or statutory authority for that proposition and the section of the regulation they rely upon requires a citation to the "applicable law and regulations."

The respondents have not acknowledged, much less discussed the precedential decision of Espinoza v. INS, 45 F.3d 308 (9th Cir 1995) cited by the Government in their brief. The Ninth Circuit held that the "burden of establishing a basis for exclusion of evidence from a government record falls on the opponent of the evidence who must come forward with enough negative factors to persuade the court not to admit it. Id. at 310. Other than complaining about not understanding the evidence, they do not cite any other negative factors. The transcripts were filed on time. The tapes were filed one day late.

The respondents have still not been able to articulate how a timely filing of transcripts and a one-day late filing of audio is such a negative factor that the evidence cannot be admitted. Further, the delays in providing the audio and video are due to the fact that ICE had the material digitally enhanced for the respondents' benefit during the copying process. As noted above, in light of the cancellation of the hearing date, the rationale for the May 19, 2005, filing date is no longer germane. The postponement of the hearing dates has provided the respondents with even more time than previously anticipated to review the evidence submitted by ICE. They have had three months with the evidence in their hands, yet continue to file motions, rather than review the evidence. These actions do not rise to the high standard set by the Ninth Circuit for excluding evidence.

B. Evidence Submission

On July 21, 2005, the respondents filed a brief addressing ICE's response to their motion to exclude certain exhibits on the basis of excessive delay. Initially, as discussed above, the Immigration Judge should vacate the previously set deadline for the submission of evidence as subsequent events have rendered that deadline moot. However, the respondents' brief contains several troubling allegations regarding ICE's submission of evidence that are simply inaccurate. ICE did comply with the Immigration Judge's orders and certainly did not "blatantly disregard" the Immigration Judge's orders. Further, contrary to the respondents' assertion, ICE complied with the exculpatory evidence order. The order required ICE to make a formal request to the Federal Bureau of Investigation (FBI) and to make good faith efforts to obtain information. The instructions were to be implemented by June 27, 2005. ICE did make the formal request to the FBI by the requisite date. Further ICE initiated the review for exculpatory material by that date. The respondents fail to demonstrate how ICE failed to comply with the requirements set forth in the order.¹ Additionally, as the Immigration Judge himself noted in the denial of the respondents' motion to terminate, all parties to this action have played a part in the lengthy history of the case.

The respondents' motion in limine to exclude exhibits 30, 31, C and D is based upon the alleged untimely filing of such exhibits. The respondents assert that the ICE failed to comply with the Immigration Judge's order related to the filing of evidence. The respondents further allege that ICE blatantly disregarded the order and have failed to explain the evidence to them.

ICE filed over 1000 pages of documents with the Immigration Court on May 19, 2005, the date set by the Immigration Judge. The documents included Exhibits 30 and 31. Exhibit 30 consists of translated audio recordings obtained under the Foreign Intelligence Surveillance Act (FISA). For example pages 501 – 540 of the ICE's submission contains the translations of a conversation between Khader Hamide and Jamal Niser, the North American leader of the PFLP, discussing the organizational structure of the PFLP and various members positions. This evidence demonstrates

¹ The Government, while complying, again notes their continuing objection to this order, and has filed an interlocutory appeal of this order. The Government will continue to respectfully seek to have their objection to the authority of the Immigration Judge to enter such an order reviewed on appeal.

Hamide's active involvement with the PFLP's affairs. This directly relates to the issues contained in the current charges as it demonstrates Hamide's activities went to support the PFLP. It further rebuts any argument that Hamide was not aware of the PFLP and its activities as he held significant conversations with their North American leader.

Pages 389-395 are a translation of a conversation between Jamal Niser and Michel Shehadeh, the day after a fundraising event. This conversation includes information about the amount of money raised at the event and how much would be forwarded to Niser. This directly relates to the allegations that Hamide and Shehadeh solicited funds for the PFLP's benefit and materially supported the PFLP through their activities. Exhibit 31 consists of a transcript of a videotape of tape involving an event held at Camp Radford that both respondents attended. The transcript notes and the video confirms the transfer of money from Khader Hamide to Ali Kased, a high ranking PFLP member and that the individuals present, including both respondents, confirm that they are all PFLP. This provides additional direct evidence of Hamide and Shehadeh providing monetary support to the PFLP, the charges pending in the case. All the documentary evidence was submitted by the date set by the Immigration Judge.

ICE advised the Court and respondents when the Court set the May 19, 2005, filing date that all the audio and video recordings may not be prepared by that date. The actual recordings, which were held by the Department of Justice, were turned over to the respondents after ICE received, copied, and digitally enhanced them. ICE submitted the evidence to the Court and the respondents as soon as the copies were made available. The first set of audio recordings were sent to respondents merely one day after the documents were filed with the Immigration Court. Respondents had the translations to review in preparation of their case in a timely fashion and have not explained how the one-day delay in receiving some of the audio recordings has prejudiced them. In fact, with the cancellation of the hearing, the respondents now clearly have sufficient time to translate all of the recordings and prepare materials related to such exhibits. Further, the respondents claim that ICE has not sufficiently "explained" how the transcripts and recordings relate to one another. Although ICE is under no such obligation to explain its evidence prior to the hearing,² ICE has made every possible good faith effort to address the respondents' concerns.

C. Efforts to Address Evidentiary Issues

Respondents' counsel claims that "[t]he government has still, to this day, failed to provide an explanation of how much of the recorded material correlates to the hundreds of pages of transcript, and has failed to do so even though many of the recordings in question were translated months or even years ago." See Page 1 of the Respondents' Reply to the Government's Response to Respondents' Motion In Limine Concerning Exhibits 30, 31, C and D and In Further Support of Respondents' Motion to Terminate on the Basis of Excessive Delay (hereinafter Respondents' July 21, 2005 Motion).

² Any issues of this nature are better resolved in open court; hence the decision of the parties to include an exchange of evidence in open court in their joint stipulations.

Respondents' counsel seems to imply that their inability to understand the material submitted is attributable to ICE. ICE has submitted the material as required. In addition, in an attempt to keep the case on track for a hearing at the soonest possible date, ICE attempted to meet with respondents counsel to address their issues.

ICE has made numerous good faith efforts to meet with and communicate with respondents' counsel regarding this issue. ICE is at a loss as to how respondents' counsel can cite any difficulty in pairing the transcripts and the visual or audio evidence as a reason for either exclusion of the evidence or termination of this case. In fact, respondents' counsel's actions have made it impossible for ICE to address any of these concerns. Respondents' counsel's cancellations of meetings and lack of any attempt to contact ICE after the cancellation of the meetings has been the sole reason that ICE has been unable to address the respondents' concerns regarding this issue. At the next status conference, ICE will make the following offer of proof regarding its efforts to meet with respondents' counsel to address their concerns.

On Thursday, July 7, 2005, ICE counsel called respondents' counsel to set up an appointment to meet regarding the issues that respondents' counsel described during a status conference with the Immigration Judge earlier that day. A meeting was scheduled at respondents' counsel's office for 10:00 am on Monday, July 11, 2005.

Later on July 7, 2005, the Immigration Judge cancelled the hearings scheduled for the following week.² However, ICE kept an attorney from its headquarters in Washington, D.C. in Los Angeles, at additional government expense, primarily to meet with respondents' counsel. This information was shared with respondents' counsel.

On Monday, July 11, 2005, respondents' counsel called ICE counsel and cancelled the meeting citing that respondents' counsel was "too busy" to meet that afternoon. ICE counsel told respondents' counsel that he was available at any time during the week of July 11-15 to meet and that the meeting was his primary reason for staying in Los Angeles. Respondents' counsel said that his schedule was quite busy and that the earliest he could meet was at 2:00 PM on Friday, July 15, 2005. However, he also informed ICE's counsel that he may have to cancel the meeting.

On Friday, July 15, 2005, while ICE counsel was in transit to respondents' counsel's office, respondents' counsel called and once again cancelled a meeting. Respondents' counsel then stated that he believed the issues could be resolved over the phone.³

³ It should be noted that respondents' counsel previously described by the evidence at issue as "impossible for anyone to determine which recordings purportedly correspond to which portions of the transcript." See Page 4 of Respondents' Motion In Limine Concerning Exhibits 30, 31, C and D filed on June 29, 2005. ICE finds it perplexing that respondents' counsel now claims that these issues can be easily resolved over the phone.

Also on Friday, July 15, 2005, ICE sent respondents' counsel a letter, a copy of which was also sent to the Court, outlining the frustrations of ICE, described above. The letter contained all information needed, including phone numbers, to contact ICE attorney handling this issue. Yet, almost 59 days later, respondents' counsel has not made any effort to contact ICE's attorney to discuss this issue.

In sum, respondents' counsel should not be rewarded for ignoring the multiple good faith efforts ICE has made and continues to make to address respondents' counsels' concerns. Granting any portion of the Respondents' July 21, 2005 Motion would do just that.

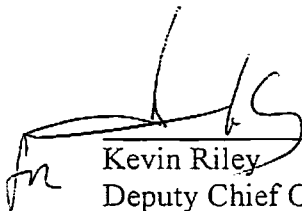
Additionally, ICE believes that respondents' counsel attempt to exclude this evidence and avoid meeting with ICE may actually be explained by the damaging nature of the recordings and transcripts.

ICE has complied with the order set by the Immigration Judge regarding the filing of evidence. Further, contrary to the respondents' assertion, ICE complied with the exculpatory evidence order. The order required ICE to make a formal request to the Federal Bureau of Investigation and to make good faith efforts to obtain information. The instructions were to be implemented by June 27, 2005. ICE did make the formal request to the FBI by the requisite date. Further ICE initiated the review for exculpatory material by that date. The respondents fail to demonstrate how ICE failed to comply with the requirements set forth in the order.

CONCLUSION

ICE respectfully requests that the Immigration Judge vacate the previous filing deadline due to events subsequent to the order. ICE also requests that the Immigration Judge set a date for the exchange of evidence between the parties. ICE also requests that the Immigration Judge schedule a status conference to discuss setting a date for the open court exchange of evidence between parties per the joint stipulations; setting a deadline for any objections regarding the evidence; and setting a date for a hearing. Finally, ICE requests that the Immigration Judge deny the respondents motion in limine to exclude exhibits 30, 31, C and D.

DATE: September 12, 2005


Kevin Riley
Deputy Chief Counsel

Elena Kusky
Assistant Chief Counsel

CERTIFICATE OF SERVICE

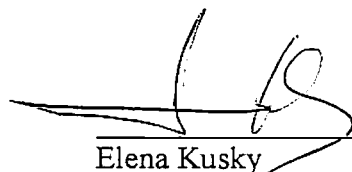
The undersigned hereby certifies that on the 13th day of September 2005, a copy of the Government's Motion to Vacate Filing Deadline, Motion to Schedule Exchange of Evidence, and Response to Respondents' Motion to Terminate Proceedings and Exclude Exhibits 30, 31, C and D was sent to each of the respondents' counsel of record, by placing the same for delivery through the United States mail, as follows:

Marc Van Der Hout, Esq.
180 Sutter Street, Fifth Floor
San Francisco, CA 94104

Leonard Weinglass, Esq.
6 West 20th Street
New York, NY 10011

David Cole, Esq.
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Ahilan T. Arulanantham
American Civil Liberties Union of
Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026



Elena Kusky
Assistant Chief Counsel