United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

KALEJS

MAY 17 1985

File: A11 655 361 - Miami

In re: KONRADS KALEJS

IN BOND PROCEEDINGS PURSUANT TO 8 C.F.R. § 242.2(b)

APPEAL

ON BEHALF OF RESPONDENT: Ivars Berzins, Esquire
484 West Montauk Highway
Babylon, New York 11702

ON BEHALF OF SERVICE: Jeffrey N. Mausner
Acting Appellate Trial Attorney

ORAL ARGUMENT: May 8, 1985

APPLICATION: Release on bond

In a decision dated April 23, 1985, an immigration judge found the respondent to be an extremely poor bail risk and denied his request for a change in custody status, leaving him detained without bond. The respondent has appealed. The appeal will be dismissed.

The respondent is a 72-year-old male, a native of Latvia and citizen of Australia. He was admitted to the United States as a lawful permanent resident on February 6, 1959. On October 29, 1984, an Order to Show Cause was issued charging him with deportability under sections 241(a)(1), (2), and (19) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1), (2), and (19), respectively. The respondent is accused of having ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between July 21, 1941, and May 8, 1945, under the direction of or in association with the Nazi Government of Germany. He is also charged with having concealed these facts when he applied for his visa and when he applied for admission to enter the United States in 1959.

In support of its contention that the respondent is a poor bail risk, the Service offered an affidavit dated February 4, 1985, by the trial attorney, Office of Special Investigations (OSI), and the testimony of one witness. In the affidavit, the trial attorney states that a subpoena was issued to the respondent on February 23, 1984, and that he appeared at INS offices

for an interview under oath on March 1, 1984. The trial attorney communicated with the respondent a number of times between February and August of 1984. In a conversation on August 27, 1984, the trial attorney advised the respondent that an Order to Show Cause would be issued unless a settlement could be reached by September 7, 1984.

On September 4, 1984, the respondent sold a certificate of deposit for $100,000 and withdrew another $252,000 from two other accounts. On September 7, 1984, the respondent stated that he needed more time to consider the proposal of OSI. He was informed that a case would be filed forthwith. The trial attorney states that on September 12, 1984, efforts to serve the Order to Show Cause began 1/ at the respondent's address in Winnetka, Illinois. Intermittent surveillance of that address was conducted over several days. The respondent was not seen and other persons at the home claimed that they did not know where he was.

Attempts to serve the respondent at his address in Petersburg, Florida, began on or about October 27, 1984. A Service investigator went to the premises on at least two occasions. Neighbors reported that no one had been living at that address for several months.

On November 26, 1984, the trial attorney spoke with Ivars Berzins, a private attorney in New York who has represented several Latvians prosecuted by OSI. Counsel stated that he was not at that time representing the respondent and did not know where the respondent was. The trial attorney advised counsel to inform the respondent that if he did not accept service of the Order to Show Cause, the government would request that an arrest warrant be issued. Counsel informed Ms. Kalnins, a friend with whom the respondent lives and with whom he owns property jointly, of the government's intention. No response was received from the respondent.

On November 30, 1984, the trial attorney mailed copies of the Order to Show Cause and Form I-618, by regular mail, to the respondent at his addresses in St. Petersburg, Florida, and Winnetka, Illinois.

1/ An Order to Show Cause in the record is dated October 29, 1984. The file contains no explanation whether another Order to Show Cause was issued before the one dated October 29, 1984. However, the respondent has not questioned that attempts were made to serve him on or about September 12, 1984, nor has he alleged that he was available to be served had such efforts been made.

On December 4, 1984, Larry P. Sprinkle, Supervisory Criminal Investigator for the Immigration and Naturalization Service in Tampa, Florida, accomplished service by tacking the Order to Show Cause and Form I-618 to the door of the respondent's home in St. Petersburg, Florida. No one was at home at the time.

Based at least in part on the trial attorney's affidavit, a warrant was issued for the respondent's arrest on February 22, 1985. Inspector Pascucci testified at the hearing regarding his investigation leading up the apprehension of the respondent. The immigration judge found that this inspector made 12 points that bore on the bondability of the respondent. They are:

a) The respondent's high degree of mobility since September 1984, including temporary stays in Toronto, Canada and Australia;

b) Respondent's return to the United States and avoidance of his legal residences in Winnetka, Illinois and St. Petersburg, Florida;

c) The assistance that respondent has received from his lady friend, Ms. Austra Kalnins, in avoiding service of process and arrest. Ms. Kalnins even lied to investigators in saying that she had not seen the respondent in almost one year when the investigation had shown otherwise;

d) The existence of other possible confederates who assisted respondent in hiding and who would not cooperate with the government;

e) A pattern of non-cooperation with the investigation on the part of certain persons in the Latvian community;

f) Respondent's registering at a motel in Treasure Island, Florida under the name C. Michaelson. C. Michaelson is the deceased second husband of respondent's late sister. Other C. Michaelson documents were located hidden in respondent's car, leading investigators to believe that respondent was attempting to assume a new identity;

g) Respondent's ownership of substantial and highly liquid assets, his withdrawal of substantial funds from his accounts, and his possession of $10,000 cash upon arrest;

h) Respondent's purchase of an open airline ticket from Toronto to Australia, and his possession of a currently valid Austrialia passport;

i) Respondent's lack of family ties in the United States except for one nephew to whom he is not particularly close;

j) Respondent's joint ownership with Austra Kalnins of substantial real property holdings, including the Winnetka and St. Petersburg homes, and two Ft. Lauderdale condominiums;

k) Confidential information from an informant that Austra Kalnins had made statements to a Latvian War Veterans Association that she would get respondent out on bond and "go to the islands";

l) The expenditure of approximately 1,500 man-hours on the investigation, costing taxpayers some $42,000.

On March 26, 1985, an Order to Show Cause was filed with the immigration judge. A master calendar hearing in the case was set for April 10, 1985, and notices of the hearing were sent by certified mail to the respondent. The respondent's present counsel was notified by telephone and by letter of the hearing, although at the time he was not the attorney of record in this case. The respondent failed to appear for the hearing on April 10, 1985, and the case was administratively closed. The respondent was apprehended on April 19, 1985, in Miami Beach, Florida, by officers of the United States Marshall Service. He was apprehended in a motel in which he was staying under a name other than his own. He has been in detention since that time.

The immigration judge found the respondent to be an extremely poor bail risk and that it was virtually certain that he would abscond. Accordingly, he denied the respondent's request for a change in custody status. It is from this decision that the respondent appeals.

Both the respondent and the government have submitted briefs in connection with the appeal. Both appeared for oral argument before the Board. At oral argument, counsel for the respondent moved to strike a portion of the government's brief on appeal beginning on page 16 entitled "Weight of the Evidence" and extending into page 19. The respondent objects because the matters relating to the strength of the evidence of deportability were not made part of the record below, were not considered by the immigration judge, and are not referenced in his decision. The respondent objects that this portion of the brief makes reference to four specific documents that bear on the question of deportability, and they are documents which the respondent has not seen. He complains that he is at a severe disadvantage in attempting to respond to these documents because he has not seen them. The respondent contends that it would be unfair for the Board to consider this information under the circumstances.

The respondent's motion to strike will be granted. We have reviewed the matter in question and find it to be of marginal significance to this bond determination and unnecessary for our resolution of it. As the matter was not presented to the immigration judge, we will not consider it.

The respondent has also raised a number of other issues regarding his bond hearing. We shall address these issues before going to the ultimate questions of whether the respondent is a poor bail risk and whether he should be detained without bond. First, the respondent contends that he was deprived of due process of law by the immigration judge's refusal to permit transcription of the bond hearing below. He complains that the immigration judge made a recording of the hearing for his own use in preparing his decision, but would not allow transcription. The respondent contends that he was prejudiced by the absence of this transcription in that there is no way to determine if the facts are accurate, or if facts were omitted, and the lack of a record prevents adequate review. We find this contention to be without merit. In Matter of Chirinos, 16 I&N Dec. 276 (BIA 1977), we pointed out that the primary consideration in a bail determination is that the parties be able to place the facts before an impartial judge as promptly as possible. We held that there is no requirement for a formal hearing, and that there is no right to a transcript of a bond redetermination hearing. Matter of Chirinos, is controlling here. Furthermore, we find no prejudice to the respondent from the absence of a transcript in any event. The record is adequate for our review. We are satisfied that the facts are sufficiently established to permit our decision because the respondent was present and heard the evidence presented and

has not even contested the substance of it. Furthermore, if there were additional facts favorable to the respondent bearing on the question of bondability, he would have presented them in his brief or at oral argument.

Second, the respondent contends that unsworn, irrelevant, and hearsay testimony was permitted below. The respondent objects to a long affidavit submitted by the trial attorney, OSI. He also objects to references in that document to settlement negotiations between the respondent and the government. He contends that these references should have been deleted. He also contends that bond determination proceedings have been impermissibly intertwined with deportation proceedings in this case. We find these contentions to be without merit as well. Hearsay testimony is admissible in deportation proceedings. See Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974); Marlowe v. INS, 457 F.2d 1314 (9th Cir. 1972); Navarrette-Navarrette v. Landon, 223 F.2d 234 (9th Cir. 1955), cert. denied, 351 U.S. 911 (1956). No greater standard is effective in bond proceedings. 8 C.F.R. § 242.2 provides in pertinent part:

> The determination of the immigration judge as to custody status or bond may be based upon any information which is available to the immigraiton judge or which is presented to him by the alien or the Service.

The respondent has made no effort to show that the trial attorney's affidavit is in any fashion unreliable or inaccurate. As far as the fact that the affidavit reflects negotiations between the respondent and OSI, we pause only to note that that information is relevant to these proceedings insofar as it establishes that the respondent was well aware that proceedings against him were pending when he decided to go into hiding. We rely on it for no other purpose. We find no violation of the rule requiring that bond and deportation hearings be kept separate and apart. The respondent's deportation proceedings will come at a later date, and these proceedings will be separate from those.

Third, the respondent contends that the immigration judge erred in refusing to permit proper cross-examination of the witness for OSI. More particularly, the respondent complains that he was not provided the notes from which the officer testified before the immigration judge. Jencks v. United States, 353 U.S. 651 (1957). Jencks is a criminal case involving a trial on the merits. The respondent has not cited any authority establishing that this rule is applicable in immigration

bond redetermination cases. In fact, he has not established that it is applicable in any bond proceedings. In the absence of such authority, we decline to impose such a rule.

Turning to the merits of this case, we have held that an alien generally should not be detained or required to post bond pending a determination of deportability unless there is a finding that he is a threat to national security or a poor bail risk. Matter of Patel, 15 I&N Dec. 666 (BIA 1976). In determining the necessity for and amount of bond such factors as employment history, length of residence in the community, family ties, record of appearance or nonappearance at court proceedings, and the nature of the respondent's criminal or immigration history may properly be considered. See Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, supra; Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Moise, 12 I&N Dec. 102 (BIA 1967); Matter of S-Y-L-, 9 I&N Dec. 575 (BIA 1962).

The respondent has commented with respect to each of paragraphs (a) through (l) mentioned by the immigration judge as having a bearing on bondability in this case. We find three of the respondent's comments to be well taken. With respect to items (d) and (e), we agree with the respondent that those are either not supported by the record or that they are insubstantial. With respect to paragraph (i) we note that the respondent's nephew appeared for oral argument with respondent's counsel. The remainder of the respondent's comments raise questions as to the quality or quantity of the government's evidence, or claim the action is ambiguous. Such questions by the respondent are not evidence. The government, in contrast, has submitted substantial evidence indicating that the respondent went into hiding to avoid service of the Order to Show Cause and that he failed to appear for a deportation hearing. The respondent's questions regarding any particular aspect of this evidence is wholly unconvincing in the absence of even so much as a simple denial from the respondent that he in fact went into hiding to avoid deportation or any explanation for his failure to appear for the deportation hearing.

The respondent also points to a number of factors to counterbalance the inference that he is a poor bail risk and which militate toward a grant of bond in this case. The respondent points out that he is 72 years old and in ill health. He purports to have recently had an operation for kidney stones and to have bleeding ulcers and gall stones at present which may require surgery in the future. He also purportedly has

phlebitis in both legs for which he is taking medication. 2/ The respondent points out that he has lived in this country for 25 years and was gainfully employed in the same job until 1983 when he retired. He points out that he has no prior criminal record and is not alleged to have committed any subversive or narcotics offenses. He contends that his return to this country and employment of counsel evidences his desire to face the charges against him. He also complains that his detention will seriously impair his ability to assist counsel in the preparation of his defense. He points out that he is incarcerated in Florida while his attorney's offices are in New York. He also points out that the deportation proceedings are expected to be quite lengthy. He contends that the true reason for his incarceration is that OSI is trying to force him to abandon his defense and to accept the settlement that he previously rejected.

We find the respondent's contentions to be without merit. From our review of the record, we find the evidence that the respondent is a poor bail risk to be simply overwhelming. The respondent went to great lengths to avoid deportation proceedings including the use of a false identity, travel outside the country, collection of his assets and turning them into cash, avoiding his normal residence, and failure to appear for a scheduled deportation hearing. His contention that his return to the United States and employment of counsel indicates his desire to fight the charges against him is not well taken. We think a more accurate characterization of these circumstances is that they manifest the respondent's recognition of the absence of any other alternative in view of his apprehension and incarceration. His contention that his incarceration will greatly impair his preparation of his defense because he is detained in Florida and counsel is in New York is not persuasive either. The respondent has two places of residence: one in Illinois and the other in Florida. Neither may be regarded as convenient to New York, the location of his counsel. Furthermore, in selecting his counsel the respondent was fully aware of where counsel was located. In any event, our conclusion that the respondent is a poor bail risk flows exclusively from the respondent's own conduct in avoiding the Order to Show Cause and his failure to appear for a deportation hearing. Therefore, he alone is responsible for any inconvenience he may incur in the preparation of his defense or otherwise. We

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2/ This specific information about the respondent's health is not supported by any affidavit, reference in the immigration judge's decision, or other evidence. However, we will accept it for purposes of this bond proceeding only.

do not order the respondent detained to punish him or as leverage in his negotiations with OSI. See Matter of Au, 13 I&N Dec. 133 (BIA 1968). We order him detained because we agree with the immigration judge that the respondent has given us good reason to believe that nothing less will assure that he will be available for further proceedings.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

[redacted] /s/

Chairman

[redacted]

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DISSENTING OPINION: James P. Morris, Board Member

I respectfully dissent.

The majority finds that the evidence is overwhelming that the respondent is a poor bail risk. I agree with that finding and would authorize his release only upon his posting a substantial bond. However, I do not agree that the respondent should be held without bail and, therefore, I would sustain his appeal.

The majority opinion notes that the respondent has pointed out that he is 72 years old and is in poor health. However, the opinion in no way responds to these contentions. I think that it is important to consider those factors in a case of this nature, which may involve protracted administrative and judicial proceedings before all issues ultimately can be resolved. I believe that under these circumstances a person of the respondent's age and health should not be incarcerated over a long period of time if there is any other way to provide reasonable assurance that he will appear as required. It has not been the practice of this Board to require more than a reasonable assurance that an alien will appear as required, and to insist upon complete assurance would require detention in all cases of suspected bail risks. The issue, then, is what amount of bond, if any, will provide reasonable assurance that the respondent will appear when required. The majority has adopted the view that no amount of bond would be sufficient. I disagree.

The Immigration and Naturalization Service began in September 1984, attempting to serve an Order to Show Cause on the respondent, and the record indicates that the respondent took positive steps to avoid being served with that document. I view his activities in this regard to be a serious adverse factor in considering his application for release on bond. However, it should be remembered that the respondent was not under any legal obligation to cooperate with the Service in accepting the Order to Show Cause. The respondent's failure to appear at the hearing scheduled for April 10, 1985, is another adverse factor. His conduct clearly indicated his desire and willingness to avoid deportation proceedings. However, at that time he was not under bond, and his conduct cannot reasonably be said to indicate a willingness to forfeit a bond in order to evade the proceedings.

The opinion of the majority points out that the respondent, together with his lady friend, possesses considerable assets. These assets apparently represent the life savings of the respondent, who is now retired. In view of the fact that the respondent is a citizen of Australia and apparently is entitled to take up residence in that country if he wishes, it seems very unlikely that he would willingly forfeit his substantial assets in order to become a fugitive in this country. At oral argument, counsel for the respondent indicated respondent's willingness to tie up virtually all of his assets in order to be released from detention. While it has not been established in the record exactly what the respondent's assets are, it is a matter of concern to me that Government counsel has continued to insist that the respondent be detained without bond. I believe that the Government could reasonably demand an accounting of the respondent's assets and some assurance that he does not have vast hidden assets that would diminish the respondent's likelihood to appear in proceedings as required. However, I find the Government's outright rejection of the proposal made by the respondent's attorney to be unreasonable, and in view of that unreasonable position, I would not require the respondent at this time to make any further proof of the extent of his assets in order to justify his release on bail.

The record indicates that much of the respondent's assets is held jointly with his friend, Austra Kalnins. Moreover, I note that in defending against the allegations in the Order to Show Cause, the respondent may incur significant expenses. Therefore, I am not inclined to set bond at an amount which would include all or most of his assets. I regard the respondent as a serious bail risk and believe that he should be released from detention only upon the posting of a substantial bond. I would sustain the respondent's appeal and order his release upon the posting of bond in the amount of $200,000.

/s/

James P. Morris
Board Member

I concur in the foregoing dissenting opinion.

/s/

Fred W. Vacca
Board Member

[redacted]