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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SREYNUON LUNN,)	
Plaintiff,)	
)	
)	
vs.)	CA No. 17-10938-IT
)	
)	
YOLANDA SMITH, et al,)	
Defendants.)	

BEFORE: THE HONORABLE JUDGE INDIRA TALWANI

HEARING ON MOTION TO DISMISS

John Joseph Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, MA 02210
Thursday, June 22, 2017
2:30 p.m.

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3510
Boston, MA 02210
Mechanical Steno - Transcript by Computer

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:

3 AMERICAN CIVIL LIBERTIES UNION
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7 ON BEHALF OF THE DEFENDANTS:

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P R O C E E D I N G S

1
2 THE CLERK: U.S. District Court is now in session.
3 The Honorable Judge Indira Talwani presiding. This is Case No.
4 17-cv-10938, Lunn v. Smith, et al. Will counsel please
5 identify themselves for the record.

6 MS. LAFAILLE: Good afternoon, your Honor. Adriana
7 LaFaille here with Matthew Segal on behalf of Mr. Lunn.

8 THE COURT: Good afternoon.

9 MS. CONNOLLY: Good afternoon, your Honor. Kathleen
02:33 10 Connolly on behalf of the respondents in this case.

11 THE COURT: Good afternoon.

12 So I've got two motions in front of me. With regard
13 to the motion to -- for reconsideration on the dismissal of the
14 federal defendants, I assume -- there's no opposition to it and
15 you're here. We're arguing this on the mootness grounds. So I
16 assume either you're going to prevail on the mootness grounds,
17 in which case I suppose the motion for reconsideration is
18 itself moot; or if I deny the motion to dismiss on the grounds
19 of mootness, you would not disagree that there's some proper
02:34 20 party at that point that needs to be substituted in. Right now
21 I have only the sheriff, I believe.

22 MS. CONNOLLY: That's correct, your Honor. With
23 respect to the claim they asserted in their petition, it's our
24 position that is moot; and, therefore, we did not file an
25 opposition.

1 THE COURT: Either way, I don't need to worry about
2 that motion. We'll worry -- the motion to dismiss is moot.

3 MS. CONNOLLY: That's correct, your Honor.

4 THE COURT: So that's your motion so I'll let you
5 start.

6 MS. CONNOLLY: Thank you, your Honor. As this Court
7 is aware, it's respondent's position that this case is moot.
8 Mr. Lunn, in his habeas petition, challenged his detention by
9 ICE. Mr. Lunn was released on May 25, 2017. Therefore, his
02:35 10 challenge, his requested relief, has been granted and the case
11 is moot.

12 Now, your Honor, to the extent that Mr. Lunn is asking
13 this Court to issue a future injunction barring ICE from
14 re-detaining him without first coming to this court, such
15 request is improper for a number of reasons. First of all,
16 your Honor, inasmuch as he's requesting ICE come to this court
17 -- or the government come to this court to say it's reasonably
18 likely that he will be removed in the foreseeable future,
19 that's actually prohibited by the REAL ID Act, specifically 8
02:35 20 U.S.C. Section 1252(g), which would prohibit the district court
21 from issuing an opinion related to a decision by the Attorney
22 General to, in relevant part, execute a removal order, which is
23 essentially, I believe, what they're asking this court to do,
24 is say issue an injunction prohibiting this action, which is a
25 direct, in that circumstance, execution of removal order.

1 THE COURT: Let me just back you up a few steps and go
2 a little bit sort of starting with basics here. This is a
3 motion to dismiss on the grounds that it is moot, and you are
4 bringing that as a subject matter jurisdiction argument.
5 You're not simply saying they didn't comply with the statutory
6 requirements under the habeas statute of custody but rather the
7 not in custody makes -- leaves us with no case in controversy.

8 MS. CONNOLLY: That is correct, your Honor.

9 THE COURT: So the record in front of me is not just
02:36 10 the complaint and the allegations in the complaint but as
11 augmented by the affidavits, et cetera, that are -- the rest of
12 the record that's in front of me.

13 MS. CONNOLLY: That's correct, your Honor.

14 THE COURT: Okay. And with regard to the specific
15 facts that I'm dealing with, which seems like it would be
16 helpful for me to understand that, I'm a little -- I'm having a
17 hard time constructing sort of the factual story as both sides
18 have put it. And let me sort of focus in on where my question
19 is because I think this might get a little bit to the heart of
02:37 20 the matter of what the terms of release are and what's the
21 ability to revoke essentially, and that is, that he -- Mr. Lunn
22 was released under -- on conditions originally in 2008,
23 correct?

24 MS. CONNOLLY: That is correct, your Honor.

25 THE COURT: Was that release pursuant to 241.13 or

1 241.4?

2 MS. CONNOLLY: Your Honor, I don't know specifically
3 which -- under which regulatory authority that release was. I
4 do know that ICE determined it was unable to get travel
5 documents to remove him and, therefore, released him under an
6 order of supervision. I do not know precisely which regulation
7 it was under.

8 THE COURT: But it was following -- as I understand
9 this process, if they are unable to get documents and they make
02:38 10 that determination, they then do a release, supervised release;
11 and if at some point it later becomes possible to get
12 documentations, the individual can be brought back in.

13 MS. CONNOLLY: That is one of the circumstances in
14 which they could be brought back in, that's correct, your
15 Honor.

16 THE COURT: The reason I'm focusing on this is that it
17 seems that if he is released pursuant to 241.13 and he's
18 revoked -- he's brought back in because of violations of his
19 conditions, there's a procedure there that says he can be held
02:39 20 for six months, and there's a procedure saying, if it's more
21 serious, you could have criminal charges brought. I think the
22 petitioner is arguing that you would be limited to criminal
23 charges and so forth. But there's a set of debates if that's
24 the way we're proceeding.

25 If, on the other hand, there is no determination that

1 we don't have travel documents but there's simply -- well,
2 strike that. Even under the 24.13 -- 241.13 release, if at
3 some point it becomes evident that you could get the travel
4 documents, you could bring him in for that reason as well.

5 MS. CONNOLLY: That's correct, your Honor.

6 THE COURT: Okay. Alternatively, if he's released
7 under 241.4, then we have this language that seemed troublesome
8 to the Ninth Circuit and to Clark saying, well, if the
9 individual can be revoked simply in the discretion -- exercise
02:40 10 of unlimited discretion, then we have this problem. So it
11 seems sort of -- for me to focus on the mootness question, I
12 need to know the context of the release.

13 MS. CONNOLLY: Sure, your Honor. And, first of all, I
14 will note that the title of Section 241 -- of Regulation 241.13
15 is dealing with the determination when there's a significant
16 likelihood of removing a detained alien.

17 Now, I can say -- I don't know about the 2008 order.
18 I can tell you the release notification that we have before us
19 today -- and that was attached to, I believe, the opposition as
02:41 20 Exhibit B -- discusses you may be brought back in if you
21 violate the conditions of release, one of which is potentially
22 being rearrested on criminal charges.

23 Certainly, there's no -- the release notification is
24 not in any way suggesting that ICE is going to pick someone up
25 -- I've read Clark. Certainly, I've seen the language that is

1 concerning to the Court -- that ICE is just going to
2 willy-nilly pick someone up, I think the language is, that the
3 circumstances of release have been met. That's certainly not
4 what we have in front of us, your Honor.

5 What we have in front of us is a release notification
6 indicating that there's two essentially main ways that he would
7 get picked up again. One is violating the terms of his
8 supervision, which includes, of course, as a subsection, being
9 criminally arrested and charged. The second is if it becomes
02:42 10 reasonably foreseeable that his removal is likely to be removed
11 either to Cambodia or to a third country.

12 THE COURT: So both of those things seem to -- those
13 seem appropriate within this administrative scheme. The part
14 where I'm having a little trouble, and I think speaks to the
15 concern expressed in the petitioner's paper, is if he could
16 just be subject to being picked up without one of those two
17 things being triggered. And the language in the declaration
18 that you filed with the reply brief describing what had
19 happened in the past said, well, he was picked up because he
02:43 20 had violated these state laws. That part seemed fine. But
21 then it continued in each of the cases and said and so, once
22 he's picked up, we've started again figuring out whether we can
23 get travel documents.

24 And the part of that that's problematic for me is that
25 if it is the position that the -- he could be picked up simply

1 for initiating again trying to find documents -- trying to get
2 authorization, then that would suggest he could just be picked
3 up at any time as opposed to one of two things -- concrete
4 things happening. Either he has, in fact, violated a condition
5 or sufficient progress has been made in obtaining travel
6 documents that removal is reasonably foreseeable but that you
7 couldn't just pick him up to say, okay, whenever we have a
8 little bit of time on our docket we'll pick people up and start
9 the process anew. That would seem to be inconsistent with --

02:44 10

MS. CONNOLLY: Your Honor, if your Court -- your
Honor, I think that's explicitly laid out in Zadvydas.

11
12 Certainly, it's not -- in the deposition, where I think there
13 was no -- stating we've picked him up three times: 2008, 2009,
14 and this current detention. In each of those times, it was
15 because he violated his conditions of release. And so one of
16 the things they need to do is look again at those conditions.

17 However, it's not working in a bubble, your Honor.

02:45 20

18 Certainly, he's violated his conditions of release. He's been
19 rearrested. He's brought again to ICE's detention for
violating those conditions of release. And so they're going to
21 look and see have country conditions changed. Is he now likely
22 to get the travel documents such that he could be removed to
23 Cambodia or to a third country?

24 ICE is not picking him up just to see if they could
25 start that process anew. And I agree with the Court on that.

1 And the government and the respondents agree with the Court on
2 that. Certainly, I think the Zadvydas court language is clear
3 that if he violates his conditions of release that is an
4 appropriate reason for him to be detained but not just picking
5 him up willy-nilly.

6 THE COURT: So I think the point of divergence might
7 be the following: Mr. Lunn does -- you're saying that it's the
8 government's position that if Mr. Lunn doesn't do anything to
9 violate the terms of his conditions of release until there is a
02:46 10 substantial likelihood that he can now be removed he wouldn't
11 be picked up. But you're then saying, but if he is picked up
12 for violating, we can then keep him while we are trying to
13 figure out whether we can get the travel papers again. And I'm
14 questioning, once you pick him up, isn't the appropriate
15 question simply what's the proper punishment for violating
16 these conditions of release and that that is sort of on a
17 separate track from the question of let's start all over and
18 get the documents?

19 MS. CONNOLLY: Well, your Honor, a couple of things to
02:46 20 that point. First of all, with the exception of this -- if the
21 violation would result in criminal charges, the detention is
22 not a punitive thing. There's two purposes of detention in the
23 immigration context, which is to see can this person be
24 removed. They've got a final order. Can they be removed? And
25 then, certainly, we look at their conditions of release. Can

1 we effect these conditions? Can we alter these conditions?

2 ICE -- certainly, country conditions change over time,
3 your Honor, and so, yes, he, on those occasions, was brought in
4 and picked up because he's violated his release. But ICE at
5 that time is looking to say, okay, have things changed such
6 that his removal is reasonably foreseeable now? Certainly,
7 that is not prohibited under the language of Zadvydas. That's
8 not prohibited by the statutes or regulations. It's not -- the
9 government agrees with --

02:47 10 THE COURT: Actually, I would say the following: Not
11 only is it not prohibited but the government -- there's nothing
12 to suggest the government shouldn't be trying to find out this
13 question all the time once there's a final order of removal.

14 I think my only question is: Do you detain him for
15 that reason? If you're detaining him for the fact that he has
16 violated his conditions of release -- you're saying it's not
17 punitive, but it does seem you have authority to -- under
18 241.13, you have authority to hold him. "The alien may be
19 continued in detention for an additional six months in order to
02:48 20 effect the alien's removal, if possible, and to effect the
21 conditions under which the alien had been released."

22 I guess it isn't a punitive -- to effect the
23 conditions may be a punitive or may be trying to get compliance
24 with conditions.

25 MS. CONNOLLY: And also to see if -- has the country

1 conditions changed at this point such that he is now reasonably
2 likely to be removed.

3 I will note, your Honor, that on all of the occasions
4 that ICE then released him from custody it was upon a fresh
5 determination, no, it's not reasonably foreseeable that he's
6 likely to be removed so -- at this time. And so ICE is looking
7 at both of those, but ICE would not, as the Court asked
8 earlier, just say, all right. We're ready to start looking
9 into this again. Let's just pick him up for no reason. That's
02:49 10 not at all what ICE is doing. That's not what his release
11 order indicates ICE will do. That's not what Zadvydas stands
12 for.

13 Certainly, he -- when they pick him up -- it's one of
14 these things where they pick him up. He's violated his
15 conditions. He's brought to their forefront as more of a
16 priority. Let's see if country conditions have changed. Let's
17 see if he can be removed now. He's had this final order since
18 2008. Just because he was not removable back then does not
19 mean that things have not changed such that he could be
02:50 20 removable now. And so that is happening when he is detained.

21 THE COURT: But just to be very clear, the government
22 does not take the position that he is subject to detention at
23 the outset of looking in again to find out whether we can get
24 the travel papers in the absence of his violations?

25 MS. CONNOLLY: That is correct, your Honor.

1 THE COURT: Okay. So let me see if that portion of
2 the argument, I can hear some response from petitioner's
3 counsel.

4 MS. LAFAILLE: Good afternoon, your Honor. Your
5 Honor's questions are going to the heart of the dispute on the
6 merits here. Your Honor is describing the circumstance that
7 Mr. Lunn believes would be constitutional, or at least as I
8 understand what your Honor is describing, a circumstance in
9 which he could only be taken into custody if he violated his
02:51 10 conditions and were subject to criminal prosecution for that
11 violation.

12 THE COURT: Okay. So that's a divergence there.
13 You're saying that you think that if he -- if the matter is not
14 referred for criminal prosecution, then he could not be brought
15 in?

16 MS. LAFAILLE: Unless there was a reasonable -- there
17 was a significant likelihood that his removal is reasonably
18 foreseeable.

19 THE COURT: Putting that aside, just turning to the
02:51 20 violation of the conditions of release, are you saying that
21 this section under 241.13 -- I understand there are problems
22 with 241.4. But under 241.13, where it says that they can
23 detain him for six months, are you saying that that only
24 applies if they also seek criminal charges, or are you saying
25 it doesn't apply at all and it's unconstitutional or improper?

1 And there's the language here --

2 MS. LAFAILLE: Right.

3 THE COURT: -- that says -- this is under 241.13(i),
4 "Revocation of Release."

5 MS. LAFAILLE: Right. So I'd like to distinguish,
6 your Honor, maybe what we think would be the rule in this case
7 if we win versus the circumstance that Mr. Lunn finds himself
8 in now. And the debate that we're having here with the
9 government demonstrates very clearly that the circumstance that
02:52 10 Mr. Lunn finds himself in now is very different than the one he
11 would find himself in if he were to prevail in his habeas.

12 THE COURT: Okay. I'm not sure I see the differences,
13 so why don't you tell me those.

14 MS. LAFAILLE: So if he were to prevail -- and this
15 case is squarely on point with Clark, and this is the point
16 made by the Supreme Court in Clark. If the petitioner there
17 were to prevail, just like Mr. Lunn, he would be subject to
18 re-detention if removal were reasonably foreseeable or if he
19 were being criminally prosecuted for a violation of conditions.

02:53 20 But what cannot happen is simply being brought in to
21 be essentially held punitively in civil detention, without
22 trial, because of a violation of conditions to begin a process
23 of exploration of removal to a country where he has never
24 stepped foot and has continuously denied that he's a citizen.

25 THE COURT: So I have concerns about the beginning the

1 process of trying to make this determination. But I am not
2 sure I can go as far as you're suggesting that to say that the
3 government has the obligation to let people out of detention
4 after a certain period of time. They're permitted to do that
5 with conditions of release but that the only way they can
6 enforce the conditions of release is by bringing a new criminal
7 prosecution, and that in the absence of a new criminal
8 prosecution -- so, for example, if the individual is supposed
9 to be checking in every few months with the office to see
02:54 10 what's happened with -- whether some more documents are needed
11 or something. They're supposed to be showing up to do that and
12 he just doesn't show. What I hear you're saying is they don't
13 have the option of just pulling him in for a while, but they
14 would rather have to refer it to the U.S. Attorney for criminal
15 prosecution.

16 MS. LAFAILLE: Well, government counsel alluded to the
17 fact that someone who violates their conditions might become a
18 higher priority, and that exploration could certainly begin
19 while someone was out of custody. And perhaps that person
02:55 20 would find themselves in a situation they didn't want to be in
21 if they suddenly became a higher priority for ICE to obtain
22 their travel documents.

23 But I think what we're getting at here is that,
24 regardless of whether at the merits we completely persuade you
25 of our point of view, we're still talking about a circumstance

1 here that's different than the custody that Mr. Lunn currently
2 finds himself in, and that's why there is relief that this
3 court can order which, again, we hope would follow briefing on
4 the merits but --

5 THE COURT: But your argument is premised on my
6 finding this regulation then invalid. This regulation says
7 that in these circumstances -- and I would give you that it's
8 not clear he was released under --

9 MS. LAFAILLE: Can I speak to that briefly, your
02:56 10 Honor?

11 THE COURT: Yes.

12 MS. LAFAILLE: I think it is quite clear that we're
13 not in 241.13 territory. I think it's clear we're in 241.4.

14 THE COURT: You say that because of --

15 MS. LAFAILLE: Because there's -- 241.13 is a
16 headquarters review process.

17 THE COURT: But there is a -- within 241.13, there are
18 two provisions that seem very important here. One was
19 Subsection (h), which sets the conditions of release --

02:56 20 MS. LAFAILLE: Right.

21 THE COURT: -- for a person in this circumstance; and
22 the other is Subsection (i), which describes the revocation of
23 release for a person in those circumstances.

24 MS. LAFAILLE: Right. That's where the procedures of
25 241.13 have been followed, as your Honor pointed out earlier.

1 I think --

2 THE COURT: And you're saying it has because they've
3 made a determination, in 2008 and then subsequently. At each
4 of those times, they made a determination that his travel
5 documents were not going to be forthcoming.

6 MS. LAFAILLE: Well, certainly, someone in -- as I
7 read the Piepiora affidavit, someone in ICE in Boston realized
8 that this individual should be released, as they do, right?
9 The folks at the ICE office in Boston review the custody of
02:57 10 those who are within their jurisdiction and made a
11 determination to release Mr. Lunn. And we can debate whether
12 that was influenced by this litigation being filed three days
13 earlier or not. But that's quite different than the procedures
14 -- the specific procedures of headquarters review triggered by
15 a non-citizen's request that are outlined in 241.13. And the
16 repeated --

17 THE COURT: Bear with me. I tend to sometimes think
18 these things through in hypothetical ways because it may be
19 that the outcome here is you're right. This all happened only
02:58 20 under 241.4 and you can proceed. And then in a week they're
21 going to reissue this under 241.13, and then we're back into
22 that section. Just bear with me for a minute to sort of push
23 on this point.

24 If the release was pursuant to 241.13 and the
25 revocation was pursuant to 241.13, that regulation states that

1 if he is -- if he, among other things, violates his conditions
2 of supervised release, it says he may be in continued --
3 continued in detention for an additional six months.

4 So are you saying that, you know, the case here is
5 only that they haven't gone through this process, they're under
6 241.14 [sic], and, therefore, we've got this sheer discretion
7 revocation -- discretionary revocation, which is suspect under
8 the cases you cited, but that if they had done it here, it
9 would be fine, or are you saying this would be improper as
02:59 10 well, and I would not be able to follow the regs here? I would
11 have to invalidate it?

12 MS. LAFAILLE: Your Honor, I think your Honor's
13 question is if we concede that this regime comports with the
14 requirements of Zadvydas.

15 THE COURT: That's my question.

16 MS. LAFAILLE: I don't concede that it does, no,
17 although perhaps there would be a way to interpret it within
18 the limits of the Constitution to provide for an authority that
19 was somewhat narrower than that which I see coming across on
03:00 20 the plain text.

21 What I can look at is the government's treatment of
22 Mr. Lunn to this day has not comported -- whether it's been
23 under this provision or under 241.4, has not comported with the
24 requirements of Zadvydas because, even though there has been no
25 evidence of any reasonable likelihood of removal, the

1 government has repeatedly detained him simply to begin the
2 process of an exploration into whether they could obtain
3 evidence sufficient to remove him.

4 THE COURT: So here's the problem with the logic of
5 that position, though, which is -- their answer is the reason
6 we're picking him up is because he's violating the terms of
7 release. And I've certainly had the arguments in front of me
8 in other cases where somebody is saying -- whether it's a
9 criminal defendant or a situation where they're being detained
03:01 10 for other reasons, but people are saying, Let me out while
11 something is being resolved. And the answer is, it's not safe
12 or it's dangerous or there's some risk. And the answer then is
13 always, well, look, we can put in place terms of release.

14 And that's certainly what happened in Zadvydas, right?
15 There was a lot of argument saying -- pushing back, saying we
16 have to keep these people in prison or in detention. And the
17 push-back was we can give people freedom from custodial -- that
18 type of a situation and at the same time protect the interest
19 that's being pushed by people who are urging detention by
03:02 20 having conditions of release.

21 And what you're saying to me here is but those
22 conditions of release can't really be enforced. I think that's
23 what you're saying, or that the only way that those conditions
24 of release can be enforced is through new criminal procedures.

25 MS. LAFAILLE: Well, I guess I have two points in

1 response to that. One is that I think the fact that we're
2 having this discussion demonstrates -- is enough for us to
3 prevail today because it demonstrates that there is relief that
4 Mr. Lunn is seeking and that this court could grant. Now, this
5 court may ultimately disagree with us on the merits, but I
6 think the existence of this discussion is demonstrating that
7 the case is not moot right now and that Mr. Lunn is certainly
8 someone who seeks a ruling from this court that would put him
9 in a very different position than the release that he is under
03:03 10 now. And in that respect, I think we're really on all fours
11 with Clark, which is almost -- applying an almost verbatim
12 regulation to the one that I think is at issue here.

13 THE COURT: Does either side have a document which
14 sets forth his conditions of release?

15 MS. CONNOLLY: Yes, your Honor.

16 THE COURT: It's not part of the record, is it?

17 MS. CONNOLLY: Yes, your Honor. I believe it was
18 attached to petitioner's declaration of Kim Nemirow in their
19 opposition. And there's the order of supervision as well as
03:04 20 the release notification were both attached to the declaration
21 as part of the opposition. And the order of supervision has
22 the specific things, and the release notification discusses
23 what will happen if he doesn't comply.

24 THE COURT: Okay. It doesn't say on its face which
25 provision it's under. I'm sorry. You said it says there what

1 would happen if he violates?

2 MS. CONNOLLY: Exhibit B, your Honor, the one right
3 after that, is the release notification addressed to Mr. Lunn
4 explaining that he's subject to these conditions and what will
5 happen if he violates.

6 THE COURT: Okay. So petitioner at this juncture,
7 you're saying that these conditions of release are improper?
8 That's the gist of your case in controversy, is saying that he
9 shouldn't be held simply because he violates these things?

03:05 10 MS. LAFAILLE: That's right, your Honor, and that,
11 just as courts have done in Clark and Rodriguez, the Court
12 should adjudicate the merits of the underlying claim, the
13 challenge to the underlying detention, even -- because it's not
14 been rendered moot by the petitioner's release at least.
15 Certainly, the government --

16 THE COURT: Isn't the difference between this and
17 Clark, et cetera, is that this doesn't say -- what Clark and
18 Rodriguez said was, look, the government retained the
19 discretion -- the ability -- or Rodriguez says, I guess I
03:06 20 should say, is the government retained the ability to simply
21 revoke conditions at its discretion, that that discretion was
22 unlimited and unbridled and, therefore, that couldn't possibly
23 be right, whereas this says we have -- we can revoke your
24 release if you violate these specific provisions. That seems
25 fairly different.

1 MS. LAFAILLE: Well, nothing here, your Honor,
2 disavows the authority that is -- that 241.4 purports to grant.
3 This is -- it's really exactly the same as Clark, in our view,
4 because there it's not -- there may have been an identical
5 document in Clark, but there was a regulation that provided
6 broad re-detention authority.

7 The same regulation -- again, it's the government's
8 burden, and the government has certainly not shown that these
9 issues are rendered moot because of its -- we're actually under
03:07 10 241.13 or anything like that. 241.4 is really -- is almost
11 verbatim the same as the regulation at issue in Clark. It
12 provides that same authority to re-detain at the government's
13 discretion.

14 THE COURT: Don't you have to show me that there is
15 some reason to -- even if they have that authority, if I'm
16 trying to look here at whether you survive a mootness challenge
17 when he's now released, I have to look at the likelihood that
18 he will be pulled for no reason or just on their discretion to
19 start it again. And I don't have that.

03:08 20 I have them pulling him for violating a condition.
21 You might have an argument as to the length of time they're
22 keeping him or what they're doing once they're keeping him.
23 But I don't think I just have -- I don't think I have the
24 question that's posed there, which is simply saying, you know,
25 if someone can be -- have their conditions of release pulled at

1 the whim, then that's really no different than having you in
2 custody. Here, they're saying, we can have your conditions of
3 release pulled if you violate one of those things. That seems
4 different.

5 And so if you can point to why I would think here that
6 the record supports the view that he can be released -- that he
7 has a reasonable -- that it's reasonably likely that he will
8 just be pulled at whim. I mean, we have no past here. I don't
9 think there's any disagreement on this record, is there, that
03:09 10 the only times he's being pulled into custody is when he is
11 arrested for a violation of law?

12 MS. LAFAILLE: But none of that, your Honor,
13 distinguishes this case from Clark. Clark was also not a case
14 where the petitioner demonstrated any likelihood that he would
15 ever be re-detained. In fact, Clark had been released once and
16 had never been re-detained. Here it's even stronger. He
17 actually has been re-detained a couple of times.

18 I'd also point your Honor to the language in the
19 recent Piepiora declaration which actually says that because
03:09 20 the Cambodian documents -- excuse me, the Cambodian consulate
21 may be issuing travel documents. And, again, we're talking
22 about someone who the Cambodian consulate has never recognized
23 as a citizen. But because they may be issuing travel documents
24 to some of their nationals, it will be necessary, is the
25 language of the declaration -- it will be necessary to

1 re-detain Mr. Lunn for the purpose of taking him to an
2 interview, which he hasn't even been asked to appear at of his
3 own freewill. The government is already --

4 THE COURT: I actually found that part the most --
5 very puzzling part of the affidavit. Why would he have to be
6 detained rather than simply ordered to go to the interview?

7 MS. CONNOLLY: Sure, your Honor. The background is,
8 is that when these interviews are scheduled -- and they are
9 scheduled as part of the process of removing someone. They're
03:10 10 not just scheduling these unless there's an indication the
11 person is likely to be removed. But these interviews have to
12 take place at a central location because the consulate
13 interviews the people. Usually what happens is ICE -- they
14 detain the person, and then often they're relocated outside of
15 the jurisdiction such that the consulate can conduct this
16 interview. And so --

17 THE COURT: Consulate is -- there's no consulate here
18 in Boston?

19 MS. CONNOLLY: I don't know if there is or is not a
03:11 20 consulate in Boston, your Honor. Certainly, I could get that
21 information to the Court.

22 What I do know is that, just procedurally speaking,
23 how these interviews take place are often people are taken from
24 wherever they may be in the country to a central location to be
25 interviewed by the consulate. That's why they are taken into

1 detention.

2 But, again, your Honor, that's part of the removal
3 process. So that interview is occurring as part of the
4 reasonably foreseeable -- likelihood that he will be removed.
5 That's part of that. The interview is a step of that. That's
6 when we enter into 1252 land.

7 THE COURT: I think the question there with that
8 timeline and what you're allowed to do, for whatever time
9 period you're allowed to do it, is you get to do some things
03:11 10 while you're holding them in custody. And then it seems, after
11 that, you can keep on trying to do these things; and when it is
12 then foreseeable that they will be able to get the travel
13 documents, you can pull them again. But absent some other
14 problem, to just keep saying we want -- relationships have
15 thawed so we want to start our six months again or start -- I
16 don't think that would be appropriate.

17 MS. CONNOLLY: No, your Honor. To the extent that
18 that's what this conveyed, that was not what Paragraph 10 was
19 about. It was -- if Cambodia starts issuing -- which we know
03:12 20 they've already started doing for their citizens. If it looks
21 like Mr. Lunn specifically is going to be removed, his
22 interview is part of that removal process and so --

23 THE COURT: If they were to start giving travel
24 documents to individuals who were born in a refugee camp in
25 Thailand, then that would sound like you're getting close. But

1 simply that they're giving people travel documents wouldn't get
2 you there.

3 MS. CONNOLLY: Not at all, your Honor. That's why,
4 certainly, the -- country conditions are always changing,
5 right? None of us can say what's going to happen with the
6 Cambodian -- with these things, with what they're going to be
7 doing or what they are doing. But, certainly, if it is a
8 possibility that Mr. Lunn -- if it's reasonably likely that Mr.
9 Lunn is going to be removed, this interview is a step in that
03:13 10 process. They often have to move the petitioner from -- or the
11 alien from where he may be to the location so they can be
12 interviewed at the consulate. It's part of a step of getting
13 the travel documents. So it's part of the removal process
14 itself.

15 Certainly, I agree with -- I think what the Court's
16 point is -- and the respondents agree -- that just the fact
17 that Cambodia may be issuing travel documents is not reason to
18 pick up Mr. Lunn, absolutely. And, certainly, that's not a
19 circumstance ICE would pick up Mr. Lunn. It's if an interview
03:13 20 is scheduled specifically for Mr. Lunn to begin his -- to begin
21 that process of getting the travel documents, which help
22 actually physically his removal, that interview is part of that
23 removal process.

24 THE COURT: I guess I'm still a little bit of a
25 different understanding of what the Supreme Court has said

1 here, or maybe it's a different understanding of how travel
2 documents are obtained. But as I understand the inquiry, there
3 is a period of time that is given to the government to hold a
4 person while they are trying to go through these many steps.
5 That time doesn't keep getting restarted simply because
6 political conditions have changed.

7 Instead, it seems like you have this initial period of
8 time. When that initial period of time is over, the person is
9 released. If subsequently you get documents and he's now -- it
03:15 10 is now foreseeable, then you get to pick him up again. Maybe
11 you don't actually have to have the document. Maybe the
12 government says all things are go. We're just making that last
13 phone call to your current employer, but everything else is
14 already all square. We're in the last step. That might make
15 sense what you're saying.

16 But to the extent what you're saying is the effort to
17 get travel documents has six different steps and a lot of them
18 happen before a country makes its discretionary decision about
19 what it's going to do, we don't actually have any control about
03:15 20 what they're going to do; but once we're in that process, we
21 can pick him up, that doesn't seem consistent with Zadvydas.

22 MS. CONNOLLY: Certainly, your Honor, if there's
23 changed circumstances such that Cambodia -- and this is a
24 hypothetical. Certainly, if there's changed circumstances such
25 as that Cambodia says we're now accepting back people who fled

1 during the Khmer Rouge, were born in a refugee camp, parents
2 were Cambodian citizens, we're now recognizing them and
3 returning them back, changed circumstance. That could be a
4 changed circumstance such that his detention would be
5 authorized pursuant to Zadvydas and the line of cases related
6 to this.

7 I don't -- I don't know, and I certainly am not
8 purporting to assert on behalf of the government, at what stage
9 a foreign entity makes the decision definitely, yes, we are or
03:16 10 not going to take this person back. Certainly, it's -- it's
11 the reasonable likelihood language and it's the reasonable
12 likelihood that this person can be removed that we can get
13 these travel documents for this person and have them removed,
14 that is certainly the triggering language under the case law
15 and under the statute.

16 THE COURT: So just to bring this now back to
17 mootness.

18 MS. CONNOLLY: Yes.

19 THE COURT: It is your position that he's currently
03:17 20 released, and he won't be picked up again unless he has -- he
21 violates a condition of release and/or those travel documents
22 are now reasonably likely?

23 MS. CONNOLLY: A changed circumstance, your Honor.

24 THE COURT: A changed circumstance sufficient to what?
25 What would the --

1 MS. CONNOLLY: A changed circumstance such that it
2 appears reasonably likely that he's going to be removed in the
3 reasonably foreseeable future.

4 THE COURT: And if he is picked up for violating
5 supervised release, your position is how long can you hold him?

6 MS. CONNOLLY: Well, your Honor, if he's picked up for
7 violating supervised release, he certainly can't be
8 indefinitely held. The -- ICE is permitted to see, okay, have
9 conditions changed at this point? He's brought to our
03:18 10 forefront. He's now a priority. Can we get these documents?
11 Can we get him removed? If you look at the history of this
12 case, that has played out. In each circumstance where it's
13 been determined, no, he's now not likely to be removed, they've
14 released him. That's what happened in 2009 with his initial
15 release -- 2008 with his initial release, 2010 with his second
16 release; and, again, on May 25th of this year, there was fresh
17 information about that.

18 So, certainly, yes, he's bringing himself to ICE's
19 attention with violating his conditions of release. ICE is
03:18 20 permitted at that point to look and say, okay, have conditions
21 changed? Can we effectuate his removal? Certainly, that is
22 subject to all of the strictures in place from the Supreme
23 Court and from the statutes. They can't hold him for, you
24 know, five years while they're trying to see if they can remove
25 him. Certainly, that's not happened in this case. Each time

1 they've released him upon discovering, okay, this still isn't
2 going to happen; this still isn't going to happen.

3 THE COURT: Why doesn't that resolve the -- why isn't
4 the answer here that I write a memorandum and opinion saying
5 here is the past record of what has happened? Here is what
6 they state on the record their position is. Based on that,
7 there's no likelihood he's just going to be randomly picked up.
8 And if he's picked up in this manner, that wouldn't be cause
9 for concern; and, therefore, it appears that this is moot.

03:19 10 This is dismissed. And then if he does get picked up, you file
11 again.

12 MS. LAFAILLE: Well, let me start with the that
13 wouldn't be cause for concern portion of what your Honor just
14 said. In the government's view, even if we just stick to what
15 the government said now, one of Mr. Lunn's conditions of his
16 release is that he follow doctor's orders, that he take every
17 medication prescribed to him by a doctor. These are the
18 conditions by which he's bound right now and for which he can
19 be put, in the government's view, into detention for violating.
03:20 20 Our view is that's not consistent with the Constitution, and
21 because --

22 THE COURT: Wouldn't he have -- if he has problems
23 with the terms of his supervised release, isn't there a
24 procedure through Immigration for raising and seeking
25 modification of those terms?

1 MS. LAFAILLE: I'm not aware that there is one, your
2 Honor, that would satisfy the requirements of due process. But
3 I think this goes to a more fundamental point here. Mr. Lunn
4 has been effectively in custody for the past nine years.
5 Now --

6 THE COURT: But here's my problem with that: I
7 understand, as a practical matter, that it may well feel like
8 that to him. But you've got the courts and the agency trying
9 to sort of balance a scheme where you have, on the one hand,
03:21 10 due process concerns so that somebody isn't held with all of
11 their liberties taken away; and, on the other hand, you have
12 concern that the government has a right to say these are our
13 borders and these are our rules; and if you don't have a right
14 to be here, you don't get to just be wandering around. That's
15 why, you know, they use these wonderful terms like paroling you
16 into the country, and there's sort of this idea that you're
17 here but you're not really here.

18 I mean, what you're saying is, at its core, you don't
19 want him under release -- under supervision. There's no way
03:22 20 you're going to be able certainly -- even if you could convince
21 me of that, you're not going to convince anybody, as this thing
22 would make its way up, that you're to be able to say --

23 MS. LAFAILLE: That's not our argument.

24 THE COURT: -- these people can go and not have
25 custodial status or not have supervision because any

1 supervision would be custodial.

2 MS. LAFAILLE: Right. And that's not our argument.
3 Our argument is that any re-detention has to be because of a
4 reasonable likelihood that he's going to be removed.

5 THE COURT: That removes -- that takes -- that puts
6 the agents -- puts the government and the courts in the
7 position of saying, when these cases are presented to us, yeah,
8 you know, you've got this nice due process rights, but we're
9 worried about the community. So since we're not allowed to put
03:22 10 any conditions of supervision, we're going to have to keep him
11 in detention. That's where that argument pushes to. If you
12 can't have enforceable conditions of release --

13 MS. LAFAILLE: Right.

14 THE COURT: -- everybody says, well, then just retain
15 him. You're saying we prevailed -- he shouldn't be detained.
16 But now that he's being released, you can't have -- you can't
17 put restrictions on it.

18 MS. LAFAILLE: But, your Honor, I think -- there's a
19 couple points I want to say. One is that we haven't had the
03:23 20 opportunity to brief these issues, and we would like the chance
21 to persuade your Honor that more is required by Zadvydas and by
22 Clark than a world in which Mr. Lunn, someone with mental
23 illness, with addiction, reflected -- as reflected in these
24 very conditions of release, is subject to being re-detained any
25 time he fails to take medication or runs into trouble with our

1 state criminal laws and held punitively -- essentially
2 punitively for a period of time. That's an argument we would
3 like to be able to brief and argue here on the merits.

4 But as to mootness, the government has clearly not met
5 its burden to show that there is no relief that Mr. Lunn could
6 seek even if we were to take -- I mean, there's nothing, first
7 of all, here that disavows the authority in 241.4, and that's
8 why we think we're in line. We're well within the territory of
9 Clark.

03:24 10 But also, I think, more directly in this case, we
11 cannot ignore the affidavit of the person most closely involved
12 with Mr. Lunn's custody, and that's Officer Piepiora, who says
13 it will be necessary to detain Mr. Lunn for the simple purpose
14 of making him appear for an interview.

15 There's a Cambodian consulate in Lowell, by the way,
16 is the answer to your Honor's question about that. I don't
17 know if that's where interviews are held, but I do know that
18 there's a consulate there.

19 Because of issues like that, your Honor, there are
03:25 20 disputes here. There are facts that I think we need to get to
21 about exactly what has happened each time that Mr. Lunn has
22 been re-detained. We don't have those records. We hope to get
23 those records. You know, we hope to survive this stage of the
24 case and get those records and be able to make argument here on
25 the merits.

1 But it cannot be that Mr. Lunn is simply put in a
2 place where he can be re-detained at any time and the only
3 answer is that, well, if it's a problem, he can gather up the
4 necessary resources to bring a habeas petition that a court
5 will likely not be able to adjudicate because he will be
6 released before that happens.

7 THE COURT: Is there -- are there provisions for
8 challenging the terms of release?

9 MS. CONNOLLY: The order of supervision, your Honor?

03:25 10 THE COURT: Sorry?

11 MS. CONNOLLY: I'm sorry. For challenging the order
12 of supervision?

13 THE COURT: Yeah.

14 MS. CONNOLLY: Your Honor, my understanding is that
15 the order of supervision is put in place by ICE; and,
16 certainly, if a petitioner wanted to challenge that, they could
17 bring an APA complaint in the district court. That's my
18 understanding of that process. Now, I will say --

19 THE COURT: There's no internal challenges to seeking
03:26 20 modification of conditions?

21 MS. CONNOLLY: Your Honor, I confess to the Court, I'm
22 still trying to get that answer from ICE. I asked them as
23 recently as this morning, and I'm still waiting to get specific
24 confirmation of that. Not that I'm aware of, but I can provide
25 that follow-up information to the Court.

1 Certainly, your Honor, it's -- with respect to the
2 mootness argument, it is our position that -- as the Court is
3 aware, that this is moot. And, certainly, his habeas petition
4 requested his release and asked for a future order. He has
5 been released. The future order they're asking for would be
6 barred by 1252.

7 And with respect to his conditions of release, your
8 Honor, certainly, one, that wasn't part of their petition, of
9 course, because at the time he was being detained, and so
03:27 10 they're raising it in their opposition and now arguing. But
11 even putting that procedural issue aside, these conditions have
12 -- are appropriate under the case law. They are appropriate
13 under Zadvydas. There's courts in this -- in the District of
14 Massachusetts who have looked at conditions and found that they
15 are not a constitutional violation. And so -- and conditions
16 such as the ones in this case.

17 So, I mean, that's sort of jumping ahead to the
18 merits. But, again, your Honor, it's our position that, short
19 of him being released without any conditions at all, which,
03:27 20 essentially, I guess, is what he's asking for, one, that's not
21 even appropriately before this Court at this time; but, two,
22 that's not a viable option given the explicit language of
23 Zadvydas, which says that these conditions are permissible on
24 release of an alien with a final order of removal.

25 THE COURT: Okay. I have lots to think about here. I

1 will go back and read these cases a little bit further. I'll
2 take it under submission.

3 MS. CONNOLLY: Thank you, your Honor.

4 THE CLERK: Court is in recess. All rise.

5 THE COURT: This is a matter unrelated to the
6 proceedings here, but I just had a sentencing this morning
7 regarding an unlawful reentry case. And as part of the facts
8 involved there, this individual was arrested on his way -- was
9 detained on his way into a court appearance in state court.

03:29 10 It really interferes with our judicial processes if we
11 order people to appear and they're stopped from appearing
12 before us or before the state courts on the courthouse steps.
13 They are then in violation of a court order because they were
14 detained by the government.

15 So if you're talking to folks there, at least from
16 this judge, that seems to be interfering with our court orders.
17 I don't see any reason that the ICE officials can't walk into
18 the courtroom and inform the judge what the issue is and that
19 they would like the custody to go to them rather than to the
03:30 20 state or rather than having the person released on their own
21 recognition. But to stop an individual from complying with a
22 court order seems problematic so if you could please convey
23 that. Thank you.

24 MS. CONNOLLY: Yes, your Honor.

25 THE CLERK: All rise.

1 (Whereupon, at 3:30 p.m. the hearing concluded.)

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C E R T I F I C A T E

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I certify that the foregoing is a correct transcript
9 of the record of proceedings in the above-entitled matter to
10 the best of my skill and ability.

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/s/Cheryl Dahlstrom

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Cheryl Dahlstrom, RMR, CRR

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Official Court Reporter

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Dated: August 1, 2017

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