

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G.F.F.,

Petitioner,

v.

LaDeon FRANCIS, *et al.*,

Respondents.

Case No. 25-CV-7368 (JGK)

ORAL ARGUMENT REQUESTED

PETITIONER'S REPLY IN SUPPORT OF PETITIONER'S MOTION
TO ENFORCE THE COURT'S MEMORANDUM OPINION AND ORDER

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INTRODUCTION

Respondents' defense of the Immigration Judge's ("IJ") failure to comply with this Court's order misses the mark for three reasons. First, while Respondents concede that the IJ conducted no explicit analysis and made no findings on the record with respect to monetary bond and available alternatives to detention, they nevertheless ask this court to simply disregard these material omissions and clear violations of this Court's order. Second, Respondents ask the Court to abandon a fundamental principle of burden of proof: the party bearing the burden must present its case first and carry the burden of persuasion. ICE was to bear that burden, yet the IJ required G.F.F. to testify on cross-examination prior to ICE's presentation of their case, flouting that basic principle and violating this Court's order. Third, there is no support in the record for Respondents contention that Immigration and Customs Enforcement's ("ICE") evidence was sufficient, as a matter of law, to demonstrate that G.F.F. presented a flight risk that could not be mitigated by alternatives to detention and monetary bond.

Respondents do not dispute that the government's numerous violations of this Court's order have resulted in irreparable harm to G.F.F., a 22-year old asylum-seeker with no criminal history. This Court should order Respondents to immediately release G.F.F. on his own recognizance or subject to reasonable conditions, or in the alternative hold its own bond hearing.

ARGUMENT

I. Respondents' Concessions Make Clear that the IJ Did Not Consider Monetary Bond and Available Alternatives to Detention in Accordance with this Court's Order.

a. Respondents concede that the IJ did not explicitly consider monetary bond.

First, Respondents concede that “the IJ did not expressly consider monetary bond” even though Petitioner requested release on a reasonable bond amount. Opp. at 16, 17. That is a clear violation of this Court’s order to hold “a renewed bond hearing,” “determin[e] whether to grant bond,” and “consider the availability of alternatives to detention.” Memorandum Opinion and Order (“Order”) at 17, 19 (ECF No. 17). An IJ must consider monetary bond in an immigration bond hearing. 8 U.S.C. § 1226(a)(2)(A). “When a plausible, less restrictive alternative is offered to a regulation burdening a constitutional right, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.” *Hernandez-Aviles v. Decker*, No. 20 CIV. 7636 (ER), 2020 WL 5836519, at *2 (S.D.N.Y. Oct. 1, 2020) (citation and quotation omitted). This Court having ordered a “renewed bond hearing” with additional constitutional protections, the IJ’s failure to make a determination on monetary bond amounts to a clear violation of § 1226(a)(2)(A) and this Court’s order. Order 17, 19.

Respondents defense of the IJ’s failure to consider monetary bond fails for three reasons. First, Respondents do not dispute that 1) the IJ should have considered monetary bond; 2) that the IJ should have considered G.F.F.’s financial incentives when considering monetary bond; and 3) counsel for G.F.F. presented monetary bond

as a release option. Respondent's Opposition to Petitioner's Motion to Enforce ("Opp.") at 16–17 (ECF No. 25).

Second, Respondents ask this Court to assume that the IJ "implicitly" considered monetary bond. Opp. at 16. However, there is no basis in the record to support that assumption because the IJ never considered G.F.F.'s financial incentives and ability to pay, which Respondents do not dispute.¹ Opp. at 16–17. Respondents argue that consideration of ability to pay is only relevant when setting a bond amount. Opp. at 17. Yet setting a bond amount could include not setting one at all. *O.F.C. v. Decker*, No. 22 CIV. 2255 (JPC), 2022 WL 4448728, at *10 (S.D.N.Y. Sept. 12, 2022) ("[I]n any bond hearing afforded to Petitioner, the IJ must consider alternative conditions of release and Petitioner's ability to pay"). Respondents' argument fails because consideration of ability to pay and financial incentives is essential to consideration of whether a monetary bond is necessary to mitigate flight risk.

Third, Respondents ask this Court to overlook the IJ's failure to consider monetary bond by claiming that the IJ's finding of "flight risk" and inadequate safeguards was sufficient. Opp. at 16. But "address[ing] alternatives to detention in

¹ In Respondents' description of the bond hearing, they cite to IJ's statement directly addressing G.F.F. with respect to his decision, Opp. at 7, but that direct address occurred after the bond hearing, after the IJ issued his decision and asked the parties whether they planned to reserve appeal. Tr. 01:45:31.

conclusory terms” is not enough to satisfy this Court’s order. *R.R.M.C. v. Decker*, No. 22 CIV. 2952 (LGS), 2022 WL 4639674, at *5 (S.D.N.Y. Sept. 30, 2022). Due process requires that as part of any flight risk or danger analysis, ICE must bear the burden of proof on alternatives to detention. Order at 16; *Mathon v. Searls*, 623 F. Supp. 3d 203, 218 (W.D.N.Y. 2022). And given Respondents’ concession that the IJ did not explicitly consider monetary bond, financial incentives, or ability to pay, the record reflects a clear violation of this Court’s order. Pet’r Memorandum of Law in Support of Motion to Enforce (“Pet’r Br.”) at 14 (ECF No. 19).

b. Respondents concede that the IJ never considered an available alternative condition of detention.

Respondents concede that the IJ did not explicitly consider all available alternatives to detention, including home confinement. Opp. at 16 fn. 4. Yet, Respondents urge this Court to excuse that violation of this Court’s order because G.F.F.’s attorney did not present home confinement as an option. *Id.* But even if G.F.F.’s attorney did not present every alternative, that does not “relieve the IJ of [his] responsibility to comply with all conditions set forth in the Court’s bond order.” *Mathon*, 623 F. Supp. 3d at 218 (recognizing that even though attorney who represented Mathon at the bond hearing “did not present any alternatives to detention,” the IJ still had to comply with court’s order that government bear the burden of proof on alternatives to detention with respect to flight risk). Here, this Court’s order expressly required ICE to bear the burden of proof with respect to flight risk, and the IJ’s failure to consider available alternatives to detention constitutes a violation of this Court’s order. Order at 19.

c. Respondents do not dispute that the IJ's ankle monitor analysis was not individualized nor based on record evidence.

Respondents do not dispute that the IJ's analysis of an ankle monitor was not particularized to G.F.F. Opp. at 14. Respondents agree that the IJ's analysis consisted of: "as for an ankle monitor, which is really the only other thing I can think of[,] that could be just cut off by somebody and they disappear." *Id.*; Tr. 01:42:13. Respondents do not dispute that in order to reach the conclusion that an ankle monitor could be "cut off" the "IJ had to have engaged in conjecture and guesswork about facts not in the record before him. That is not, as a matter of law, permitted in a rational fact-finding exercise—and certainly not in one where the standard of proof is clear and convincing evidence." *Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 4511933, at *6 (S.D.N.Y. Sept. 18, 2019); Pet'r Br. at 10.

This Court's order was clear: due process mandates particularized finding to sustain prolonged detention, and ICE must bear the burden of proof. Order at 16. Respondents instead argue that this Court's order did not require ICE to present evidence regarding the inadequacy of each potential alternative to detention so long as there was evidence to support the IJ's determination that alternatives would be insufficient. Opp. at 14. A complete absence of evidence regarding potential alternatives to detention cannot be clear and convincing evidence about the insufficiency of such alternatives. Pet'r Br. at 10–11. The IJ's determination failed to comport with this Court's order. Order at 17.

In arguing that the IJ could have relied on alleged attributes about ankle monitors not in the record, Respondents ignore not only the burden of proof, but also the high success rate of alternatives to detention in the immigration court context. In addition, their reliance on a criminal proceeding (*United States v. Kwok*, No. 23 CR. 118-1 (AT), 2023 WL 3027440 (S.D.N.Y. Apr. 20, 2023)) is misplaced. Opp. at 15. First, in the criminal bond context, the government only bears the burden of proof by a preponderance of the evidence. *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988). Here, this Court ordered ICE to bear the burden of proof by clear and convincing evidence.

Second, the criminal court's assessment in *Kwok* is inapposite because that case involves a "[d]efendant [who] is technologically sophisticated and likely to delete, encrypt, or transfer electronic evidence and fraud proceeds if released. He ... used burner phones to conceal communications with co-conspirators... He has used Faraday bags to block the passage of radio frequency emissions and prevent electronic devices from electronic surveillance." *Kwok*, 2023 WL 3027440 at *6 (recognizing Defendant's past obstructive conduct made it unlikely that he would comply with conditions of release). That bears no resemblance to G.F.F.

Finally, Respondents do not contend with the widely documented success rates of alternatives to detention in immigration proceedings, which are civil in nature. Opp at 14; Pet'r Br. at 11.

II. The Respondents' Arguments that the IJ Correctly Applied the Burden of Proof Are Unavailing.

Respondents ask the Court to abandon a fundamental principle of burden of proof: the party bearing the burden must present their case first. The IJ flouted that principle by requiring G.F.F. to testify on cross-examination prior to ICE's presentation of their evidence, saying he could make a negative inference if G.F.F. did not testify. Tr: 00:03:59. Ignoring the context of the IJ's statements, Respondents argue that the IJ found ICE had met its burden of proof *prior* to requiring G.F.F. to testify on cross-examination. Opp. at 12. That contradicts the record. After continued discussion with G.F.F.'s counsel, the IJ said "*failure to respond is sufficient to demonstrate by clear convincing evidence of danger of flight risk.*" Tr: 00:04:48 (emphasis added). The IJ squarely placed the burden on G.F.F. to testify in a hearing that had not yet begun, and in which ICE had not presented its case or made an oral proffer, no evidence had been admitted or assigned any weight, no arguments or objections had been made with respect to any evidence, and the parties and IJ were preliminarily discussing whether an interpreter was necessary. Tr 00:00:48; 00:03:59; 00:04:48; 0:07:02. At that preliminary stage, it would have been impossible for the IJ to determine that ICE had met its burden. A lack of evidence "could not possibly establish by clear and convincing evidence" flight risk. *Nguti v. Sessions*, No. 16-CV-6703 (LJV), 2017 WL 5891328, at *2 (W.D.N.Y. Nov. 29, 2017).

Finally, Respondents argue that ICE's cross-examination of G.F.F. was on "rebuttal" even though it occurred *prior* to ICE's oral proffer and presentation of evidence. *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 242–43 (W.D.N.Y. 2019)

(noting that the argument that the IJ made an improper adverse inference for lack of testimony could be appealing if not related to rebuttal testimony). In order for ICE to properly bear the burden of proof, they must present their case first so that G.F.F. could prepare his rebuttal. *Blandon v. Barr*, 434 F. Supp. 3d 30, 41 (W.D.N.Y. 2020) (“Because the burden is on Respondents to present sufficient evidence, until the Government submits such evidence, Petitioner is under no obligation to speculatively submit a rebuttal.”). Respondents do not dispute that ICE never presented their case before cross-examining G.F.F, so ICE’s cross-examination cannot be considered “rebuttal.”

If the Court nonetheless accepts Respondents’ argument that ICE’s cross-examination of G.F.F. was on rebuttal, then ICE did not present its case first and the IJ shifted the burden of proof to G.F.F., in violation of the Court’s order. *Hechavarria*, 358 F. Supp. 3d at 243 n. 10 (“Other hearing procedures suggest that the IJ properly placed the burden of proof on the government. For example, the government put on its case first.”).

III. Respondents’ Argument that ICE Met Its Burden of Proof with Respect to Mitigation of Flight Risk by Alternatives to Detention and Monetary Bond is Unsupported

ICE did not as a matter of law meet its burden to demonstrate why G.F.F. posed a flight risk that could not be mitigated by a combination of monetary bond and available alternatives to detention. Respondents do not dispute that ICE presented no specific evidence to explain why home confinement, ankle monitor, monetary bond, or any combination thereof would not mitigate flight risk. Opp.17–

19; Pet'r Br. at 16. Instead, Respondents argue that ICE met their burden of proving flight risk without such consideration.

In order to excuse the IJ's failure to explicitly consider the merits of G.F.F.'s appeal, Respondents argue that the IJ was familiar with the merits of Petitioner's appeal. Opp. at 18. But the fact that a BIA appeal exists is not, as a matter of law, clear and convincing evidence of flight risk. And here, the IJ could only be familiar with the merits of G.F.F.'s appeal if he had reviewed G.F.F.'s notice of appeal to the BIA. The hearing record contains no such indication. *See generally* Tr.

Respondents also argue that the IJ did not mischaracterize the record with respect to G.F.F.'s compliance with check-ins, but the transcript demonstrates otherwise. Opp. at 19. The IJ stated: "[i]t's not as if he missed dates during those periods here and there and ended up meeting 10% .. he went to he went to New York and then he has 16, 15, 16 check-ins he failed to respond to." Tr. 01:42:13. This is a gross mischaracterization of the record, which reflects that G.F.F. completed over 122 check-ins, with about half of his missed check-ins occurring prior to travelling to New York and the other half occurring after arriving in New York. Pet'r Br. at 19–20. This mischaracterization is material because the IJ relied on it in making his decision. *Id.*

IV. Release is the appropriate remedy in this case.

Respondents do not dispute that G.F.F. will continue to suffer irreparable harm absent immediate release, or that the harms he is suffering in detention are especially acute given his young age, the threats and harassment he has faced while in detention, and the government's attempts to summarily deport him to a notorious high-security prison in El Salvador. In determining the proper remedy for the

government's failure to comply with a habeas order, a court in this district gave considerable weight to the harm the petitioner faced in detention and ordered release. *Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 4511933, at *7 (S.D.N.Y. Sept. 18, 2019).

While remand to the IJ may be appropriate where the district court's order did not authorize release (Opp. at 16, citing *Blandon v. Barr*, 434 F. Supp. 3d 30, 42 (W.D.N.Y. 2020)), this Court's order explicitly authorized release or a bond hearing that would comply with the Court's order in 7 days. Order at 19. The IJ's bond hearing having failed to comport with the Court's terms, immediate release is the proper remedy to government's noncompliance.

Furthermore, Respondents do not contest that returning to the immigration court would likely involve protracted litigation. Pet'r Br. at 23; *see also Romero Perez v. Francis*, No. 25-cv-8112 (JGK), 2025 WL 3110459 (S.D.N.Y. Nov. 6, 2025), ECF No. 31 (Nov. 10, 2025) (first motion to enforce), ECF No. 33 (Nov. 13, 2025) (second motion to enforce) (Petitioner filed two motions to enforce district court order after the IJ refused to hold a bond hearing, and then after the first motion to enforce the IJ held the bond hearing but ICE invoked the automatic stay to bar Petitioner's release.).

Finally, Respondents' argument that the immigration court is the proper forum fails to acknowledge the reality that district courts around the country are increasingly recognizing: the immigration court is no longer a neutral arbitral body. *Garcia v. Hyde*, No. 25-CV-585-JJM-PAS, 2025 WL 3466312, at *11 (D.R.I. Dec. 3,

2025) (“The Court is mindful that, in recent months, IJs have faced enormous pressure from the Executive Branch to dismiss cases quickly and rule in certain ways.”); *Avilez Aguinaga, v. Corley*, No. CV 4:26-0137, 2026 WL 266510, at *1 (S.D. Tex. Feb. 2, 2026) (considering petitioner’s argument that “immigration courts have been systematically transformed and are no longer capable of providing an impartial tribunal and individualized assessment” and waiving exhaustion and ordering immediate release).

The appropriate remedy in this case is to order G.F.F.’s immediate release. G.F.F. asks that, in the alternative, this Court hold a bond hearing;

CONCLUSION

For the foregoing reasons, G.F.F. respectfully requests that the Court enforce its Memorandum Opinion and Order and order Petitioner’s immediate release.

Dated: February 9, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Memorandum of Law in Support of Petitioner's Motion to Enforce complies with the type-volume limitation of this Court's Rules and Local Civil Rule 7.1(c).

1. Exclusive of the exempted portions of the memorandum of law, as provided in this Court's Rule III. D., the memorandum of law contains 2,795 words.
2. The memorandum of law has been prepared in proportionally spaced typeface using Microsoft Word for Microsoft in 12-point Century Schoolbook font as provided in this Court's Rule III.D.

Dated: February 9, 2026

/s/ Amy Pont
Amy Pont