

THIRD CIRCUIT COURT OF APPEALS

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U.S.A. :

vs. : NO. 83-1571

KOWALCHUK, SERGE, etc. :

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Philadelphia, PA, April 23, 1984

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Tape Transcription of Oral Argument  
 held in the U.S. Courthouse, on the above date.

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APPEARANCES:

RUGGERO J. ALDISERT,  
 JOSEPH F. WEIS, JR.,  
 MAX ROSENN,  
 Circuit Judges

OFFICE OF  
 SPECIAL INVESTIGATIONS

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1 MR. CARROLL: We appeal from an order  
2 revoking the appellant's citizenship on the grounds  
3 of illegal procurement and willful misrepresentation  
4 and concealment. The position of the appellant in  
5 this case, sir, is that the facts found by the Court  
6 do not justify legal conclusions, and the evidence  
7 doesn't justify what the judge calls his ultimate  
8 findings of fact.

9 What we are dealing with is this:  
10 The undisputed evidence in this case shows that in  
11 August of 1939 as a result of the Hitler-Stalin pact  
12 made on August 23 that year, Poland, and  
13 particularly the part that later became the Ukraine,  
14 was secretly given to Russia as part of its spoils,  
15 and 10 days later, when Germany invaded Poland from  
16 the west, the Russians did from the east and  
17 occupied the territory in which the events of this  
18 case occurred.

19 The Russians, as soon as they came in  
20 on September 17, 1939, discovered that this  
21 appellant's father, a minor Polish Government  
22 functionary, was a long-time anti-Communist,  
23 anti-Bolshevik person; fired him from his job,  
24 arrested him, and threatened him with deportation to  
25 Siberia. The record shows that he remained

1 unemployed thereafter as long as the events of this  
2 case are in evidence, which means not only through  
3 the Soviet occupation from September 17 of 1939 to  
4 June 21, 1941, but also through the Nazi occupation,  
5 which lasted from the 22nd of June, or a couple of  
6 days thereafter, 1941, until approximately March of  
7 1944.

8 Now, certainly Kowalchuk, Mr.  
9 Kowalchuk --

10 THE COURT: You are now talking about  
11 the father?

12 MR. CARROLL: No, sir. I am now  
13 talking about the son. I just finished the father,  
14 the point being that he was a known anti-Soviet and  
15 had been treated as such by the Soviet-occupying  
16 power up until the Nazi invasion. When the Nazis  
17 came in, he didn't fare any better. He was  
18 unmolested apparently but not in any way favored.

19 His son sought and obtained a job in  
20 the local government. His testimony on this issue  
21 was that it was a clerical job primarily dealing  
22 with distribution of food, and more specifically  
23 distribution of food to people who worked for the  
24 local government. This was only part time. He did  
25 some typing.

1                   This time, if Your Honors please --  
2 and I am talking about June of '41, although he  
3 didn't actually get the job until a couple of months  
4 later -- he had just turned age 21. He had a high  
5 school education, primarily in the later years a  
6 vocational education, training to be a tailor and  
7 had been a tailor's apprentice up until the time of  
8 the war. That was his only education.

9                   He had a brother, Mykola, who was  
10 then age 15, who also figures in this case. His  
11 testimony as to his status at the time of the Nazi  
12 invasion was: in about August he was doing this job  
13 for the local government, and he continued that job  
14 for another year, till August of '42. In August of  
15 '42 he was sent -- and Judge Fullam has found as  
16 factual these things that I am saying; this is not  
17 simply defendant's evidence. These are the fact  
18 findings of the Court below.

19                   He was sent in August of '42 to a  
20 school in a town called Matiew, about 30 kilometers  
21 from Lubomyl. He was there for six months, till  
22 January of 1943. While he was there, the massacre  
23 of the Jewish ghetto in Lubomyl, in which about  
24 5,000 people were killed by a German commando in a  
25 single day, occurred. This was in October of 1942.

1 Judge Fullam again says he finds as a  
2 fact that certainly Kowalchuk was neither present  
3 for this nor a participant personally in any acts of  
4 persecution against the Jewish or other civil  
5 population of that town.

6 Now, in March of 1944 the advance of  
7 the Russian Army coming from the east, the Kowalchuk  
8 family, along with about a million and a half other  
9 Ukrainians, 1,600,000 I think, went west. I think  
10 that Judge Fullam correctly says that no onus is to  
11 be placed upon a Ukrainian family, particularly with  
12 a father who had been arrested as an anti-Bolshevik  
13 going west when the Bolsheviks were coming back into  
14 their town of Lubomyl. It was, of course, very  
15 common.

16 They went eventually, the two  
17 brothers, Serge and Mykola, to a DP camp in  
18 Lexenfeld in Austria run by the United States Army.  
19 It is important to know that they stayed there under  
20 their own name. Serge had only one piece of paper  
21 to identify himself, an authentic birth certificate  
22 showing his proper name, proper place of birth,  
23 proper parentage. So did his brother, Michael.

24 Michael gave his correct residences  
25 at all times as being Lubomyl during the war. Serge

1 was plagued with fear that his going west might  
2 reflect badly on his parents from whom they had  
3 become separated and they thought might have gone  
4 back -- it turns out that the parents did go back  
5 but the Kowalchuks didn't know that until much later.  
6 They found them in 1958.

7           In any event, there appeared on a  
8 form called the CM-1, which was filled out for, I  
9 guess it is, the PCIRO, the Provisional Commission  
10 of the International Refugee Organization, in 1947 --  
11 specifically I think it was November 25, 1947 --  
12 there is a false statement as to Kowalchuk's  
13 residence and occupation between 1939 and '44.  
14 Instead of Lubomyl and what is called a functionary  
15 for the local government, he put down tailor's  
16 apprentice in Kremianec. Kremianec was his place of  
17 birth. It was also the place where he had been  
18 living up until 1939, apprenticed to a tailor there.

19           In any event, his little brother,  
20 filling out the same form right beside him, put down  
21 accurate information showing Lubomyl. He had been  
22 born in fact in Kremianec, and that, of course, was  
23 correctly put down. It is important that this was a  
24 statement, according to his testimony, that was made  
25 in fear of more harm to his family, and that he

1 verbally told the interviewer representing the IRO  
2 the truth. The interviewer told him, "It's okay;  
3 put something else down." In fact, it was so  
4 commonly done, that it's taken note of in the  
5 legislative history of the Displaced Persons Act  
6 that more than 40% of the DP applications at that  
7 time were falsified in that particular way, and  
8 there is splendid testimony about it in the evidence  
9 of Irena Tolstoy in the Iwanenko case, which is  
10 cited in the brief.

11 Your Honors, it is important that  
12 that statement was not made to any American official  
13 or made for the purpose of gaining entry into the  
14 United States. It was made before we even had a DP  
15 program, which began in '48.

16 He lived there for four years under a  
17 known name and with his brother. He lived there  
18 knowing that the IRO was bound by an obligation  
19 under the Treaty of the Council of Ministers in 1945  
20 at Yalta to hand over to the Russians anybody the  
21 Russians said was a war criminal. He lived there  
22 knowing that in any application he made for  
23 displaced person's status after the enactment of the  
24 American program he would be fully investigated by  
25 the CIC, which he was, and FBI, which he was, and by

1 all the other available organs of the American  
2 Government which are listed in the record here. It  
3 is about, I think, 10 separate investigating bodies,  
4 including those which would look at the Berlin  
5 Documents Center list of names accused by the  
6 Russians of being war criminals, and if his name was  
7 found on it, he would be summarily handed over to  
8 the Russians.

9 Now, if Serge Kowalchuk was a war  
10 criminal, it is extremely doubtful that he would  
11 have done what he did. He would have done what many  
12 others did, changed his identity. In fact, he did  
13 not.

14 It is bizarre to believe that he  
15 could have made this change of residence and  
16 occupation, which is all that occurred here, with a  
17 view to deceiving immigration officials. In any  
18 event, even if he did, it wasn't material because,  
19 as I will suggest later, the truth would not have  
20 been disqualifying. But it is very important for  
21 Your Honors to note he and his brother came to the  
22 United States and did all these things before the  
23 amendments to the Displaced Persons Act that took  
24 effect on June 16, 1950.

25 Your Honors will see, if you compare

1 this record with the opinion in Federenko that  
2 Federenko in very large part ignores those facts;  
3 obviously they were not in the record there, but  
4 they are here, and it makes a big difference.

5 One of the differences it makes is  
6 that under the DP Act of '48 with its implementing  
7 regulations, particularly Regulation 710.8, a false  
8 statement is only disqualifying if it is made to a  
9 DPA official. And there is no statement in this  
10 case shown by the Government to have been made to a  
11 DPA official.

12 Judge Fullam acknowledges this as to  
13 the CM-1, the 1947 document. But somehow, by an  
14 evidentiary lapse, he assumes, without any proof at  
15 all, that the Fragebogen executed in 1949, April of  
16 1949, was a statement to a DP official. There is no  
17 evidence of that. The evidence is it was done by a  
18 German-speaking person in the Lexenfeld camp, which  
19 was run not by the DPC but by the U.S. Army.

20 THE COURT: The record does show,  
21 however, that this information was on the CM-1 form  
22 and was copied on the Fragebogen which in turn  
23 accompanied the application for a visa.

24 MR. CARROLL: It did accompany the  
25 application, no question. But at that time the law

1 was, sir, that one did not become disqualified under  
2 Section 10 of the act by adoption.

3           The Attorney General's opinion in the  
4 Altman case, which is in evidence -- as a matter of  
5 fact, it's part of the Government's supplemental  
6 appendix in the case -- makes it clear that if I  
7 make a mistatement to IRO and that follows through  
8 into my immigration file, I have not misstated  
9 within the meaning of Section 10 because there is no  
10 master-servant or agency relationship between me and  
11 IRO or between IRO and these other organizations.

12           I think, Your Honors, it is important  
13 to look at the law at the time of the occurrence and  
14 not today. This is one of the big mistakes that  
15 Federenko makes. It looks at the amended statute.  
16 For instance, in appraising the Jenkins testimony as  
17 to what consuls could do. The consul in this case,  
18 Your Honors will see -- and I tried to cross-examine  
19 him by showing that he was extremely ignorant of the  
20 regulations by prying into matters having to do with  
21 DP eligibility. Judge Fullam interrupted and he  
22 said, "That makes a great legal argument."

23           And I said, "Isn't it just possible  
24 to show that he violated the regulations?"

25           And the judge said, "Apparently that

1 was done all the time."

2 True, but it doesn't authorize an  
3 unauthorized inquiry. The Government didn't show in  
4 this case until Mr. Chapin -- it's the equivalent of  
5 Jenkins -- that these questions were asked by the  
6 consul, but what the record does show is that they  
7 were not authorized to be asked.

8 If Your Honors please, this case must  
9 not float over Federenko on its hydraulic pressure  
10 as Justice Stevens said. There just isn't that  
11 evidence here.

12 THE COURT: Mr. Carroll, when the  
13 Fragebogen was prepared, it was with the  
14 understanding, as I recall, that it could be used  
15 for resettlement in a number of countries.

16 MR. CARROLL: Correct, sir.

17 THE COURT: And it was made to an IRO  
18 official.

19 MR. CARROLL: No, sir. The evidence  
20 doesn't show who it was made to. It was a  
21 German-speaking person with some reference to a camp  
22 committee.

23 THE COURT: Once the Fragebogen was  
24 completed and put on file, and then the next step,  
25 as I recall, is that the countries bid for these

1 people or submit quotas, or something of that nature.

2 MR. CARROLL: The charity which is  
3 sponsoring, they go to the NCWC, National Catholic  
4 Welfare Conference, which then promises a job and  
5 puts in a bid for them. They match up with the  
6 NCW. Then they have to get a visa.

7 THE COURT: What I am trying to get  
8 at is, at that time the Fragebogen was prepared, the  
9 Kowalchuks here didn't know that he would be going  
10 to the United States necessarily.

11 MR. CARROLL: Correct.

12 THE COURT: Now, when is it that this  
13 Fragebogen then becomes tied in with his application  
14 for United States admission?

15 MR. CARROLL: When he makes his visa  
16 application, the consular office -- see, he had to  
17 go from Lexenfeld I think to Bremen to the consular  
18 office to make an application for a visa.

19 THE COURT: Who submits the  
20 Fragebogen to the consul?

21 MR. CARROLL: The DPC has deemed him  
22 eligible.

23 THE COURT: What is the DPC?

24 MR. CARROLL: Displaced Persons  
25 Commission. But their record, and it is in the

1 record, sir, Exhibit 15, shows that it is based on  
2 the record. It is not only based on the documents.  
3 It is not based on any personal interview. It is  
4 based on the record which at that point we know  
5 includes the CM-1 and the Fragebogen.

6 THE COURT: Okay. Now, he travels  
7 from Salzburg to Lexenfeld or Salzburg to Bremen.  
8 And does he carry the Fragebogen with him or is it  
9 mailed?

10 MR. CARROLL: No, sir. There is zero  
11 evidence on how that Fragebogen, if at all, gets to  
12 the consular office in Bremen. We are not even  
13 certain it does. It may go directly to immigration  
14 in New York.

15 THE COURT: Now, what happens when  
16 Kowalchuk gets to the consul in Bremen?

17 MR. CARROLL: At the consulate in  
18 Bremen, an application is filled out, an application  
19 for a visa, which simply doesn't ask these questions,  
20 and nobody pretends there are any lies on that form.

21 THE COURT: Is there any reference in  
22 the application to the Fragebogen?

23 MR. CARROLL: No, sir, none whatever.  
24 It's a self-sustaining form.

25 Mr. Chapin pretended that it was the

1 practice of all the vice-consuls at that time to ask  
2 questions related to the DPC, but the fact of the  
3 matter is they were forbidden to. This is 8 CFR,  
4 Section 700.8 as it existed in 1949.

5           Upon the basis of the entire record,  
6 including the investigation of written statements  
7 provided for in 700.7, the Commission -- it's the  
8 DPC -- "shall make and prosecute this written report  
9 as required by Section 10 of the act" -- that's the  
10 section -- the plaintiff is relying on, the section  
11 says the burden of proof is on the applicant.

12           "...regarding the character, history,  
13 and eligibility under the act of each eligible  
14 displaced person selected for processing and  
15 preliminarily determined to be eligible for  
16 admission under 700.6. The report shall be deemed  
17 to establish prima facie the applicant's character,  
18 history and eligibility under the act, and shall be  
19 deemed to establish as conclusive the existence of  
20 all factors relating to eligibility to enter the  
21 United States except the existence of those factors  
22 required in the applicable immigration laws other  
23 than the act."

24           This clear division of functions  
25 between the consul and the DPC was firm until June

1 16, 1950, when Congress changed it, and that is one  
2 of the huge mistakes in Federenko, and that the  
3 Government makes here.

4 This consul had no authority to  
5 inquire. The law was clear, as stated in the  
6 reports of the Displaced Persons Commission which  
7 have been placed in evidence; and plainly with the  
8 effect that the bigwigs at the State Department  
9 urged Congress to amend the statute in that these  
10 people, the DPC people, had taken away a large part  
11 of the jobs and they were claiming as theirs.

12 In June 1950 they got it back. But  
13 that was six months after this case was over; also,  
14 six months after Federenko was over, but that is  
15 another question.

16 If Your Honors please, that's the  
17 fact that we deal with in this case. There is no  
18 misstatement after that Fragebogen, and there is no  
19 misstatement in the Fragebogen made to DPC.

20 The Altman case, which is again in  
21 the Government's appendix, makes it clear there is  
22 no adoption.

23 THE COURT: Mr. Carroll, I will give  
24 you a minute or two longer in order to extend  
25 courtesy to your friends as well.

1                   Could you give us a worst scenario of  
2 what Kowalchuk did as a Government employee in  
3 Lubomyl?

4                   MR. CARROLL: In taking at worst all  
5 of the Government's evidence?

6                   THE COURT: Yes.

7                   MR. CARROLL: If Your Honors please,  
8 the Government's evidence shows that it believes  
9 that he was a deputy commandant of the local police  
10 force which actively assisted the Nazis in the  
11 persecution of the Jews; that he personally helped  
12 to arrest, punish, and enforce the anti-Jewish  
13 strictures imposed by the Nazis from 1941 to 1943;  
14 that he beat people; that he helped to round them up  
15 for massacre; and that to all intents and purposes  
16 he did this with a certain amount of not willingness  
17 but zeal.

18                   That's the worst case, if Your Honors  
19 please. It has to be said, however, that that worst  
20 case is discovered in 1945 by the Government's  
21 Russian witnesses, and about the same year by the  
22 Israeli witnesses, that in all the discussions, in  
23 all the trials, in all the hubbub about the horrible  
24 massacre, 5,000 people, his name was never before  
25 mentioned for 33 years at the very least, and when I

1 asked these Russian witnesses, "How did they come to  
2 you? How did anybody discover that you were a  
3 witness to this thing if you had never discussed the  
4 thing?" they didn't have an answer, and neither did  
5 the Israeli witnesses, if Your Honors please.

6 That's a terrible disadvantage in  
7 this case. There isn't a shred of documentation.

8 Now, in the other cases there were  
9 papers, and Professor Hilberg, the Government's  
10 expert witness on the Holocaust, would merely  
11 testify, very helpfully, to the Government, "Here  
12 are the documents which show." He testified in this  
13 case that the Germans were meticulous about making  
14 records, and that he had searched all the extant  
15 records for the problems for this period and nothing  
16 implicated this man.

17 He also said that his efforts as the  
18 chairman of the President's Historical Commission on  
19 World War II to get the Russians to give documents  
20 were of no avail, and that the Russians of course  
21 would give documents to nobody.

22 THE COURT: What did the Court find,  
23 make as a finding of fact, as to what his duties  
24 were?

25 MR. CARROLL: The Court found as a

1 matter of fact that his duties were typing up  
2 rosters, sometimes typing up reports, as well as  
3 distributing food. The Court, I think without any  
4 authorization in the evidence, put a label on that  
5 as a responsible position. There is not a scintilla  
6 of evidence to justify that this was a responsible  
7 position. This man at most without education, high  
8 school/vocational school, period, was sent away to a  
9 school to learn some rudiments of administration for  
10 six months. The Court's actual fact findings are  
11 that he did clerical work and food distribution work,  
12 that he didn't personally participate, and yet the  
13 Court in a surprising conclusion to its opinion --  
14 reading the first 28 pages, one would think he was  
15 going to refuse the Government's position -- then  
16 all of a sudden comes to these conclusions about  
17 membership. Membership in what that has anything to  
18 do with anything?

19                   Your Honors, if you look at not what  
20 Justice Marshall talks about, but what Congress  
21 meant concerning aiding and what the IRO meant,  
22 which is in the record here, Your Honors will see  
23 that normal peacetime duties being carried on is no  
24 justification for finding aid to the enemy in any  
25 respect. And if a man is asked, "What military or

1 paramilitary organizations do you belong to?" and  
2 his job is in City Hall doing clerical work and food  
3 distribution work, can we say it's false when -- he  
4 doesn't respond he was in the Lubomyl  
5 Schutzmannschaft, when his relationship to it appears  
6 to be that he is a civil clerk who types rosters and  
7 reports for that organization, not a member.

8 THE COURT: Thank you, Mr. Carroll.  
9 We will take you back on rebuttal.

10 MR. MAUSNER: May it please the Court,  
11 Jeff Mausner for the appellee plaintiff.

12 THE COURT: Will you develop further  
13 the last point of Mr. Carroll's as to what was the  
14 extent of the fact finding or ultimate fact for  
15 determination of the trial Court as to what the  
16 duties of Mr. Kowalchuk were?

17 MR. MAUSNER: Yes, sir.

18 The District Court held that the  
19 defendant occupied a responsible position with the  
20 Lubomyl Schutzmannschaft.

21 Most of this determination, according  
22 to the Court, was based on the defendant's own  
23 admission, so I will go through those first.

24 The defendant admitted that he had  
25 his own office in the police station and that he was

1 one of only three police employees who had his own  
2 office there.

3 The defendant admitted that one of  
4 his duties for the Schutzmannschaft was to make  
5 schedules for patrols and duty rosters for the  
6 members of the Schutzmannschaft, and what he stated  
7 he did was he would take the names of the  
8 Schutzmannschaft members and assign them to  
9 particular locations.

10 The defendant admitted that he  
11 assigned members of the Schutzmannschaft to patrol  
12 the Jewish ghetto. While it is true, as pointed out  
13 by defense counsel in his brief, that the defendant  
14 may have later attempted to repudiate this admission,  
15 it is clear that he did make it earlier.

16 The District Court found that the  
17 defendant did issue the duty rosters as well as  
18 typing them. It must be stressed that the District  
19 Court did not find that he was merely a typist for  
20 this Schutzmannschaft.

21 THE COURT: Did the District Court  
22 also conclude that membership in this militia or  
23 police or Schutzmannschaft was not sufficient to  
24 deny a visa?

25 MR. MAUSNER: The Court held that

1 membership in a Ukrainian militia would not  
2 necessarily result in denial of a visa.

3 THE COURT: This was a Ukrainian  
4 militia, was it not?

5 MR. MAUSNER: Yes. I think that the  
6 Court held that membership in this particular  
7 militia would result in that because of the facts  
8 showing what the militia did.

9 THE COURT: Is the test according to  
10 Federenko what the militia did or what the  
11 individual member of the militia did? Now, if I  
12 recall Federenko, it is one thing to be an active  
13 head-banger and murderer and an active abuser of the  
14 Jewish population, but in Federenko they said it is  
15 quite another thing to be a barber, and it would  
16 seem that one who types up duty rosters for the  
17 militia would come in between Federenko and its  
18 example of what would not be considered improper  
19 police work.

20 MR. MAUSNER: That is correct, Your  
21 Honor. This case does fall somewhere between the  
22 two extremes set out in Federenko.

23 THE COURT: Has any precedent been  
24 established whereby a person was denaturalized in  
25 the United States for occupying just a clerical

1 position in a police force rather than being an  
2 actual patrolman?

3 MR. MAUSNER: There aren't any cases  
4 where a person is found just to be in a clerical  
5 position. There are three cases where persons were  
6 denaturalized for being members of a Ukrainian  
7 police force. Those cases are U. S. V. Koziy, which  
8 was recently affirmed by the 11th Circuit.

9 THE COURT: Judge Hackett's opinion?

10 MR. MAUSNER: Yes, Your Honor.

11 THE COURT: Does the record show here  
12 and did the Court find whether or not he wore a  
13 police uniform?

14 MR. MAUSNER: The Court held that he  
15 did wear a police uniform on occasion. The  
16 defendant first admitted that he wore a uniform and  
17 later attempted to take that back. He later stated  
18 that, well, it was merely a Boy Scout uniform and he  
19 wore it to avoid curfew on dates. But the District  
20 Court clearly did not buy that repudiation, but he  
21 did admit that he wore a police uniform at some  
22 times.

23 THE COURT: Does the Government  
24 concede that the Third Circuit test as specifically  
25 mentioned by the Supreme Court in Federenko is that

1 the misrepresentation in a denaturalization  
2 proceeding is that the facts which the denial of  
3 information concealed would have produced evidence  
4 which would justify denying the application?

5 MR. MAUSNER: No, Your Honor.

6 Is Your Honor referring to the Riela  
7 case?

8 THE COURT: Yes, sir.

9 MR. MAUSNER: That case, of course,  
10 dealt with a misrepresentation at the naturalization  
11 stage, and it followed the Chaunt decision. The  
12 Supreme Court says in Federenko that Chaunt may not  
13 be applicable when the misrepresentations occurred  
14 in the visa stage? This rule would also be  
15 applicable to the Riela case.

16 THE COURT: Are you sure of that? I  
17 thought Chaunt stood for the proposition of a  
18 denaturalization proceeding. Well, the test is  
19 "might," and the Supreme Court in Federenko reserved  
20 the question whether the test would be "would" or  
21 "might" in a visa application.

22 MR. MAUSNER: That's right, Your  
23 Honor. But the Supreme Court in Federenko also --  
24 it is not clear that the Chaunt test applies when  
25 the misrepresentations occurred at the visa stage

1 rather than the naturalization stage.

2 It is the Government's position that  
3 under any test for materiality the misrepresentations  
4 in this case are material.

5 THE COURT: How is the Government's  
6 position sustained by Judge Fullam's determination  
7 that at that time mere membership in the militia  
8 without more would not have been sufficient to deny  
9 the visa?

10 MR. MAUSNER: The reason is that the  
11 Government proved at trial facts which would have  
12 resulted in the denial of a visa: that he assisted  
13 in persecution and voluntarily assisted the enemy  
14 forces.

15 THE COURT: Now you are talking about  
16 proofs of mixed questions of law and facts, are you  
17 not? And whether we sustain the District Court's  
18 ultimate conclusion of law, that he assisted the  
19 enemy action against the United Nations or whether  
20 he voluntarily assisted in persecuting the civilians,  
21 the civil population, that had to be established by  
22 what the Supreme Court has declared clear and  
23 convincing evidence so as not to leave the issue in  
24 doubt. If there is a doubt, has the Government met  
25 its burden?

1 MR. MAUSNER: No, Your Honor. But  
2 according to the District Court, that standard of  
3 proof was met at the trial; therefore, the  
4 misrepresentations that were made were material. In  
5 other words, if he had said that he was a member of  
6 the Ukrainian police, that in itself might not have  
7 led to denial of the visa according to the District  
8 Court. There was a great deal of evidence that we  
9 put in that it would have led to a denial of the  
10 visa, but the Court went the other way on that.  
11 However --

12 THE COURT: When the Court went the  
13 other way, it was making a finding of basic or  
14 circumstantial evidentiary facts to which we apply  
15 the clearly-erroneous rule.

16 MR. MAUSNER: That's correct, Your  
17 Honor.

18 THE COURT: And if we accept that  
19 part of the Court's determination, then in order to  
20 accept the Government's argument here, we would have  
21 to find that clearly erroneous.

22 MR. MAUSNER: That's correct, Your  
23 Honor. We are not arguing for reversal of that.

24 What the Court did is, it went on to  
25 say that he could not have revealed that he was in

1 the Ukrainian police without other facts coming out,  
2 and especially what would have come out was what  
3 this Ukrainian police force was. It was a police  
4 force that was established by the Nazis when they  
5 occupied Lubomyl. It was directly subordinate to  
6 the German SS and police. Its function was to  
7 subjugate the civilian population for the Nazis and  
8 to carry out the Nazi persecution of the Jews, and  
9 at that time the defendant would have been ineligible  
10 clearly under the Displaced Persons Act.

11 THE COURT: What you're saying is  
12 that by virtue of his membership, his voluntary  
13 membership, in that organization, that that alone in  
14 that kind of organization would have been sufficient  
15 to disqualify him?

16 MR. MAUSNER: Yes, Your Honor, it  
17 would have been. But this case goes farther than  
18 that, because not only was he a member, he held a  
19 responsible position in it. And he also admitted  
20 specific acts that constituted assistance in  
21 persecution.

22 THE COURT: I had this comment. A  
23 finding of specific acts that he admitted that would  
24 have shown that he clearly violated the act.

25 MR. MAUSNER: Well, assigning members

1 of this police force to guard and patrol the Jewish  
2 ghetto is such an act. He admitted that.

3 THE COURT: When you answered Judge  
4 Rosenn, then the mere membership in the militia was  
5 sufficient. The Government is taking that position  
6 and is disagreeing with the district judge? Isn't  
7 that right?

8 MR. MAUSNER: No, Your Honor, we are  
9 not saying that.

10 THE COURT: Do you want to answer  
11 Judge Rosenn's question again?

12 MR. MAUSNER: May I answer your  
13 question first, Your Honor?

14 The judge ruled that membership in  
15 the Ukrainian police at that time would not  
16 necessarily result in disqualification.

17 THE COURT: Mere membership.

18 MR. MAUSNER: That's correct.  
19 However, he said it would certainly at the very  
20 least have had to have led to further inquiry. That  
21 means asking this person who was a member of the  
22 Ukrainian police what the Ukrainian police did --  
23 did it regularly and routinely beat Jews, arrest  
24 Jews, confiscate their property, guard the Jewish  
25 ghetto, as the Ukrainian police in Lubomyl did.

1 THE COURT: Now, we come into "would"  
2 have led or "might" have led, don't we? Once we  
3 move from the basic facts as the narrative or  
4 historical facts and get into the ultimate finding  
5 which has a legal connotation, then we have to meet,  
6 do we not, the question of what is the Third Circuit  
7 test, and what an investigation would have produced?  
8 Here I think the Government has to concede that the  
9 Third Circuit has a higher standard than at least  
10 two other circuits as pointed out specifically both  
11 in the text and in the footnotes of the Federenko case.

12 MR. MAUSNER: Then, Your Honor, if I  
13 may, there may be a distinction between an inquiry  
14 and an investigation. The District Court in this  
15 case held that the materiality issue was governed by  
16 Federenko, and I think that the important point made  
17 there was that even before getting to this stage of  
18 conducting an investigation, the person who saw that  
19 he listed that he had worked for the police in  
20 Lubomyl would have said, "What is this police force?  
21 What do they do? Were there Jews in this town?  
22 What happened to the Jews in the town?"

23 Right then if the defendant had been  
24 truthful, he would have had to reveal what the  
25 Lubomyl Schutzmannschaft was, and at that point

1 membership in the Schutzmannschaft alone would have  
2 caused disqualification, even if his own specific  
3 acts of persecution had not come out.

4 THE COURT: Yes, but aren't you  
5 moving -- we are talking about Fedérenko, counselor.  
6 Federenko made its decision under the first prong of  
7 the Chaunt test and not under the second prong.

8 MR. MAUSNER: That's correct.

9 THE COURT: And here we have to  
10 decide this case under the second prong, do we not?

11 MR. MAUSNER: Well, even if you do  
12 decide it under the second prong, I believe that the  
13 facts in this case meet it because the Court held an  
14 investigation would have occurred, and that is a  
15 factual finding.

16 THE COURT: Is that a factual finding?

17 MR. MAUSNER: Yes, Your Honor, that  
18 is a factual finding. It is a historical fact of  
19 what would have happened back at that time.

20 THE COURT: If it is a factual  
21 finding, it does not leave the issue in doubt; is  
22 that right?

23 MR. MAUSNER: That is the standard of  
24 proof in this case, yes, sir. We have proven facts  
25 at the trial showing that he would have been

1 disqualified and therefore --

2 THE COURT: That was the first prong  
3 of Chaunt.

4 MR. MAUSNER: Yes, Your Honor. That  
5 would also satisfy the second prong of Chaunt, as  
6 long as we can show an investigation would have  
7 occurred.

8 THE COURT: And if we would find that  
9 the Government didn't prove its case under the first  
10 prong, only go to the second prong, then we would  
11 have to decide whether it would have revealed this  
12 as distinguished from what it might have revealed.

13 MR. MAUSNER: I don't believe the  
14 Court would be faced with that problem.

15 THE COURT: You do not want to be  
16 faced with that problem?

17 MR. MAUSNER: Yes, Your Honor, that  
18 is correct, because the District Court ruled that an  
19 investigation would have resulted and then we might  
20 have a question on the second part of that second  
21 prong -- if both of these are satisfied, because the  
22 Government has shown evidence that he did persecute  
23 and the District Court found that he would have been  
24 disqualified for a visa.

25 THE COURT: Now, is it the

1 Government's position that the District Court found  
2 that he both aided the enemy and persecuted the  
3 civil population?

4 MR. MAUSNER: Yes, Your Honor.

5 THE COURT: Mr. Mausner, the Soviet  
6 witnesses exculpated Mykola, the defendant's brother,  
7 but they did not exculpate Serge with activity in  
8 aid of the enemy. Also, Mykola in his application  
9 in the Fragebogen and in his CM-1 form did not  
10 engage in misrepresentation. The District Court  
11 found that Serge did intentionally misrepresent.  
12 Did the District Court attach any significance to  
13 the exculpation of Mykola and the incrimination of  
14 Serge and to the correct representations by Mykola  
15 and the misrepresentations by Serge?

16 MR. MAUSNER: Yes, Your Honor. The  
17 District Court noted the fact that Mykola had been  
18 exculpated by the Soviet witnesses in its discussion  
19 of the credibility of the Soviet witnesses. He  
20 stated the fact that they would exculpate somebody  
21 butresses their credibility when they inculcate the  
22 defendant. However, the District Court still would  
23 not credit the Soviet witnesses' testimony  
24 concerning the specific atrocities that the  
25 defendant had committed.

1 THE COURT: His findings are made  
2 entirely on Serge's admissions?

3 MR. MAUSNER: Not entirely. What he  
4 stated was that he based his factual findings for  
5 the most part on the defendant's testimony and the  
6 testimony of defense witnesses as well as other  
7 evidence that was not contradictory to that. He may  
8 have relied on the Soviet testimony for  
9 corroboration of the general conditions in Lubomyl  
10 and the role of the Lubomyl Schutzmannschaft, which  
11 really isn't in dispute in this case. It is  
12 indicated very clearly what the police force was and  
13 what it did.

14 I would like to stress that one of  
15 the main functions of this Lubomyl Schutzmannschaft  
16 was to carry out the Nazi persecution of the Jews,  
17 which constituted half the population of Lubomyl.

18 The defendant performed necessary  
19 functions for the Schutzmannschaft and therefore he  
20 assisted it in persecuting the Jews.

21 The District Court's finding that the  
22 defendant's role in the Lubomyl Schutzmannschaft  
23 assisted the Nazis in persecution is therefore not  
24 clearly erroneous, which brings me to the standard  
25 of review in this case.

1           It is our position that the District  
2 Court's finding that the defendant assisted the  
3 Nazis in persecution, voluntarily assisted the enemy  
4 forces, and made a willful misrepresentation for the  
5 purpose of entering the United States are factual  
6 findings subject to the clearly erroneous standard  
7 of --

8           THE COURT: You are saying they are  
9 factual. It has occurred to me they would be either  
10 errors or are ultimate facts.

11           MR. MAUSNER: It is our position that  
12 they are ultimate facts, and in that regard I would  
13 like to point out a recent 11th Circuit case which I  
14 mentioned earlier, U. S. v. Koziy. That was a case  
15 that also involved a Ukrainian policeman.

16           THE COURT: A policeman who went on  
17 patrol.

18           MR. MAUSNER: Yes, Your Honor, that  
19 is correct.

20           The 11th Circuit held in that case  
21 that determinations of eligibility under the  
22 Displaced Persons Act are issues of ultimate facts  
23 subject to the clearly-erroneous standard of  
24 review.

25           THE COURT: If you do that, then

1 there is actually no review in these cases. You are  
2 talking about two provisions, voluntarily assisted  
3 the enemy or assisted in the persecution of the  
4 civil population, and if a District Court sitting as  
5 a fact finder finds that there is virtually no  
6 review.

7 MR. MAUSNER: Well, there is the  
8 clearly erroneous standard of review on this  
9 question.

10 THE COURT: So, isn't this in the  
11 same category as negligence? Negligence is, quote,  
12 unquote, a fact found by the jury. But what we  
13 review is what is found by the judge sitting without  
14 a jury in order to get the clearly-erroneous. What  
15 we must take as the historical and basic facts are  
16 whether the car was going 90 miles an hour on the  
17 wrong side of the road through an intersection. But  
18 the next part of that, quote, fact is a question of  
19 law subject to review.

20 MR. MAUSNER: Well, the question of  
21 whether the Court applies the correct definition of  
22 negligence is, Your Honor. It is our position that  
23 these are ultimate factual issues.

24 The review as you say is limited.

25 As to the defendant's

1 misrepresentation, I would like to clear up a few  
2 points concerning the Fragebogen.

3           The Fragebogen was only for the  
4 purpose of immigration to the United States. It is  
5 clearly stated on the Fragebogen that any false  
6 statements made in the Fragebogen could lead to  
7 denial of entry into the United States. And no  
8 other countries are mentioned.

9           The defendant made misrepresentations  
10 in this Fragebogen. He claimed that he had been a  
11 tailor in the town of Kremianec during the entire  
12 time of the Nazi occupation. He never revealed the  
13 true fact that he had been an employee of the  
14 Schutzmannschaft in Lubomyl during that time. And  
15 the Fragebogen was signed by the defendant under  
16 oath. This Fragebogen went to the Displaced Persons  
17 Commission and it was considered by them. The  
18 Fragebogen then went to the vice-consul and during  
19 the interview with the United States vice-consul --  
20 and the only purpose of the interview was for  
21 determination of eligibility to enter the United  
22 States -- the defendant was once again sworn to the  
23 truth of all the statements contained in the  
24 Fragebogen.

25           THE COURT: Is that a matter of

1 record?

2 MR. MAUSNER: Yes, Your Honor.

3 THE COURT: Do you want to give us a  
4 reference?

5 MR. MAUSNER: Yes, Your Honor, I will.  
6 This is Appendix 1033. That is the testimony of the  
7 vice-consul in the case, Mr. Chapin.

8 Defendant's citation of the case in  
9 the matter of Altman was really inapposite here --  
10 may I continue?

11 THE COURT: Yes, sure.

12 MR. MAUSNER: That case involved a  
13 misrepresentation made to the, I believe it was,  
14 International Refugee Organization. It was some  
15 agency not charged with the administration of the DP  
16 act. That decision specifically noted that if the  
17 applicant adopts or makes a false statement by reasserti  
18 the misrepresentation before an agency of the  
19 Government charged with administration of or  
20 enforcing the DP Act, then the misrepresentation  
21 does disqualify the applicant: And in this case the  
22 defendant signed and was sworn to the Fragebogen.  
23 In the Altman case, when the applicant appeared  
24 before the Displaced Persons Commission officials,  
25 he told the true facts. That, of course, wasn't

1 done in this case where Kowalchuk never revealed --

2 THE COURT: Is it true the Fragebogen  
3 also reasserted the information in the CM-1?

4 MR. MAUSNER: That's correct, Your  
5 Honor.

6 THE COURT: When did they say that?

7 MR. MAUSNER: Well, it's defendant's  
8 claim that he is not responsible for the  
9 misrepresentation in the Fragebogen because some of  
10 that information may have been copied from the CM-1  
11 form. However, when he signed and then he was sworn  
12 to it, he certainly reasserted those  
13 misrepresentations whether or not they were copied  
14 from some other form. And as is noted in our brief,  
15 also there is information that is contained on the  
16 Fragebogen that is not contained in the CM-1 form,  
17 some details, that could have only been supplied by  
18 the defendant in connection with his filling out the  
19 Fragebogen itself.

20 In the Iwanenko case, which was  
21 mentioned by the defendant, it was completely  
22 distinguishable from this case. In that case Miss  
23 Iwanenko misrepresented her place of birth in order  
24 to avoid -- well, actually because of her fear of  
25 repatriation to the Soviet Union. In truth,

1 repatriation to the Soviet Union had stopped before  
2 1947.

3           The Court in Iwanenko held that this  
4 misrepresentation was not material since she would  
5 have obtained the visa anyway. There was no proof  
6 in the case, and in fact not even a claim, that Mrs.  
7 Iwanenko had served in the Ukrainian police under  
8 the Nazis, assisted the Nazis in persecuting  
9 civilians or voluntarily assisted the enemy.

10           The Court in that case specifically  
11 held that she would have been without any question  
12 eligible under the Displaced Persons Act, which was  
13 not the case here.

14           THE COURT: Well, counsel, you have  
15 been very able and very frank with this Court and  
16 very cooperative. I am not just speaking for myself.  
17 But what would be the position of the United States  
18 Government if we found the denaturalization -- is it  
19 the position of the United States Government that  
20 this anti-Communist be deported to the Soviet Union?

21           MR. MAUSNER: It would certainly be  
22 our position that he would be deported. The place  
23 that he would be deported to depends on many factors.

24           THE COURT: You couldn't deport him  
25 to anyplace else except the Ukraine?

1 MR. MAUSNER: Well, the way the  
2 deportation statute works, the defendant has his  
3 first choice of where he wants to be deported anyway,  
4 so he has that first choice.

5 There are other places that people  
6 have been deported and choose to be deported or the  
7 Government chooses to deport them. At this time I  
8 don't think that we can reach the determination on  
9 whether we would seek to deport him there, but  
10 certainly he has the first choice as to where he  
11 would go.

12 THE COURT: And the Government has to  
13 accept that.

14 MR. MAUSNER: His choice, yes, Your  
15 Honor, if the country that he chooses accepts him,  
16 yes. The Government has no power over that matter.

17 THE COURT: As a matter of historical  
18 record, in these denaturalization cases, what has  
19 been the track record? Have they been deported?

20 MR. MAUSNER: We have not deported  
21 anyone to the Soviet Union. We have not forcibly  
22 deported anybody. Some of them have left on their  
23 own to the country of their choice. Hopefully --  
24 well, it is our position that we do deport these  
25 people. If they do not leave voluntarily, we

1 designate a country that will take them. We will  
2 try to deport them somewhere else.

3 At this time we have not yet.

4 THE COURT: Is it also a fact that  
5 this investigation by the Department of Justice was  
6 prompted by Russian language sources? Is that a  
7 fact found by the District Court?

8 MR. MAUSNER: Yes, Your Honor. I  
9 can't speak from personal knowledge as to how it was  
10 instituted. That's correct.

11 I would like to note in that regard  
12 that the defendant noted that there is no  
13 corroborating information and so on. That isn't  
14 true because the defendant himself has corroborated  
15 some of the allegations in this case. He, of course,  
16 had always claimed that he had been a tailor in  
17 Kremianec during the war. Well, when it finally  
18 came down to it, he admitted that in fact he had  
19 worked for the police in Lubomyl, which is what all  
20 of these witnesses were claiming all along.

21 THE COURT: How old was he at this  
22 time?

23 MR. MAUSNER: At the time of the  
24 beginning of the occupation he was 21. During the  
25 acts of the persecution and the atrocities that we

1 allege, he was either 21 or 22.

2 THE COURT: Thank you. You have been  
3 very helpful.

4 MR. MAUSNER: Thank you, Your Honor.

5 MR. CARROLL: With Your Honors'  
6 permission, I would like to clarify precisely what  
7 the lower Court's factual findings as to the  
8 appellee's personal participation was. I refer the  
9 Court to Page 1690. Judge Fullam says: "The  
10 evidence as a whole makes it quite clear the  
11 defendant did occupy a position of some  
12 responsibility within the Schutzmannschaft. He had  
13 his own office there, one of only three sets of  
14 private offices. He typed up and issued duty  
15 rosters. He typed the daily reports of police  
16 activity: He probably wore a police uniform of some  
17 kind at least during some of his duty hours at the  
18 police station."

19 The Court then departs from his  
20 personal participation and comes to the following  
21 factual statement at Page 1693: "It suffices to  
22 register my firm conclusion that the evidence is  
23 plainly insufficient to constitute clear and  
24 convincing proof of the defendant's involvement in  
25 massacre." Then it goes on to say that "The

1 defendant was aware of the responsibilities assigned  
2 to the Schutzmannschaft and occupied a responsible  
3 position albeit largely clerical within that  
4 organization." That's the totality of Judge Fullam's  
5 actual findings.

6 THE COURT: He did not find then that  
7 this man assigned patrols?

8 MR. CARROLL: Quite the contrary, sir.  
9 The evidence was that Mr. Kowalchuk typed the  
10 rosters prepared by someone else.

11 On the standard of review, I think  
12 maybe both sides had been less than exacting in  
13 their research. I think, sir, that Justice  
14 Marshall's statement in Federenko in referring to --  
15 and I am referring to Page 700, 66 Lawyers Edition,  
16 2d, "After stating and concluding," unequivocally,  
17 not leaving the issue in doubt, "the standard" -- he  
18 goes on to say -- "any less exacting standard would  
19 be inconsistent with the importance of the life that  
20 is at stake in the denaturalization proceeding, and  
21 in review of the naturalization cases we have  
22 carefully examined the record ourselves." This is  
23 consistent with what Justice Murphy said in  
24 Schneiderman where, if the Court please, the Court  
25 laid down a rule that all inferences should be drawn

1 favorably to the accused and the Government must,  
2 then it goes on to state the same test, not to leave  
3 the issue of doubt.

4 This Court and the First Circuit, it  
5 seems to me, have pretty clearly departed from any  
6 applicability of Rule 52A to these cases.

7 I refer the Court to Judge Kalodner's  
8 decision in Anastasio which is in 226 Fed. 2nd  
9 912.

10 THE COURT: What page?

11 MR. CARROLL: I am getting it. 912,  
12 Your Honor.

13 The two First Circuit decisions that  
14 seem clearly to give this broader scope in favor of  
15 the defendant are the Cufari, 217 Fed. 2nd 404,  
16 where the Court says, "Nor did the Court in the  
17 Beninger case lay down a rule of appellant's conduct  
18 in the denaturalization cases comparable to the  
19 clearly erroneous rule embodied in Rule 52 A. That  
20 is to say, it is not suggested that we reverse, only  
21 when the opinion that the District Court was clearly  
22 erroneous in its conclusion that the Government's  
23 evidence was not so clear and unequivocally  
24 convincing."

25 The Court left the matter of our

1 appellate function pretty much at large when on Page  
2 679, 322 U. S., it summarized the discussion in this  
3 case: "Suffice it to say that the emphasis on the  
4 importance of clear unequivocal and convincing proof  
5 on which to rest cancellation of the certificate  
6 would be lost if it were ascertained by lower courts  
7 whether the exact standard of proof had been  
8 satisfied and left open to review."

9 In Chaunt and Costello the Court held  
10 that its responsibility to the defendant in this  
11 case was so great that the usual rule of being bound  
12 by the concurrent factual findings of the two lower  
13 courts had no application, and they made that an  
14 exception.

15 It seems to me that is in favor of  
16 the appellant, Your Honors, because of the  
17 preciousness of the right involved, in order to avoid  
18 being bound by Rule 52-A as to the factual findings  
19 which I don't think the assisting-the-enemy issues  
20 are.

21 I think, Your Honor, it is more like  
22 finding foreign law. What you have to do, it seems  
23 to me, is go back to what was happening then. We  
24 placed in the record distinctive evidence that shows,  
25 if the Court please, that incorporation of a

1 Fragebogen into a DPC file and from there to a  
2 consular file is not a renewed statement of any  
3 falsehood in the Fragebogen. The Attorney General,  
4 who at that time was a former judge of this district,  
5 said in the Altman case, which is reported in full  
6 in the Government's appendix, Page 59 --

7 THE COURT: Is the case in the  
8 Government appendix?

9 MR. CARROLL: Yes, sir. It says: "In  
10 reaching its conclusion in Seuss and Altman, it gave  
11 effect to the limitation of the regulation to  
12 findings of misrepresentations for the purpose of  
13 gaining admission to the United States only to  
14 persons charged with the enforcement of the act.  
15 The administration of part of the Displaced Persons  
16 Act is declaratory of an intention to regard those  
17 misrepresentations made by the harassed and  
18 persecuted displaced persons to lower-level  
19 representatives enumerated without any effect unless  
20 persisted in and reaffirmed before a representative  
21 of an agency charged with the administration and  
22 enforcement of the Displaced Persons Act.

23 "Bear in mind that this legislation  
24 was remedial in nature.

25 "We believe that this humane and

1 liberal interpretation was eminently proper and that  
2 the totality of the regulation clearly shows a  
3 disposition to forgive persons' representations to  
4 lower level officials.

5 "In this philosophy we were confirmed  
6 by the Attorney General who approved that the  
7 Board's rule as set forth in the cited cases -- this  
8 is the Benninger and Gosch appeals and Seuss. The  
9 Commission rejected the case solely on the basis of  
10 the file without ever having interviewed the  
11 applicant and without any direct reaffirmation of  
12 the false statement to the Commission."

13 That is exactly what they held could  
14 not be a basis for disqualification under Section 2.

15 Similarly, if the Court please, the  
16 law as to the meaning of wilful misrepresentations --  
17 misrepresentation is summed up by Congressman  
18 Walter when he spoke to the amendments to the act,  
19 and this language is repeated in Judge Perry's  
20 opinion in Iwanenko. "It is the opinion of  
21 conferees that the sections of the bill which  
22 provide for excluding aliens who obtain travel  
23 documents by fraud or who willfully misrepresented  
24 material facts should not serve to exclude and  
25 deport bona fide refugees who, in fear of being

1 forcibly repatriated to their former homelands  
2 misrepresented their place of birth when applying  
3 for a visa, and such misrepresentation did not have  
4 as its basis a desire to avoid the quoted provision  
5 of the law or an investigation in the place of their  
6 former residence."

7           The decisions at that time, if Your  
8 Honors please, were largely made by IRO. The  
9 evidence is their Information Circular No. 23, June  
10 10, 1948. Solomon's advice to IRO eligibility  
11 officers, where the truth would make a person  
12 ineligible, the fact of the producing of forged  
13 documents or making false statements doesn't alter  
14 the matter. The person is still ineligible. If he  
15 is first determined as eligible on the basis of  
16 false pretenses, he should be made ineligible when  
17 the truth is known. But the ineligibility is not  
18 based on false statements but that he is otherwise  
19 ineligible, Your Honor, under some part or parts of  
20 the IRO constitution. If a person is eligible on the  
21 basis of the truth, the fact he has been made eligible  
22 as a result of a false statement hardly means that  
23 he has benefited as a result of his false pretenses.

24           Similarly, Mr. Thomas, who is one of  
25 the Government's witnesses in this case,

1 acknowledged that Hugh Voght, on January 2, 1948, in  
2 his capacity as zone eligibility officer, answered  
3 the following question.

4 THE COURT: Where are you reading  
5 from now?

6 MR. CARROLL: This is from  
7 Information Circular No. 14.

8 THE COURT: Is there an appendix  
9 reference?

10 MR. CARROLL: Your Honor, I think  
11 this was left out of the appendix. It is in the  
12 record. If you will give us permission, I will  
13 supplement it.

14 THE COURT: Very well. Any objection  
15 to supplementing the record?

16 MR. MAUSNER: I believe his request  
17 was to supplement the appendix. I have no objection.

18 THE COURT: Thank you.

19 MR. CARROLL: The question is what  
20 should be done with refugees who make false  
21 statements in regard to eligibility and  
22 acceptability for various resettlement schemes.

23 The answer is the very same as the  
24 previous ones, the whole paragraph. It says that  
25 this is true as finally ascertained in order to make

1 them eligible, the fact that they lied doesn't make  
2 them ineligible. That was the the prevailing mores  
3 at the time.

4 Now, with regard to indigenous police  
5 forces, the Government also works by hindsight. If  
6 Your Honors will look at the appendix, the Manual  
7 for Eligibility, as far as at least their selected  
8 parts of it, you will see commencing at Page 38  
9 where they talk about what it is that makes  
10 assistance to the enemy, persecution of civil  
11 population, or assisting enemy forces in the field.

12 The IRO says to its people that the  
13 guiding rules laid down in the respect of war  
14 criminals also apply to the below, that is, to those  
15 assisting the enemy. The names are usually included  
16 in the United Nations War Crimes Commission's list.  
17 "When a person not on the above list is generally  
18 considered by his countrymen as having been guilty  
19 of persecution and the eligibility officer has no  
20 reason to doubt what they are saying, he would do  
21 well after having collected all the available  
22 information to withhold decision unless he has  
23 contacted either the occupational governmental  
24 bodies or regional headquarters." The word  
25 "voluntarily" is the crux of the matter. This is

1 the intentional element.

2 "Assistance to enemy forces may have  
3 been military, communitary, administrative, or  
4 economic; but it must have been voluntary and given  
5 deliberately. Persons concerned with the specific  
6 purpose of hindering the enemy against the allies or  
7 against the civil population of the territory."

8 THE COURT: Did the District Court  
9 find that he voluntarily joined the Schutzmannschaft?

10 MR. CARROLL: The Court says that he  
11 voluntarily joined. There is no question about that.  
12 But that is not the issue. The issue is, did he  
13 voluntarily aid in the persecution? There is a big  
14 difference, Your Honor, between joining and helping,  
15 being an accomplice.

16 THE COURT: Wait a minute. How did  
17 the District Court believe that because he went  
18 first, did he not (not understandable) find that by  
19 virtue of his membership in that organization, his  
20 voluntary membership in that organization, he did  
21 assist the enemy?

22 MR. CARROLL: No question that the  
23 Court said it. I regret that Your Honor says it is  
24 a finding. I think it is a conclusion that has no  
25 place in the Court's findings. The Court has said

1 that he is a clerical functionary and that's all the  
2 Court has found. He says nothing, for instance,  
3 about the circumstances under which he joined.  
4 Kowalchuk said he needed a job and he went to work.  
5 The Government's witness Spatzga said, "I became a  
6 policeman because I didn't want to be slave labor  
7 and be deported."

8 THE COURT: Does the record show  
9 whether the Schutzmannschaft was in operation before  
10 the Germans came in?

11 MR. CARROLL: The record shows that  
12 it was not in operation before the Germans came in,  
13 if Your Honors please. I think one or two witnesses  
14 testified that Lubomyl was too small to have any  
15 police force, and when they had troubles they went  
16 to the Oblast or some larger town nearby for help.  
17 The then-existing militia which was a province-wide  
18 thing rather than purely local. Lubomyl was only  
19 10,000 or 12,000 population.

20 The test for voluntary assistance  
21 requires criminal intent because it is war criminals  
22 the IRO is talking about. And I think you can't  
23 just look at 1983 and 1984 tests for these things.  
24 You have to look at what was happening in 1949 when  
25 these statements were made and apply the test

1 applicable at that time.

2           Your Honors, the evidence as to what  
3 the Displaced Persons Commission did in processing  
4 like 1,600,000 refugees during the the period of  
5 existence makes it impossible for there to have been  
6 any kind of microscopic scanning that the Government  
7 is looking for. Everybody knew that people chanced  
8 running away from Soviet armies. Everybody knows in  
9 1949 Churchill's Iron Curtain speech was a year old  
10 by that time, that these people knew in 1944 about  
11 the Iron Curtain in Europe, if Your Honors please.  
12 Getting away from the Soviets was a perfectly good  
13 thing to do, and we accepted those people. We would  
14 not disqualify, as the Government evidence shows, by  
15 mere membership in an indigenous force. The  
16 evidence is to the contrary.

17           THE COURT: Thank you very much,  
18 gentlemen.

19           The Court expresses its gratitude to  
20 Mr. Carroll and Mr. Mausner for excellent  
21 presentations; and indeed we would like to have a  
22 transcript of this argument made. Make the  
23 necessary arrangements with the Clerk's Office and  
24 we want original and three copies.

25           We will take the matter under

1 advisement.

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Transcribed by Florence M. Foster

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