United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

JAN 9 1981

File: A8 194 566 - New York City

In re: BOLESLAVS MAIKOVSKIS

IN DEPORTATION PROCEEDINGS

APPEAL

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

ON BEHALF OF GOVERNMENT: Jeffrey N. Mausner
Richard D. Sullivan
Office of Special Investigations
Trial Attorneys

Thomas H. Belote
Special Assistant United States
Attorney

ORAL ARGUMENT: June 18, 1980

CHARGE:

Order: Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, not entitled under Act of May 26, 1924, to enter because immigrant visa procured by fraud or misrepresentation

Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, person who, under Section 13 of Displaced Persons Act of June 25, 1948, as amended on June 16, 1950, was inadmissible as one who advocated or assisted in the persecution of any person because of race, religion, or national origin

Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, an alien not entitled under Section 10 of Displaced Persons Act of June 25, 1948, as amended, to enter because immigrant visa procured by willful mispresentation of material facts

Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, a person whose entry is prejudicial to the interests of the United States, under the Act of May 23, 1918, as amended

Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, immigrant not in possession of valid immigrant visa, in violation of Section 13(a) of Act of May 26, 1924

Lodged: Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, person who, under Sections 2, 10, and 13 of Displaced Persons Act of June 25, 1948, as amended on June 16, 1950, was inadmissible as one who advocated or assisted in the persecution of any person because of race, religion, or national origin

Section 241(a)(1), I&N Act (8 U.S.C. 1251(a)(1)) - Excludable at time of entry, to wit, an alien not entitled under Sections 6 and 10 of Displaced Persons Act of June 25, 1948, as amended, to enter because immigrant visa procured by willful mispresentation of material facts

Section 241(a)(19), I&N Act (8 U.S.C. 1251(a)(19)) - Ordered, incited, assisted, or otherwise participated in persecution of persons because of race, religion, national origin, or political opinion, in association with the Nazi government, or government in any area occupied by the Nazi government, or established with the assistance or cooperation of the Nazi government, or ally of the Nazi government, during the period from March 23, 1933 to May 8, 1945

APPLICATION: Permission to take depositions in Latvia

The Acting Commissioner of the Immigration and Naturalization Service has certified to us for review an August 22, 1978, decision of an immigration judge in which the Government's motion to take depositions in Latvia, U.S.S.R., was denied. The record will be remanded to the immigration judge.

There are, at the outset, two jurisdictional problems facing us in this case, the untimeliness of the certification of the Acting Commissioner, and the interlocutory nature of the immigration judge's decision. The immigration judge rendered his decision on the Government's motion in August of 1978, but the Government did not request certification of that decision until March of 1980. Due to this delay, we find that we are not required to consider this case. While the regulations give the Commissioner, "or any other duly authorized officer of the Service" (8 C.F.R. 3.1(c)), authority to certify a case to the Board, the regulations also provide that, "The certification of a case . . . shall [not] serve to extend the time specified in the applicable parts of this chapter for the taking of an appeal." 8 C.F.R. 3.3(a). Appeals from decisions by immigration judges in deportation cases must be taken within 10 days (unless the decision is served by mail, in which case three additional days are given). 8 C.F.R. 242.21. The Government argues that these regulations relate only to final rulings by immigration judges, not to interlocutory rulings, such as the one here. Oral argument tr. at 8. We do not agree. 8 C.F.R. 242.21 talks only of appeals from "a decision" of an immigration judge, not of "final" decisions. We hold that the 10-day limit is applicable to appeals and certifications taken from interlocutory decisions, and that as the Commissioner's certification of this case was thus untimely, we are not bound to consider it.

We further hold, however, that we may consider the case by taking it on our own certification. The provisions of 8 C.F.R. 3.3(a) cannot logically be applied in instances where this Board certifies cases to itself, since we would generally have no way of knowing that a case even existed until after the 10-day period had run. The Government has offered some explanation for its delay in certifying the case by stating that it was attempting, following the immigration judge's denial of its request to take depositions in Latvia, to arrange to have the desired witnesses brought to the United States. As there is some excuse for the Government's delay, we have decided to take the case on certification, despite the interlocutory nature of the appeal. There is nothing in the regulations which precludes us from entertaining interlocutory decisions by immigration judges, and we have on occasion reviewed such decisions, notwithstanding our general rule to the contrary. See Matter of Seren, Interim Decision 2474 (BIA 1976); Matter of Fong, 14 I&N Dec. 670 (BIA 1974). In view of the significance of the issue raised here, and in order to avoid further delay in the final disposition of the proceedings, we have determined that this is an appropriate case in which to consider an interlocutory decision.

We turn now to the merits of the case. The immigration judge denied the request to take depositions mainly because of his belief that there were inadequate safeguards to insure fair

procedures and truthful testimony in the Soviet Union. We do not agree that, as a matter of law, such depositions cannot be reliable. We note that two United States District Courts, in two recent denaturalization cases, indicated that the taking of depositions in Soviet territories is not so inherently unfair or unreliable as to be barred. In the first of these cases, United States v. Osidach, 79-4212 (E.D. Pa.), the Court accepted into evidence videotaped depositions which had been taken in the Ukraine, U.S.S.R. As is the case here, the Government in Osidach alleged that Osidach had been a policeman in the Ukraine during World War II, and had in that capacity taken part in atrocities against Jews and others. See Government's Supplemental Memorandum of Law. In the second case, United States v. Linnos, 79 C 2966 (E.D. N.Y.), the Court ruled that the United States could proceed to take depositions in Estonia, U.S.S.R. That case involved a person claimed by the Government to have been a concentration camp commandant during World War II. The Court found that there would be certain precautions to protect the "reliability and integrity of the depositions" in Estonia. The Court stated that it could rule on the admissibility of the depositions, and the weight, if any, to be given them, after they were taken. See Government's Second Supplemental Memorandum of Law. 1/

We have decided to adopt the rationale of the District Courts in these cases, and we thereby reverse the immigration judge's denial of the Government's request for depositions. Rather than bar altogether the taking of depositions in Soviet territories, we hold that such depositions may be taken, and that their admissibility, and the evidentiary weight attached to them, shall be determined by the immigration judge after they are taken. In making these determinations, the immigration judge shall of course consider fully the circumstances under which the depositions were obtained.

Despite this holding, we are unable at this time, on the basis of the "record" presently before us, to determine the necessity for the taking of these expensive and time-consuming depositions.

1/ The Government brought these two cases to our attention after oral argument was heard. Counsel for the respondent protests that the supplemental memoranda informing us of these cases should be rejected as untimely. We do not agree. The pertinent decisions in these cases were not made until after oral argument, and were brought to our attention very shortly after they were made. The relevance of these cases is obvious, and it is appropriate for us to consider them. See generally Fed. R. Ap. P. 28(j).

The immigration judge's decision, at 6, indicates that the Government considers that the depositions in question form "the proof of essential elements in their case not available anywhere else in the world. It follows that if that evidence is not produced that part of the case itself falls." Exactly what part of the case would fall if this evidence is not obtained, however, is not specified either by the immigration judge or by the Government. It is not clear whether the depositions sought are considered essential to the Government's entire case. 2/ As there is certain other probative evidence now readily available, the immigration judge may be required to determine whether or not the further evidence now sought by the Government would be merely cumulative.

Because the record before us is incomplete, and does not contain a copy of the transcript from the hearing, 3/ we cannot say with any certainty what evidence the immigration judge considered. We note, however, that in 1976, statements regarding the respondent's activities in Latvia in 1941-1943 were made by six witnesses the Government now seeks to depose. The respondent's brief on appeal states that although these statements were submitted as exhibits in support of the Government's motion to take depositions, they were never offered into evidence. Similarly, there are transcripts available from depositions taken of four of these same witnesses in 1978, when United States Government attorneys were present and did some questioning. These transcripts are contained in the record before us, but apparently were not offered into evidence at the hearing. Respondent's brief at 40.

2/ The regulations provide that depositions may be ordered in deportation cases only where a witness is not reasonably available at the place of the hearing, and his testimony is "essential." 8 C.F.R. 242.14(e).

3/ At oral argument before this Board, the trial attorney for the Office of Special Investigations stated that the record from the proceedings below was not forwarded to us because it was "not relevant" to the issue before us, in that it did not deal with the question of depositions in Latvia. Oral argument tr. at 7. We note that the events of the hearing, and the evidence presented there, are relevant at least to the issue of whether the depositions are crucial to this case, and a complete record file, with transcript, would have made the task of deciding this interlocutory appeal an easier one.

The respondent protests that these prior statements have little or no evidentiary value, because they were obtained under circumstances which render them inherently untrustworthy. This is the same argument he makes regarding the proposed depositions. At least five of the witnesses who made the earlier statements appeared also as witnesses for the Soviet government in a 1965 criminal trial of the respondent, held in absentia. The respondent was convicted at that trial of war crimes and crimes against the state, and was sentenced to death for these crimes. The statements made by the witnesses in 1976 and 1978 at the behest of the United States are essentially the same as those made at the 1965 trial. The respondent contends that, having made certain statements as witnesses for the Soviet government in 1965, these persons were unlikely, and are still unlikely, to change their stories at a later date. We have no way of knowing, however, to what extent the witnesses' 1976 and 1978 statements were influenced by the testimony given in 1965, or to what extent any future statements may be influenced by prior testimony. As with the proposed depositions, we believe that the problems posed by these statements are factual matters for the immigration judge to consider, and should not bar the use of the statements as a matter of law. 4/

Besides his arguments regarding the inherent unreliability of the 1976 and 1978 statements (as well as of the proposed depositions), due to the very fact of their having been taken in Soviet-controlled territory, the respondent also argues that the use of the prior statements would be unfair because they were made

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4/ We note that whatever reservations we may have regarding the possible unreliability of statements given in the Soviet Union, and we do recognize the problems inherent in such statements, we cannot accept the respondent's, and the immigration judge's, comparison of the respondent's case and his 1965 trial, to that of the more recent trials of Soviet dissidents. While the respondent's criminal trial may have had certain political aspects to it, the conviction record provided to us by the respondent reveals that the trial was overwhelmingly concerned with serious, specific, and non-political charges of heinous crimes against Jews and others. Any political overtones were minor, especially in comparison with the purely political trials of the dissidents. Furthermore, unlike the dissidents mentioned by the respondent, the respondent has not recently engaged, in the Soviet Union, in attacks on the Soviet state.

without the opportunity for cross-examination. It is true that neither the respondent nor any representative for him was present when the statements in question were taken. This fact does not, however, render the statements inadmissible. Although both the statute and the regulations provide that an alien in deportation proceedings must be given a "reasonable" opportunity to cross-examine witnesses presented by the Immigration and Naturalization Service, when the Government has shown that it is unable to secure the presence of an affiant, the use of statements without cross-examination does not violate an alien's due process rights. Matter of DeVera, 16 I&N Dec. 266 (BIA 1977). It has been consistently held that hearsay statements are admissible in administrative proceedings where their use is, (1) fundamentally fair and, (2) probative. Martin-Mendoza v. INS, 499 F.2d 918 (9 Cir. 1974). See also Solis-Davila v. INS, 456 F.2d 424 (5 Cir. 1972); United States v. O'Rourke, 211 F.2d 609 (8 Cir. 1954), cert. denied, 348 U.S. 827 (1954). Like the potential problems of taking depositions in Soviet territories, the lack of an opportunity to cross-examine may go to the weight to be given to evidence, but it will not necessarily render the evidence inadmissible.

Our ruling at this time in no way reflects any evaluation of the substantive merits of the case, or of the credibility of, or weight to be given to, either the evidence already of record, or that brought to our attention in connection with the certification process. Both the government and the respondent are free to present relevant evidence on remand. The government should have the opportunity to present its case in full, including the 1976 and 1978 statements. If the Government indicates that it still needs further depositions in order to prove its case, then the immigration judge shall determine whether or not this further evidence would be cumulative. If he determines that the depositions are "essential" (under 8 C.F.R. 242.14(c)) to a proper disposition of the case, then he shall order that they be taken. If he determines otherwise, then he should proceed to a final decision on the merits. An appeal from a final decision will lie by either side.

ORDER: The record is remanded to the immigration judge for further proceedings consistent with the foregoing opinion.

David L. Milhollan

Chairman