84-4143

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 84-4143

BOLESLAVS MAIKOVSKIS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

For Review of an Order of the Board of Immigration Appeals, Executive Office for Immigration Review, Department of Justice

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

CASES: Page

CASES: Page

STATUTES:

STATUTES:

MISCELLANEOUS:

REGULATIONS

I. PRELIMINARY STATEMENT

This is a petition for review of an order of deportation entered by the Board of Immigration Appeals (BIA) against Boleslavs Maikovskis on August 14, 1984. The decision of the BIA was unanimous.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was there reasonable, substantial, and probative evidence supporting the BIA's factual finding that the inhabitants of Audrini were persecuted because of political opinion?

2. Did the BIA deprive Maikovskis of due process by concluding that he was deportable under §241(a)(19) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1251(a)(19)?

3. Did the BIA err in concluding that an individual's personal motive for engaging in persecution is not relevant to a determination of deportability under §241(a)(19) of the INA?

4. May this Court conclude, as a matter of law, that Maikovskis is deportable under Section 241(a)(19) of the INA because he assisted in the persecution of Jews?

5. Did the BIA err in concluding that Maikovskis is deportable under Section 241(a)(1) of the INA because he made a material misrepresentation when he applied for a visa to this country?

III. STATEMENT OF THE CASE

A. Nature and Background of the Case

This deportation proceeding was initiated by a Superseding Order to Show Cause and Notice of Hearing issued on December 20, 1976. Additional allegations and charges of deportability were subsequently served upon Maikovskis.

The factual allegations and legal charges as they currently stand are set forth in Exhibits 133 and 134 (A32-33).[1]

The government alleged, inter alia, that Maikovskis had been employed as the Chief of Police in the Second Precinct of the Rezekne District Police Department in Latvia during the Nazi occupation of that country; that in that capacity he participated or assisted in acts of persecution against the civilian population; and that he misrepresented his true wartime employment and activities to immigration authorities in order to gain admission to the United States as a displaced person. The government charged that his employment as a Latvian policeman, his activities on behalf of the police, and his misrepresentations to obtain a visa rendered him deportable under Sections 241(a)(1) and (19) of the INA.

On June 30, 1983, Immigration Judge Francis Lyons held that the government had not established deportability on any ground and ordered the deportation proceedings against Maikovskis terminated. By order dated August 14, 1984, the Board of Immigration Appeals reversed the Immigration Judge and ordered Maikovskis deported under both Sections 241(a)(1) and 241(a)(19). (A735-775.)

Maikovskis' appeal from the BIA decision does not contest the Board's finding that during the Nazi occupation of Latvia he had served as a precinct

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[1] The following forms of citation to the record below are used in this brief: If the portion of the record referred to appears in the Joint Appendix (cited as "A"), the page number in the Joint Appendix is given, followed by a parallel citation to the exhibit number that was used in the immigration court. Example: (A92, Ex. 24-4). Exhibits are referred to as "Ex." and the trial transcript as "Tr." All "Tr." citations are to the proceedings which took place from 1981 to 1984. There are no references in this brief to any transcripts from 1977. Citations to the transcript are in the following form: witness, date of transcript, "Tr.," page numbers. Example: (Maikovskis 9/1/81 Tr. 385-388). Citations to different exhibits are separated by a semi-colon; parallel citations are separated by a comma.

Chief of the Latvian Police. Nor does he contest that, in this capacity, he participated in the arrest of all the inhabitants of a village (Audrini) and the burning of all the homes in the village, because some of the inhabitants had engaged in anti-Nazi activities. He does not deny that all of these civilians were later killed with the assistance of the Police, although he does deny that he personally participated in the killings. He does not contest the BIA's conclusion that the action taken against the Audrini villagers (including women and children) constituted persecution. Finally, Maikovskis does not contest the BIA's finding that he misrepresented his police service and activities when he applied for a visa to the United States.

Maikovskis' appeal from the findings of deportability centers on two principal contentions:[2] (1) the persecution of the aforementioned villagers was not "because of political opinion" and hence not a deportable action under 8 U.S.C. §1251(a)(19); and (2) the misrepresentations made at the time of his visa application were not "material" and hence were not deportable actions under 8 U.S.C. §1251(a)(1).

B. Statement of Facts[3]

1. Maikovskis' Activities During the Nazi Occupation of Latvia

Nazi Germany invaded the U.S.S.R. on June 22, 1941. After German forces reached the city of Rezekne (approximately July 9, 1941), they established a local Latvian police unit. (A92, Ex. 24-4; Scheffler 7/20/81 Tr. 46; Ex.

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2 Maikovskis has also raised several related or subsidiary arguments, all of which are addressed in the course of this Brief.

3 This explication of the facts is derived from the record evidence considered by the BIA; it does not include Soviet witness testimony which the BIA did not consider. That testimony is discussed separately at pp. 10-12, infra.

24-1; 24-4; A271-273, Maikovskis 9/1/81 Tr. 347-349.) The Latvian police were directly subordinate to and under the command of the German SS and police. (Ex. 24-15; 7/20/81 Tr. 52; Ex. 24-1; Exs. 62, 83, 84; Maikovskis 9/1/81 Tr. 365-367, 371-372.)

a. Maikovskis' Service As Chief of Police

Prior to the Nazi occupation of Latvia, Boleslavs Maikovskis had never been a policeman; he had been employed as a bookkeeper for the Latvian Railway and Highway Departments and as a farm worker. (A107, Ex. 40; A270-271, Maikovskis testimony 9/1/81 Tr. 346-348.) From 1933 to 1940 Maikovskis also was a member of a national guard organization known as Aizsargi. (A111, Ex. 40; A271, Maikovskis 9/1/81 Tr. 347.)

After the Nazi invasion, Maikovskis voluntarily joined the so-called Latvian Self Defense in Rezekne. (A272, 301, Maikovskis 9/1/81 Tr. 348, 377.) When the Germans formally organized police forces they converted the Latvian Self Defense units into Police units under German command. At that time, Maikovskis voluntarily became Chief of the Second Police Precinct of Rezekne. (A273-274, 300-302, Maikovskis 9/1/81 Tr. 349-350, 376-378; Exs. 82, 60-69.) This was a full time job; Maikovskis had no other employment. (A301-302, Maikovskis 9/1/81 Tr. 377-378.) Maikovskis served in this position until the Germans fled Latvia in 1944. (A276, Maikovskis 9/1/81 Tr. 352.) At that time, Maikovskis retreated to Germany with the other German forces. (A56-57, Ex. 14 pp. 13-14.)

The Second Police Precinct included several villages and areas near the city of Rezekne, among them the villages of Audrini and Kaunata and the Anchupani Hills; Maikovskis was responsible for police supervision of all of these areas. (A287, 293, 278, Maikovskis 9/1/81 Tr. 363, 369, 354.)

b. Persecution of Jews

The German policy in Latvia was to seize and shoot all Jews, except for a small number of skilled laborers. (Ex. 24-3.) During the period from 1941 to 1943, virtually all of the Jews of Latvia were murdered. (Ex. 24-1; Ex. 24-3; 7/20/81 Tr. 46-47.) Latvian Self Defense units, and their successors, the Latvian police, conducted mass arrests and mass shootings of Jews throughout Latvia. (Exs. 24-1, 24-2, 24-3, 24-4, 24-5, 24-6, 24-7, 24-8, 24-9; Scheffler 7/20/81 Tr. 46-51, 56-58, 72-74, 77; Scheffler 7/21/81 Tr. 127-131; Exs. 25, 28.) It was reported to the Chief of the German Security Police and SD in Berlin on July 18, 1941, that Rezekne Police Chief Matsch "has taken over the liquidation of the Jews," including 80 Jews who were murdered. (A94, Ex. 24-4.)[4]

On August 1, 1941, "200 Communists and Jews from the district of Rezekne were shot in the morning hours by the Latvian Self Defense." (A97, Ex. 24-6.) "On the early morning of August 5, several hundred Jews were shot in Rezekne by the Latvian Self Defense." (A98, Ex. 24-6.)

Boleslavs Maikovskis was a Captain and Chief of the Self Defense and Latvian police in Rezekne during the time of these arrests and executions. (Ex. 82; Ex. 45/60;[5] A60-61, Ex. 15; A271-274, Maikovskis 9/1/81 Tr. 347-350.) His direct superior at this time was Rezekne District Police Chief Matsch (spelled "Macs" in Latvian). (A272, 276, Maikovskis 9/1/81 Tr. 348, 352; Ex. 88)

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[4] The government introduced into evidence, without objection (7/20/81 Tr. 44), certain documents which were used by the prosecution in the Nuremburg trials; copies of these documents are now kept at the U.S. National Archives in Washington. Exhibits 24-4 and 24-6 are two of those documents.

[5] Exhibit 60 is the English translation of Exhibit 45.

On December 31, 1941, Maikovskis' direct superior (Matsch's successor), Albert Eichelis, wrote the following for distribution to Rezekne policemen:

> During the last six months, our work has been dominated by our desire to free ourselves of Communist and Jewish leftovers, organize powerful police forces, and raise and develop our whole way of life. [A156, Ex. 85; A277-278, Maikovskis testimony 9/1/81 Tr. 353-354.]

By December 1941, the Latvian police had assisted in the murder of approximately 71,000 Latvian Jews. Fewer than 4,000 Jews were still alive in ghettos in the cities of Riga, Daugavpils, and Liepaja. (Ex. 24-3.)

Maikovskis admitted that at the beginning of the German occupation about 50 Jews lived in his precinct in the village of Kaunata. (A278, Maikovskis 9/1/81 Tr. 354.) He also admitted that the Latvian police were involved in killing Jews in Rezekne while he was Chief of the Second Precinct, but he claimed that he had not been personally involved. (A285-286, Maikovkis testimony 9/1/81 Tr. 361-362.)

c. Persecution of the Residents of the Village of Audrini

After the murder of the Jews of the Rezekne area had been completed, the Latvian police turned their attention to other "enemies" of the Nazi regime. One village in Maikovskis' Police Precinct -- Audrini — was populated by ethnic Russians of the Orthodox faith; they were believed by the Germans to be sympathetic to the communists. (Ex. 24-10.) Several inhabitants of the village had apparently hidden several Soviet soldiers or partisans, who were later discovered by the Latvian police. A military skirmish with the partisans ensued in which two or more Latvian policemen were killed. (Exs. 24-10, 24-11, 24-12.) The killings of the policemen occurred on or about December 18 and 21, 1941. (Ex. 24-10; Ex. 84.)

German authorities immediately ordered that punitive action be taken. On or about December 22, 1941, Maikovskis ordered his police to arrest all of the 200-300 inhabitants of the village; he thereafter ordered the police to burn the entire village to the ground. (A288-295, Maikovskis 9/1/81 Tr. 364-371; A126-130, Ex. 47/62;[6] A148-155, Ex. 84; Ex. 24-10.) On January 2, 1942, the Latvian police from the Second Precinct carried out the destruction of the village. (Id.) Maikovskis admitted at trial that he had given these orders to his subordinates. (A126-130, Ex. 62; A309-312, 9/1/81 Tr. 385-388; A288-295, 9/1/81 Tr. 364-371.)

After their arrests, thirty of the Audrini inhabitants were publicly shot in the Rezekne market square. (Ex. 24-10; A286, Maikovskis testimony 9/1/81 Tr. 362.) The remaining villagers, including women and children, were taken to the Anchupani Hills (an area within Maikovskis' precinct) and shot to death there. (Ex. 24-10; Ex. 84.)[7] Maikovskis claims that he did not order or

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[6] Exhibit 62 (A126-130) is the English translation of Exhibit 47. At trial, Maikovskis admitted signing this report (A309-312, Tr. 385-388), which stated inter alia:

> on orders of the German authorities, all the residents of the Audrini Village, Makaseni County, were imprisoned, but the village itself was burned.

[7] Exhibit 84 (A148-155) states:

> On December 22 of last year, on the order of the Territorial Commissar at Daugavpils, all residents of the village of Audrini were arrested, and on January 2, of this year, the village itself was burned to the ground. Also, the inhabitants were shot to death, with 30 of the death sentences carried out in public in the Rezekne market place.

This document is a typewritten copy of an original report to the vice-prosecutor of Daugavpils, Latvia. The copy contains a notation that the original had been signed by Maikovskis.

A chemical physicist (Dr. Antonio A. Cantu of the Bureau of Alcohol, Tobacco and Firearms and the FBI) tested the document and found no evidence of inauthenticity. (Ex. 119.) The BIA found that this document was authentic. (A750, Decision p. 16.)

participate in the shootings.

The reason for this severe punitive action was set forth in an Operational Situation Report authored by the office of the Chief of the German Security Police (SIPO) and Security Service (SD) in Berlin on February 2, 1942:[8]

> The inhabitants of the village of Audrini are Russians — of Orthodox faith -- all told 48 families. Blind in their nationalism, they supported the Red Armyists 100%.
>
> * * *
>
> This village was one of the most active in the Communist sense.
>
> In pursuit of this affair, on 18 December 1941, two Latvian auxiliary policemen came upon armed Red Army men. The Red Army men fled into a house. The Latvian auxiliary policemen broke the door open and faced 5 armed Red Army men. One of the auxiliary policemen grabbed the gun from the Red Army man and shot with it. Thereupon he himself was shot. The second policeman managed to escape.
>
> After this event became known the county police of Rositten[9] sent out 110 policemen, who patrolled the woods.
>
> On 21 December 1941 at about 12:30, a patrol of three men -- they probably were the same Red Army men -- came upon some armed men. The policemen were shot at with automatic pistols and killed. On the same day another policeman was killed.
>
> By order of the commander of the Security Police and the Security Service, all the inhabitants of the village of Audrini, to wit 61 men, 88 women and 51 children, were arrested and transported to Rositten. The cattle and supplies were handed over to the county agricultural agent.
>
> In agreement with the commander of the Security Police and the Security of the Ostland [Territory "East"], the commander of the Einsatzkommando 2 has ordered that:
>
> 1. The village of Audrini is to be burned to the ground and that
>
> 2. the entire population found incriminated is to be shot.
>
> Pursuant to this order, the village was set on fire on 2 January 1942. Although the houses had been searched, hidden hand-grenades and other ammunition exploded after the fire was started.

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8 This report was used by the prosecution at the Nuremberg trials.

9 The German name for Rezekne was "Rossiten." (Scheffler 7/20/81 Tr. 65.)

> On 3 January 1942 a part of the villagers were shot under exclusion of the public. On 4 January 1942 at 11 o'clock, 30 male villagers were shot in public on the market square in Rositten. [Ex. 24-10, emphasis added.]

The Audrini incident was part of a long-term campaign of persecution of persons suspected of Communist sympathies. A July 1941 report by the office of the Chief of the German Security Police and SD identified the towns surrounding Rezekne as being politically suspect:

> Isolated groups of Red Army and native communists still are at large in the woods; however, they do not engage in any larger operations. There is no evidence of organized raids. Starting July 7 the surrounding towns and forests will be systematically combed for members of the Red Army and native Communists. * * * The police detachments have been instructed to bring leading Communists into the jail at Rezekne.
>
> In individual towns bands have formed under Communist leadership. These are indigenous Russians belonging to the Russian Orthodox Church. These Old Believers are direct descendants of the criminals who were deported from Tsarist Russia to Baltic border states. They are not popular with the Latvians who regard them as robbers and thieves. The members of the Russian Orthodox Church have always been strongly inclined towards Communism and, together with the Jews, during the rule of the Communists, formed the backbone of the Communist party. A part of these Old Believers, especially the younger generation, has formed bands after the arrival of the Germans. Active Communists have assumed command of these bands, which are now attempting to terrorize the local populace. The auxiliary police has been ordered to hand over the leaders and clergy of the Old Believers to the Einsatzkommando. [A92-95, Ex. 24-4, emphasis added.]

Indeed, several documents in the record reflected the active involvement of the Latvian Police in the Nazi effort to eradicate all vestiges of communist ideology. For example, the Chief of the Rezekne District Latvian Police (Eichelis) reported on the Police activities for the last six months of 1941:

> During the last six months, our work has been dominated by our desire to free ourselves of Communist and Jewish leftovers, organize powerful police forces, and raise and develop our whole way of life. [A156, Ex. 85.][10]

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[10] See also Ex. 50/65 (Ex. 65 is the English translation of Ex. 50); Ex. 24-6 (A97); Ex. 24-1. Another document, Exhibit 86, was an order from Eichelis to Maikovskis in November 1941, requiring the latter to increase security during the anniversary of the Bolshevik Revolution:

(footnote continued)

d. The Soviet Depositions

Videotaped depositions of seven witnesses were conducted in Riga, Latvia during May 14-19, 1981. (Exs. 30-36.) Some of these witnesses testified to Maikovskis' direct participation in the persecution and murder of Jews. Most of these witnesses worked as policemen under Maikovskis' command. They identified him by name, description, and photograph. These witnesses testified to the following events:

In the autumn of 1941, Maikovskis participated in a mass shooting of Jews in the Anchupani Hills. Maikovskis gave orders for all the policemen in the rural districts to assemble for an action. (Ex. 30, Zhukovskis dep. p. 28.) After the policemen gathered at his office, he assigned Zhukovskis to be head of a group that guarded the execution site. (Zhukovskis dep. pp. 29-30.) Zhukovskis and his men were taken to the Anchupani Hills, where the guards were posted and were ordered by Maikovskis to shoot any Jews who tried to escape. (Zhukovskis dep. p. 31; Ex. 32, Miglinieks dep. pp. 9-10, 18-20.)

Jews were brought to the Anchupani Hills in lorries by prison guards. (Zhukovskis dep. p. 32; Miglinieks dep. pp. 10, 20-21; Exhibit 34, Shalayev dep. pp. 26-28.) Policemen under Maikovskis' command took the Jews off the lorries and into a wooden house, where they were forced to undress. (Zhukovskis dep. pp. 33-35.) Policemen under Maikovskis' command then led the Jews in groups of ten to the shooting site; they were lined up in front of a ditch and shot. (Zhukovskis dep. p. 35.)

Particular attention should be paid to execution spots, Jewish and Communist cemeteries, at which Communist demonstrations could occur.

Altogether, approximately 300 men, women and children were shot that day. (Zhukovskis dep. p. 36.) Maikovskis was present during the shootings. (Zhukovskis dep. p. 36.)

Prior to this action, Maikovskis helped organize the Self Defense group in Kaunata, which was an area under his jurisdiction. (Ex. 31, Kalninsh dep. p. 11.) He thereafter ordered the head of the Kaunata Self Defense group (Kalninsh), to kill all Jews in that region. (Kalninsh dep. pp. 14-21, 34-35, 40-43.) Approximately 50 Jews were shot as a result of this order. (Kalninsh dep. pp. 15-21, 26, 34-35, 40-43; Ex. 35, Mezhale dep. pp. 11-14.) Maikovskis also refused to punish members of the Self Defense group who had raped two Jewish girls, on the basis that Jews were not entitled to the protection of the law. (Kalninsh dep. pp. 16-18.)

Maikovskis also gave orders for all of the Gypsies living around Makashani (another area under his jurisdiction) to be arrested and sent to Rezekne. (Ex. 33, Usne dep. pp. 11-12.) Approximately seven Gypsies, including women and children, were arrested and sent to Rezekne. (Usne dep. pp. 12-13.)

Finally, several of these witnesses testified to the incident at Audrini. (Ex. 30, Zhukovskis dep.; Ex. 32, Miglinieks dep.; Ex. 34, Shalayev dep.) Their description of the destruction of the village is substantially similar to that previously given, based on western evidence and Maikovskis' admissions. In addition, they clarified Maikovskis' personal role in the killings in the Anchupani Hills after the village was burned. Specifically, Maikovskis was responsible for obtaining volunteers for the firing squad and organizing the guards at the killing site. (Zhukovskis dep. pp. 10, 38; Miglinieks dep. pp. 13,21.) Maikovskis also gave orders that any attempted escapees should be shot. (Zhukovskis dep. pp. 38-39.) Maikovskis was present

throughout the shootings and, after the firing squad had finished, he ordered his men to walk along the killing-ditch and to shoot anyone still alive. (Zhukovskis dep. pp. 13-16.) Approximately 200 men, women and children were shot that day. (Zhukovskis dep. pp. 40, 12; Shalayev dep. pp. 21-24, 10-11.)

The BIA did not view these videotaped depositions and did not decide the question of what weight the depositions should be given, "since we have been able to make determinations of deportability without relying in any way on that disputed evidence." (A746, BIA Decision p. 12.)

2. Maikovskis' Immigration to the United States

a. Maikovskis Repeatedly Lied in Order to Obtain a Visa

After Nazi Germany was defeated, Maikovskis applied to enter the United States under the Displaced Persons Act ("DP Act"),[11] an immigration law passed to help the victims of the Nazis. In making his application, he lied repeatedly about his activities during the Nazi occupation.

The first step in Maikovskis' immigration to the United States was the completion of an "Application for I.R.O. Assistance" (Form CM/1) (A105-112, Ex. 40). This form contained an explicit warning that anyone who made a willful, material misrepresentation would be barred from obtaining any benefits under the DP Act and would thereafter not be admissible into the United States. (A109.) Maikovskis admitted at trial that he signed the CM/1 form immediately below this warning. (A300, 9/1/81 Tr. 376.)

Maikovskis nevertheless misrepresented both his employment and his place of residence in the IRO application. He stated that from December 1941 to

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[11] Chapter 647 -- Public Law 774, 62 Stat. 1009 (1948) as amended in Public Law 81 -- 555, 64 Stat. 219 (1950), A16-31.

b. Maikovskis Repeatedly Lied to Prevent His Deportation

Maikovskis continued to lie about his police service under the Nazis even in the United States. He was questioned, under oath and with his attorney present, in 1966 and 1975. On January 21, 1966, he swore that he had worked for the Highway Construction Department in 1941-1942. (Ex. 13 pp. 7-8, A41.[13]) On February 15, 1966, he stated that he had worked at the Highway Construction Department during the entire time of the German occupation. (Ex. 14, A46.) He said that he temporarily served as "an ordinary keeper of order" and then as a chief of the order keepers from July or August 1941 to November 1941. (A46-52.) He emphatically stated several times that "I never was a police officer." (Id.) He insisted that his order-keeping functions ceased by November or early December 1941, and that he thereafter worked full time at the Highway Construction Department. (Id.) He denied that he ever wore a uniform, ever assisted the Germans in arresting anyone, or ever gave orders to arrest anyone. He denied giving any assistance whatsoever to the Germans. (Id.)

At trial, Maikovskis admitted that he had served full-time as Chief of the Second Police Precinct in Rezekne during the entire time of the German occupation. (A276, 301-302, 9/1/81 Tr. 352, 377-378.)

c. Evidence Regarding the Effect of Maikovskis' Misrepresentations on His Admissibility Under the DP Act

Several witnesses testified at trial or by deposition concerning the effect Maikovskis' misrepresentations had on his admissibility under the DP

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[13] Page 7 of Ex. 13 was inadvertently omitted from the Joint Appendix. Copies of page 7 are being submitted with this brief.

Act. The government and Maikovskis also introduced documentary evidence on this subject.

Rosemary Carmody was a vice consul of the U.S. State Department in 1951; she was responsible for the processing of persons under the DP Act. It was Ms. Carmody who interviewed Maikovskis at the time of his visa application and granted his visa under the DP Act. (A213, Carmody 7/23/81 Tr. 242; A101-104, Ex. 38.) Carmody testified that if Maikovskis had revealed that he was a police chief in Rezekne during the Nazi occupation, he would have been per se ineligible under the DP Act and she would have denied the visa. (A220-221, Carmody 7/23/81 Tr. 249-250.)

The government introduced into evidence the DP Commission Inimical Lists (A131-144, Exs. 75 and 76), which were used by the DP Commission in processing applicants for immigration. The organizations appearing on the lists were deemed hostile to the interests of the United States. Both the prosecution and defense witnesses testified that anyone who belonged to an organization appearing on the list was ineligible to enter the U.S. under the DP Act. (A251-252, Conan 7/23/81 Tr. 285-286; A497-499, Charig 3/31/82 Tr. 737-739; A617-618, Printz dep. pp. 29-30.)[14]

Both Inimical Lists contained the organization "Schutzmannschaften" under the heading for Latvia. (A139, 143.) The original inimical list (A139, Ex. 75) made an exception for a member of the Schutzmannschaften who could "produce evidence that he was conscripted and did not commit atrocities or

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[14] Exhibit 71, dated 21 August 1950, is a memorandum stating that instructions had been issued by the DP Commission European Headquarters requiring members of organizations included on a "List of organizations considered inimical to the United States under Public Law 774 (as amended)" were to be rejected under Section 13 of the DP Act. The List referred to was Exhibit 75.

otherwise persecute civilian populations." (See also A505, Charig 3/31/82 Tr. 745.)

Abraham Conan, a senior DP Commission official,[15] testified that the term "Schutzmannschaften," as used on the Inimical Lists, included local police forces such as the Latvian police in Rezekne. (A257, Conan 7/23/81 Tr. 291.) Gerard Charig, a member of the DP Commission Review Panel,[16] testified that the Review Panel interpreted the term "Schutzmannschaften" to mean all Latvian police. (A504, Charig 3/31/82 Tr. 744.)[17] Even the Immigration Court found that Maikovskis had been in the Schutzmannschaft and that "Schutzmannschaft covered all . . . local police." (A725, Immigration Court decision p. 11.)

Exhibit 100 (A180), a U.S. Displaced Persons Commission rejection for one Zilvestris Skurulis, shows the treatment that members of the Latvian police or Schutzmannschaft received. This rejection states the following:

> The Commission . . . finds that the Applicant is rejected under Section 13 [of the DP Act] because Subject is (was) a member of, or participated in, a movement which is hostile to the United States or its form of government since, CIC report, dtd 3 Mar 1950, discloses that applicant was from 12 Mar 1942 to 17 Aug 1943 a member of the "Schutzmannschaft" (Latvian Police), which is an organization considered inimical to the United States.

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[15] Mr. Conan served as senior officer for the DP Commission in Bremen, Germany and then as senior officer for the DP Commission in the British Zone of Germany. Maikovskis' visa was processed in the British zone. (A230, 7/23/81 Tr. 264.)

[16] The Review Panel was the "court of last resort" on the question of eligibility under the DP Act; its decisions were given precedential effect. (A487, 490, Charig 3/31/82 Tr. 727, 730.)

[17] The German occupying forces during World War II also referred to the local Latvian police as the "Schutzmannschaften." See Exhibits 24-13, 24-14 and 24-15, all from the U.S. National Archives. Dr. Wolfgang Scheffler testified that all Latvian police forces, including the police in Rezekne, were designated "Schutzmannschaften" by the German authorities. (Affidavit of Dr. Scheffler, Ex. 27; 7/20/81 Tr. 50.)

participated in burning an entire village and arresting all the inhabitants. (A621, Id. at 33.)[18]

C. The Relevant Law

Maikovskis entered the United States under the DP Act in December 1951. Section 2(b) of the Act defined "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization [I.R.O.] and who is the concern of the International Refugee Organization." Annex I, Part II of the I.R.O. Constitution provided, in relevant part, that certain persons would not be the "concern" of the I.R.O. These persons included:

> 1. War criminals, quislings and traitors.
> 2. Any other person who can be shown:
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Section 10 of the DP Act provided, in pertinent part, that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Section 10 also specifically placed the burden of proving eligibility for displaced person status upon the applicant.

Section 13 of the DP Act, as it was amended in June 1950, provided that:

> [n]o visas shall be issued under the provisions of this Act, as amended . . . to any person who is or has been a member of or participated in any

[18] Maikovskis also introduced into evidence several documents showing that some members of the Latvian police had revealed their police service, but nevertheless had been admitted to the United States under the DP Act. Such evidence was not inconsistent with the government's proof, as explained at pp. 42-43, infra.

> movement which is or has been hostile to the United States or the form of government of the United States, or to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II.

Section 241(a)(19) of the INA, 8 U.S.C. §1251(a)(19), the so-called "Holtzman amendment," provides for the deportation of any alien who:

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with —
>
> (A) the Nazi government of Germany,
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

Section 241(a)(1) of the INA, 8 U.S.C. §1251(a)(1), provides for the deportation of any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

D. The Board of Immigration Appeals' Decision

The BIA found that Maikovskis ordered and participated in the arrests of all the inhabitants of Audrini (A744-745, 754, Decision pp. 10-11, 20) and that he ordered that the village be burned.[19] (A744-745, 754, Decision pp. 10-11, 20.) The BIA held that these actions constituted assistance in persecution of civilians. (A757, Decision p. 23.) In addition, it held that this persecution was undertaken because of some of the victims' political

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[19] The Board did not reach the question of whether Maikovskis had also participated in the killings of the Audrini residents.

(i.e., pro-Communist or anti-Nazi) opinions. (A758, Decision p. 24.) The Board concluded that, pursuant to Section 241(a)(19) of the INA, Maikovskis should be deported. (A753-758, Decision pp. 19-24.)[20]

Finally, the BIA held that Maikovskis' misrepresentations to immigration officials at the time of his visa application were material and violative of Section 10 of the DP Act. Maikovskis was therefore not entitled to a visa under the DP Act, the law in effect at the time of his entry. Accordingly, this statutory bar to entry provided a separate ground for deportation under Section 241(a)(1) of the INA. (A768-770, Decision pp. 34-36.)

With respect to Maikovskis' alleged assistance in the persecution of Jews, as defined under Section 241(a)(19), the BIA found that the Latvian Self Defense and Latvian police throughout Latvia had assisted in the persecution and murder of Jews. (A746-749, Decision, pp. 12-15.) It further found that the Latvian Self Defense and Latvian police in Rezekne had murdered Jews living in the Rezekne district (A748-749, Decision pp. 14-15). The BIA did not reach the legal question of whether Maikovskis' service as a chief of a police unit that murdered Jews resulted in his having assisted in the persecution of Jews, under Section 241(a)(19). Because it had concluded that there were other grounds for deportation, the BIA found it unnecessary to decide whether Maikovskis had assisted in the persecution of Jews. Accordingly, the Board also decided not to view or consider the Soviet deposition testimony, much of which related to Maikovskis' involvement in the persecution of Jews.

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[20] The Board also held that the burning of Audrini constituted a "war crime," as defined in the constitution of the IRO. (A757, Decision p. 23.) Because persons engaged in war crimes and persons who assisted in persecuting civilians were ineligible for visas under Section 2(b) of the DP Act, Maikovskis was excludable from the United States at the time of his entry. Maikovskis may therefore be deemed deportable under Section 241(a)(1) of the INA because of his participation in the Audrini incident.

IV. BURDEN OF PROOF AND STANDARD OF REVIEW

The burden of proof in a deportation proceeding is by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." Woodby v. INS, 385 U.S. 276, 286 (1966); Kokkinis v. INS, 429 F.2d 938, 941 (2d Cir. 1970). This standard is not the same as the standard of proof imposed in criminal cases, requiring proof beyond a reasonable doubt. Kokkinis, 429 F.2d at 941. This Court has specifically held that the burden of proof in a deportation proceeding is "a standard intermediate between the long established burden of proof of 'reasonable, substantial and probative evidence' and the more onerous burden of proof of evidence 'beyond a reasonable doubt.'" Kokkinis, 429 F.2d at 941.[21]

The standard of review to be applied by this Court to the BIA's findings of fact is set forth in 8 U.S.C. §1105a(4). The BIA's findings, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

The reason for the persecution of the inhabitants of Audrini is a question of fact.

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[21] Nor is the burden of proof in a deportation case the same as the burden of proof in a denaturalization case. For denaturalization, the government must prove its case by "'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.'" Schneiderman v. United States, 320 U.S. 118, 125, 158 (1943). This last requirement -- "which does not leave the issue in doubt" — has led courts to equate the burden of proof in denaturalization cases with the criminal standard. United States v. Riela, 337 F.2d 986, 988 (3d Cir. 1964). See Brief for the Petitioner pp. 6-8, where he erroneously argued that the same standard applies to a deportation proceeding. Kokkinis clearly holds to the contrary.

V. ARGUMENT

A. There Was Reasonable, Substantial, and Probative Evidence That The Audrini Villagers Were Persecuted Because of Political Opinion

Maikovskis does not contest the BIA's finding that the arrest of all the Audrini residents and the burning of the village constituted a war crime. Nor does he deny that his participation in these acts constituted assistance in persecution of civilians. (Brief for the Petitioner p. 17.) The only finding that Maikovskis contests in this regard is the finding that the persecution was because of political opinion.

There clearly is sufficient evidence in the record to support the BIA's determination that villagers in Audrini were persecuted because of the political opinions of some of the villagers. Exhibit 24-10 makes it clear that the Germans viewed the village as a hotbed of communist activism and that the communist politics of some of the villagers played a significant part in the decision to destroy the village.

That political persecution was an objective at Audrini becomes even clearer when viewed in the context of political purges which took place throughout the region. Exhibit 24-4 shows that the Latvian police often participated in the arrests of Communists in the towns around Rezekne. One of the primary tasks of the police was the suppression and elimination of "Communist . . . leftovers." (Exs. 85, 86.) Exhibit 50/65, which Maikovskis signed, establishes that Maikovskis himself was often involved in arrests of villagers or members of Communist "bands." Some Communists were shot in Rezekne because of their political opinion. (Ex. 24-6.)

It is clear that Congress intended this type of political persecution (especially when it rises to the level of a war crime) to be covered by Section 241(a)(19) of the INA. Congress intended this provision of law to be

flexible enough to cover all forms of racial, religious and political persecution devised by the Nazis:

> The committee explored thoroughly the possibility of including in the bill a definition of the phrase "persecution because of race, religion, national origin or political opinion." Such inclusion was deemed unnecessary in light of the substantial body of precedence already discussed and the success achieved in administering current INA provisions, such as section 203(a)(7) and 243(h), without the benefit of an express definition.
>
> Additionally, any such definition would necessarily limit application of the provision to particular, presently foreseeable situations. Persecution, however, has and will continue to take many forms and it is the intention of the committee in recommending this legislation to allow the maximum amount of flexibility possible in its administration. The inclusion of a necessarily limited and rigid definition would be inconsistent with such an intent.
>
> * * *
>
> In applying the "persecution" provisions of the bill, it is the intention of the committee that determinations be made on a case-by-case basis in accordance with the case law that has developed under the INA sections heretofore cited, as well as international material on the subject such as the opinions of the Nuremberg tribunals.[22]

Significantly, the incident at Audrini was specifically cited by the International Military Tribunal as an example of a war crime. (Trial of War Criminals Before the Nuremberg Military Tribunals, Case 9, Einsatzgruppen Trial, Opinion and Judgment at 430.)

In view of the evidence establishing the Nazi objective of eliminating all Communist activity in the area of Audrini, the BIA's finding that the massacre at Audrini occurred because of the political activities and political opinion of some of its inhabitants had "reasonable, substantial and probative" support in the record. Further, that finding is fully consistent with

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[22] House Report No. 95-1452, Committee on the Judiciary, 95th Congress, 2nd Session, Amending the Immigration and Nationality Act, Section 241(a)(19), pages 6-7.

Congress' intention of giving an expansive reading to the proscription against persecution in Section 241(a)(19).[23]

B. The BIA Did Not Deprive Maikovskis of Due Process By Finding Him Deportable Under Section 241(a)(19)

Section 241(b) of the INA requires the following in any deportation proceeding:

> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
>
> * * *
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government.

On December 14, 1977 Maikovskis was served with the following factual allegations, supplementing those contained in the original Order to Show Cause:

> 23. Among the activities and conduct alleged in paragraph number 9 was your participation and acquiescence in the arrest of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, in or about December, 1941.
>
> 24. Among the activities and conduct alleged in paragraph number 9 was your participation and acquiescence in the burning of the dwellings of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, on or about January 2, 1942.
>
> 25. Among the activities and conduct alleged in paragraph number 9 was your participation and acquiescence in the execution of a number of peaceful civilian inhabitants of the village of Audrini, Latvia, at the location known as the Anchupani Hills, on or about January 3, 1942. [Exhibit 21.]

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[23] This is not the first case in which the BIA has found someone deportable because of political persecution against Communists. In Matter of Laipenieks, Interim Decision 2949 (BIA 1983), the BIA held that "under section 241(a)(19), communism is an included form of 'political opinion' and that those who are involved with the specified persecution of communists are deportable under the statute." (A34, Decision p. 34.) This decision is now on appeal to the Ninth Circuit Court of Appeals.

Those allegations put Maikovskis on notice of the facts the government sought to prove regarding Audrini.

After the Immigration and Nationality Act was amended to add Section 241(a)(19) as a basis for deportation,[24] the government served an additional charge of deportability, as follows:

> There is hereby lodged against you the additional charge that you are subject to be taken into custody and deported pursuant to the following provision of law:
>
> 10. Section 241(a)(19) of the Immigration and Nationality Act, in that you ordered, incited, assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in association with, the Nazi government of Germany, any government established with the assistance or cooperation of the Nazi government of Germany, or any government which was an ally of the Nazi government of Germany, during the period beginning on March 23, 1933, and ending on May 8, 1945. [Exhibit 22.][25]

Although this amended pleading set forth additional factual allegations, as well as a new legal ground, it made clear that the original factual allegations were being reincorporated and that deportability under Section 241(a)(19) applied to both the old and new factual allegations.

On March 18, 1980, when the government served Exhibit 22, it was the government's position that the additional legal charge — Section 241(a)(19) of the Immigration and Nationality Act —applied to the Audrini incident. The

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[24] Section 241(a)(19) of the Immigration and Nationality Act became law on October 30, 1978. The Office of Special Investigations, Criminal Division, Department of Justice, was created on September 4, 1979, and thereafter assumed responsibility for the prosecution of this case.

[25] Application of Section 241(a)(19) to Maikovskis is unquestionably Constitutional. Lehmann v. United States ex rel. Carson, 353 U.S. 685, 690 (1957) (Congress has the power to establish grounds for deportation that apply retrospectively.); Harisiades v. Shaughnessy, 342 U.S. 580, 594-595 (1952) ("The inhibition against the passage of an ex post facto law by Congress * * * applies only to criminal laws * * * and not to a deportation act like this."); Mahler v. Eby, 264 U.S. 32, 39 (1924).

government took that position throughout the trial, introducing Exhibit 24-10 into evidence on July 20, 1981. The last hearing in this case (other than the April 28, 1983 conference) took place on March 31, 1982; at that time the government presented its rebuttal. Up until this point, the government had never withdrawn its reliance on the Audrini incident to establish deportability under Section 241(a)(19).

However, on June 9, 1982 an Immigration Court in San Diego rendered its decision in the Edgars Laipenieks case, A11-937-435. The Immigration Court held that an alien's wartime participation in the arrest, confinement, interrogation, and/or physical abuse of alleged Communists and Soviet activists held in Nazi-occupied Latvia did not constitute persecution "because of political opinion" within the meaning of §241(a)(19).

On April 28, 1983, more than a year after "the Government and the respondent concluded their cases" (A741, BIA Decision p. 7), the Immigration Judge convened an additional hearing to review the allegations and charges made against Maikovskis. (Id.) Based on the Immigration Court's decision in Laipenieks, the government felt that the strongest legal argument to establish deportability under Section 241(a)(19) was the persecution of Jews. At the April 28, 1983 hearing, the government made an effort to direct the Immigration Judge's attention to the legal theories for deportation which had the strongest and clearest precedent for support. The Immigration Judge, at this hearing, asked the government several times to only specify the minimum the government had to prove in order to establish each charge. (April 28, 1983 Tr. 7-15, 19, 54-55.) It was in this context that the government stated that it did not rely on the factual allegations involving Audrini to establish Charge VI under Section 241(a)(19).

It is clear that Maikovskis could not have relied on the government's statement on April 28, 1983 in presenting his case; the presentation of all evidence had been completed over a year prior to that date. By that time, Maikovskis had had six years notice of the factual allegations involving Audrini, three years notice of the legal charge under Section 241(a)(19), and almost two years notice of the government's reliance on Exhibit 24-10. Because the facts and the legal theory of political persecution arising out of the Audrini incident were alleged several years prior to the close of trial, Maikovskis cannot argue that counsel's statement made a year after all testimony was completed created a violation of due process.[26]

Furthermore, the BIA did not deprive Maikovskis of due process by deciding the case on a legal theory alleged, but not argued in its brief, by the government. The Supreme Court, in Fedorenko v. United States, decided the case on a legal theory which the government had not argued. 449 U.S. at 512-514. Justice Stevens, in his dissent, characterized the majority's actions as follows: "Today this Court affirms on a theory that no litigant argued, that the Government expressly disavowed, and that may jeopardize the citizenship of countless survivors of Nazi concentration camps." 449 U.S. at 530. The majority, while agreeing that the legal theory upon which it based its decision was not argued by the government, disagreed that the government had expressly disavowed it; the government had merely stated in its brief that it "has no quarrel with" the District Court's holding that involuntary service as

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[26] The Board of Immigration Appeals reversed the Immigration Court's decision in Laipenieks on September 8, 1983, holding that arresting, confining, beating, or killing persons because they were Communists or Soviet activists did constitute persecution "because of political opinion" under §241(a)(19).

a concentration camp guard did not constitute persecution under the DP Act. 449 U.S. at 513-514 n.35.

Clearly, in light of Fedorenko, there is no constitutional infirmity in the BIA having found deportability under a legal theory alleged by the government, but which had not been emphasized post-trial.

C. Maikovskis' Personal Motive for Engaging in Persecution of the Audrini Villagers is Irrelevant Under Section 241(a)(19)

The Supreme Court held in Fedorenko v. United States that any person who assisted in the persecution of civilians — even if the assistance was involuntary -- was ineligible for a visa under the DP Act:

> The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard — whether voluntary or involuntary --made him ineligible for a visa. That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing §2(a) with §2(b) [of the IRO constitution, quoted at page 18, supra] which excludes only those individuals who voluntarily assisted the enemy forces . . . in their operations . . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from §2(a) compels the conclusion that the statute made all those who assisted in the persecution of civilians ineligible for visas. [449 U.S. at 512, emphasis in original, footnotes omitted.]

Clearly, if voluntariness is not a factor in determining whether someone assisted in persecution, motive or intent cannot be.

Maikovskis attempts on two grounds to distinguish between the provision in the DP Act at issue in Fedorenko and Section 241(a)(19):

1. Section 241(a)(19) requires that the persecution be "because of race, religion, national origin, or political opinion;" and
2. Section 241(a)(19) applies to resident aliens, while the DP Act applied to aliens who were outside the United States seeking entry.

Brief for the Petitioner pp. 24-25.

Both attempted distinctions are without merit.

The words "because of race, religion, national origin, or political opinion" in §241(a)(19) refer to the reason that the victims were singled out by the Nazi government, not to a particular defendant's personal motive for assisting in the arrests, beatings, burnings, or murders. So long as a person's acts had the effect of assisting the Nazi regime in its program of political persecution, that person is deportable under Section 241(a)(19). As the Board of Immigration Appeals held in Matter of Laipenieks, Interim Decision 2949 (Sept. 8, 1983) (A677)[27] the objective impact of a person's assistance in persecution is determinative under Section 241(a)(19) and not the personal motivation:

> Section 241(a)(19), and other provisions of the Holtzman Amendment contain no reference whatsoever to an alien's motivations and intent behind his assistance or participation in the specified persecution. On the other hand, Congress has qualified certain other provisions of the Immigration and Nationality Act with an intent element. See, e.g., sections 212(a)(19); 212(a)(31); 215(a)(2), (3), (4), (5), and (7); 241(a)(6)(G); 241(a)(13); 257; 266(a), (c) and (d); 274; 275(3); 277. Moreover, the legislative history of the Holtzman Amendment (discussed earlier) shows that Congress carefully examined prior statutes relating to persons who engaged in persecution. Among these, for example, was the DPA, in which Congress also showed that it was capable of incorporating or omitting an intent/voluntariness requirement as it deemed appropriate. This demonstrates that Congress also knew how to incorporate a motivation/intent requirement in the Holtzman Amendment, yet it chose not to do so. Therefore, as in Fedorenko, we find that the plain language of the Amendment mandates a literal interpretation, and that the omission of an intent element compels the conclusion that section 241(a)(19) makes all those who assisted in the specified persecution deportable. Thus, the respondent's particular motivations or intent for his alleged assistance and participation in persecution is not a relevant factor. [A711, Laipenieks Slip Op. at 36.]

The orders which Maikovskis gave to his men to arrest all the inhabitants of Audrini and to burn the village certainly assisted the Germans in carrying out their persecution of the village's residents because of their political

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[27] Appeal pending Ninth Circuit, Docket No. 83-7711.

beliefs and activities. It is irrelevant whether Maikovskis gave these orders because he didn't like the political opinions of the villagers, to advance in the Nazi hierarchy, because he was obeying orders, for money, or for any other reason. He effectuated the Nazi's policies vis a vis Audrini, knowing exactly why the Nazi authorities had prescribed such policy.

Maikovskis' argument becomes absurd when carried to its logical conclusion. Under Maikovskis' thesis, the government would be required to prove that the Commandant of Auschwitz, for example, personally hated Jews before it could deport him. Presumably, it would be a valid defense to deportation that the Commandant did not personally hate Jews, but merely murdered them in order to advance in the Nazi hierarchy. Congress clearly did not intend such a result and nothing in the Fedorenko decision would support it.

Maikovskis also argues that Section 241(a)(19) should be construed to contain a motive and intent requirement because it applies to resident aliens, whereas the DP Act applied to aliens outside the United States seeking entry. (Brief for the Petitioner at p.25.) However, this argument ignores the fact that Section 212(a)(33) of the INA, 8 U.S.C. §1182(a)(33), excludes from entry into this country aliens who assisted the Nazis in persecution "because of race, religion, national origin, or political opinion." This provision is identical in language to Section 241(a)(19); both provisions were enacted at the same time. It cannot be argued that the language in Section 241(a)(19) gives rise to a motive and intent requirement, while the exact same language in Section 212(a)(33) does not.

Furthermore, the interpretation of the DP Act in Fedorenko arose in the case of an individual who was in the United States and,in fact, was a United States citizen. The Supreme Court perceived no constitutional reasons why

Fedorenko's resident status should automatically accord him additional benefits. The issue there, as here, was Congress' intent.

The BIA's holding that motive or intent is irrelevant under Section 241(a)(19) is consistent with Fedorenko. It is also entitled to deference:[28]

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

Udall v. Tallman, 380 U.S. 1, 16 (1965).[29]

D. On the Basis of the Facts Found by the BIA, Maikovskis Assisted in the Persecution of Jews as a Matter of Law

The BIA found that the Latvian Self Defense and Latvian police force in Rezekne were involved in the murder of Jews. (A747-749, Decision pp. 13-15.) Maikovskis was a Captain and Chief of the Self Defense and Latvian police in Rezekne during the time that these murders were carried out by subordinates. (Ex. 82; Ex. 45/60; A60-61, Ex. 15; A271-274, 285-286, Maikovskis 9/1/81 Tr. 347-350, 361-362.)

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[28] Maikovskis mischaracterizes the BIA's holding in the Laipenieks case at page 22 of the Brief for Petitioner; the language shown in quotes is not a quote from the BIA's decision. The BIA's actual holding in Laipenieks is as follows:

> [W]e reject the respondent's argument that his motivations should be considered, and we proceed to examine carefully whether his particular conduct can be considered as having "assisted" the LPP [Latvian Political Police] and/or the Nazis in the persecution of communists. In so doing, we look not to the respondent's subjective intent, but rather, to the objective effect of his actions in deciding whether he assisted in the specified persecution.

(A712, Laipenieks slip op. at 37.)

[29] See also American Paper Institute v. American Electric Power, 76 L.Ed.2d 22, 39 (1983); Power Reacter Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1960); Noverola-Bolaina v. Immigration and Naturalization Service, 395 F.2d 131, 136 (9th Cir. 1968).

Maikovskis' high rank in a police unit directly involved in the murder of Jews should, as a matter of law, result in a finding of deportability based on persecution because of religion or race. The evidence need not prove that Maikovskis personally fired a rifle in the shooting actions. To make such argument would contravene traditional concepts of responsibility and culpability. The Fedorenko case is again instructive.

Fedorenko, as a conscripted perimeter guard at Treblinka, was found to have assisted in persecution "as a matter of law." No evidence in the case proved that he personally murdered anyone. Certainly it could not be argued that senior officials of Treblinka did not assist in persecution merely because they did not perform guard duty or never fired a bullet at prisioners. As one moved higher up the ladder of rank, the less likely it was for that person to be directly involved in or even present at executions. Yet, such persons must be deemed more culpable -- especially those who volunteered for their positions.

Maikovskis fits this model. Maikovskis, as a high-ranking volunteer, knew that members of his police force were participating in the extermination of Jews. He helped recruit and maintain that police force and oversaw many of its operations. He cannot be deemed less culpable than lower ranking members of his police force who engaged in the murder of innocent civilians. He must be deemed to have assisted in the persecution of people who lost their lives at the hands of his colleagues and subordinates.

Other decisions involving alleged persecutors on behalf of the Nazi regime also support the argument that proof of direct involvement in killings, beatings, etc. is not necessary to a finding of assistance in persecution. United States v. Schellong, 547 F.Supp. 569 (N.D. Ill. 1982), aff'd, 717 F.2d 329 (7th Cir. 1983), cert. denied, No. 83-961 (Jan. 23, 1984), deportation

ordered, Matter of Schellong, A10-695-922 (Immigration Court, Chicago, Illinois)[30] (SS officer who trained guards at Dachau and Sachsenburg concentration camps ordered denaturalized and deported); United States v. Osidach, 513 F.Supp. 51, 98-99 (E.D. Pa. 1981) (Ukrainian policeman who patrolled the streets of a city where Jewish residents were ghettoized assisted in persecution); United States v. Kowalchuk, 571 F.Supp. 72, 81-82 (E.D. Pa. 1983)[31] (police official who performed largely clerical and administrative duties for a police force that persecuted Jews ordered denaturalized because he assisted in the persecution of Jews).

See also Matter of McMullen, I.D. 2967 (BIA 1984):

> We find that the respondent, by his active and effective membership in the PIRA [Provisional Irish Republican Army], participated in the persecution of others. Our finding is supported by the * * * Charter of the International Military Tribunal which includes in the definition of "crimes against humanity," "persecutions on political, racial or religious grounds" and states with regard to any such crimes that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." The record reflects that at the time the respondent joined the PIRA its use of violence was escalating. The respondent testified that he was respected as an effective member of the PIRA until 1977 and that his duties included training other PIRA members and conducting special operations. We find it significant that the respondent was personally responsible for coordinating a considerable number of illegal arms shipments from the United States to Northern Ireland. Through those arms shipments the respondent directly provided, in part, the instrumentalities with which the PIRA perpetrated its acts of persecution and violence. We have no difficulty in concluding that these arms were directly involved in the murder, torture, and maiming of innocent civilians who publicly opposed the PIRA, and are unwilling to isolate these arm shipments from their ultimate use by the PIRA in conducting its campaign of terror. Thus, we find clear evidence that the respondent aided and assisted in the persecution of others within the meaning of the Act. See Fedorenko v. United States, 449 U.S. 490 (1981); Matter of Laipenieks, supra; see also United States v. Kowalchuk, 571

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[30] On appeal to the BIA, A10-695-922.

[31] The Court of Appeals reversal at 744 F.2d 301 (3d Cir. 1981) has been vacated and withdrawn; the case is scheduled for reconsideration in banc. Case No. 83-1571 (Nov. 1, 1984).

F.Supp. 72 (E.D. Pa. 1983); United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981). [Slip Op. at 9-10, footnote omitted.]

This Court may reach the legal conclusion that Maikovskis assisted in the persecution of Jews, on the basis of the facts found by the BIA. This Court should thus affirm the BIA's order of deportation under Section 241(a)(19) based on assistance in the persecution of Jews, quite apart from the finding of deportability based on Maikovskis' involvement in the incident at Audrini. N.L.R.B. v. American Geri-Care, Inc., 697 F.2d 56, 64 (2d Cir. 1982), cert. denied, 103 S.Ct. 1876 (1983).

E. Maikovskis is Deportable Under Section 241(a)(1) Because of His Persecution of the Residents of Audrini, Regardless of the Reason for that Persecution

Maikovskis does not challenge the BIA's determination that his activities at Audrini constituted persecution of civilians and a war crime. (Brief for the Petitioner p. 17.) He challenges only that part of the finding under Section 241(a)(19) relating to "political opinion" as the basis for the action against Audrini.

Section 2(b) of the DP Act, which incorporated the IRO Constitution, prohibited the entry into this country of any person who assisted the enemy in persecuting civil populations (regardless of reason) or who was a war criminal. Therefore, even if the Audrini incident did not constitute political persecution, Maikovskis' activities at Audrini would have rendered him ineligible for a visa under the DP Act.

Because Maikovskis was excludable from entry under the DP Act, he is therefore deportable under Section 241(a)(1) of the INA as an alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Deportability under Section

241(a)(1) is consistent with, but independent of the deportability finding under Section 241(a)(19).

F. Maikovskis' Misrepresentation Regarding His Service in the Police During the Nazi Occupation Was Material

1. The Attorney General's and the Second Circuit's Materiality Test

The BIA applies the following standard of materiality in deportation proceedings:

> In Matter of S- & B-C-, 9 I&N Dec. 436 (A.G. 1961), the Attorney General held that a misrepresentation is material if either "(1) the alien is excludable on the true facts, or (2) the misreprsentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." In a more recent decision, Matter of Boseugo, 17 I&N Dec. 125 (BIA 1979, 1980), this Board refined Matter of S- & B-C-, supra. We held that where it is not shown that an alien would have been excludable on the true facts, then the Government must "show [that] facts possibly justifying denial of a visa or admission to the United States would have likely been uncovered and considered but for the misrepresentation." If the Government is able to make this showing, then the burden of proof shifts to the alien to establish that "no proper determination of inadmissibility could have been made." [A760-761, Maikovskis Decision pp. 26-27.]

The standard of materiality used in the Second Circuit in deportation cases is that either the true facts, if revealed on the visa application, would have resulted in an applicant's exclusion or

> that a truthful answer might have induced the Consul to have instituted an investigation which, if other facts were disclosed, might have resulted in a proper refusal of the visa.

In re Field's Petition, 159 F.Supp. 144, 147 (S.D.N.Y. 1958), quoted approvingly in Ganduxe Y Marino v. Murff, 183 F.Supp. 565, 567 (S.D.N.Y. 1959), aff'd on the opinion below, 278 F.2d 330 (2d Cir. 1960), cert. denied, 364 U.S. 824 (1960). See also United States ex rel Jankowski v. Shaughnessy, 186 F.2d 580, 582 (2d Cir. 1951). In rejecting the argument that the government

could prove materiality only if it could show that a visa would have been denied based on the true facts (i.e., the facts concealed), the court in Ganduxe noted that:

> A decision that an alien may make a false statement in his application for a visa in order to avoid the raising of a substantial question as to his eligibility and then, if he is caught in the false statement after having successfully choked off investigation, may try out his eligibility just as if nothing had happened would, it seems to me, be an invitation to false swearing. [183 F.Supp. at 567.][32]

The standard of materiality for misrepresentations in naturalization applications is set forth in Chaunt v. United States, 364 U.S. 350 (1960).[33] The government must prove

> that either (1) facts were suppressed "which, if known, would have warranted denial of citizenship" or (2) that their disclosure "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." [364 U.S. at 355.]

The Second Circuit interprets the second prong of this standard as follows: a misrepresentation is material, even if the true fact itself would not be a sufficient ground for denial of naturalization, if it "closes to the Government an avenue of inquiry which might conceivably lead to collateral information of greater relevance."[34] United States v. Oddo, 314 F.2d 115,

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[32] Accord Berenyi v. Immigration Director, 385 U.S. 630, 636-637 (1967); United States v. Fedorenko, 597 F.2d 946, 951 (5th Cir. 1979).

[33] The government agrees with Maikovskis that the Chaunt standard of materiality also applies to misrepresentations made at the visa stage. (Brief for the Petitioner p. 38.) All Courts of Appeals which have considered the issue have so held. See, e.g., United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984); United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981); Kassab v. Immigration and Naturalization Service, 364 F.2d 806 (6th Cir. 1966); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).

[34] In his brief, Maikovskis argues that use of the term "might" in various articulations of the materiality test is inconsistent with the standard of proof required in deportation or denaturalization cases. (Brief for the Petitioner p. 37.) However, it is not inconsistent to require the government to prove that something "might" happen by clear, unequivocal and convincing evidence. The Supreme Court recognized this in its

(footnote continued)

118 (2d Cir. 1963), cert. denied, 375 U.S. 833 (1963). See also United States v. D'Agostino, 338 F.2d 490, 491 (2d Cir. 1964).[35]

2. Maikovskis' Misrepresentation Was Material Under Any Test of Materiality

Although the Supreme Court has not yet stated definitively the test of materiality to be used in deportation cases arising out of visa misrepresentations, Maikovskis' misrepresentations would have to be deemed material under any of the proposed tests set forth above.

Under the BIA's test of materiality (Matter of S- & B-C- and Matter of Bosuego), a misrepresentation is material if the true facts concealed would have warranted denial of a visa or if the true facts had cut off a line of inquiry which, in turn, would likely have uncovered facts "possibly justifying denial of a visa." Matter of Boseugo at 13. Focusing on the second half of this test, there is no dispute between the parties that an investigation would have ensued if Maikovskis had revealed his police service at the time he applied for his visa. (Brief for the Petitioner p. 39.) Indeed, Maikovskis' own witnesses (Printz, Borchers) testified that an applicant who had served in the Latvian police would have had his police service fully investigated to determine whether he had assisted in persecution. It is therefore clear that

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articulation of the standard of materiality in Chaunt: the government must "show by 'clear, unequivocal, and convincing' evidence * * * that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355 (emphasis added).

35 Several circuits have applied this same test to cases of visa misrepresentation by alleged Nazi collaborators. United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984); United States v. Koziy, 728 F.2d 1314, 1320 (11th Cir. 1984), cert. denied, ___ U.S. ___; United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981). See also Kassab v. INS, 364 F.2d 806 (6th Cir. 1966); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).

Maikovskis' misrepresentation shut off a line of inquiry which was relevant to his visa application.

That this inquiry would have uncovered facts which would "possibly" have justified denial of his visa cannot be disputed. No one denies that at least some Latvian police members were rejected for visas under the DP Act. (A177-192, Exs. 99-107.) Indeed, the evidence shows that all Latvian policemen were presumptively ineligible for visas unless they could satisfy their burden of showing that they had not persecuted civilian populations and that they had been conscripted into the police. (A139, Ex. 75.) These facts, standing alone, establish that anyone who concealed his wartime Latvian police service was cutting off a line of inquiry into "facts possibly justifying denial of a visa."

The Second Circuit's tests of materiality in both deportation and denaturalization cases leads to the same result. As even Maikovskis' own witnesses concede, his revelatin of police service would have resulted in an extensive investigation. That investigation "might have resulted in a proper refusal of the visa." In re Field, 159 F.Supp. at 147. Similarly, the concealment of Maikovskis' police service closed "to the Government an avenue of inquiry which might conceivably [have led] to collateral information of greater relevance." United States v. Oddo, 314 F.2d at 118. Again, the fact that other Latvian policemen were rejected for visas under the DP Act clearly establishes that relevant, disqualifying facts "might" have been found if Maikovskis had truthfully disclosed his police service.[36] Of course, in this case one of Maikovskis' own witnesses conceded that, if the facts found by the

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[36] Alternatively, applying the second prong of Chaunt by analogy, Maikovskis' police employment, if truthfully revealed, "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of [a visa]." 364 U.S. at 355.

BIA concerning Audrini were known to the DP Commission, a visa would not have been issued. The government's witnesses confirmed this fact.

Indeed, even if this case were to be adjudged under the strictest standard of materiality, the facts justified a finding of materiality. It is generally agreed that Justice Stevens' dissent in Fedorenko sets forth the most rigorous test of the government's burden of proving materiality:

> There are really three inquiries, however: (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful answer would have prompted more inquiry. Thus I would presume that an investigation, if begun at the time that the misstatement was made, would have been successful in finding whatever the Government is now able to prove. [449 U.S. at 537.]

In this case, an investigation would have assuredly commenced if Maikovskis had truthfully stated his wartime employment. Furthermore, the government proved at trial facts which would have resulted in Maikovskis' ineligibility under the DP Act -- his involvement in the arrest of the Audrini villagers and the burning of the village. Even if the Audrini villagers were not persecuted because of political opinion, the arrest of all the inhabitants and the burning of the entire village constituted persecution of civil populations and a war crime, within the meaning of the IRO Constitution. Section 2(b) of the DP Act barred the granting of visas to persons engaged in such activities. Hence, a "disqualifying circumstance actually existed."

Finally, even though Justice Stevens gave little or no weight to the third factor, it seems quite probable that the investigation by the DP

Commission and/or State Department would have discovered the disqualifying information if Maikovskis had given truthful answers. The fact that the Audrini incident was cited in the Nuremberg decision as a war crime and that other Latvian policemen were rejected under the DP Act, make it likely that the disqualifying facts would have been discovered.

In sum, all judicially recognized tests of materiality would lead to a finding of deportability under Section 241(a)(1). The BIA's holding to this effect is not error.[37]

3. Maikovskis' Disclosure of Membership in the Aizsargi From 1933 to 1940 Does Not Vitiate the Materiality of His Misrepresentations

The pre-war organization in Latvia known as the Aizsargi was initially on the DP Commission's Inimical List, but was subsequently removed from the list. Some members of the Aizsargi became policemen after the Nazi invasion. Maikovskis claims that, because he disclosed his membership in the Aizsargi, but was still admitted to the United States as a displaced person, a DP Commission investigation of his police service (had he disclosed it) would not have discovered disqualifying facts such as the Audrini incident. In effect, he argues that if Audrini was not discovered in an investigation of his Aizsargi membership, then it would not have been discovered in the course of an investigation into his Police employment. That analysis is factually, logically and legally untenable.

First, Maikovskis was initially rejected as a DP because of his Aizsargi membership at a time when such membership was per se a disqualifying factor.

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[37] It should also be noted that Gerard Charig, a former member of the DP Commission's Review Panel, testified that it was "unequivocally a material misrepresentation" for Maikovskis to have stated on his visa application that he was a bookkeeper when in fact he was a member of the Latvian police. (A517-518, 3/31/82 Tr. 757-758.)

Accordingly, no investigation into Maikovskis' Aizsargi activities was conducted, because none was legally required. (Ex. 71; A762, BIA Decision p. 28 n.17; A140, Ex. 75; A251-252, 7/23/81 Tr. 285-286; A497-499, 3/31/82 Tr. 737-739; A608-618, Printz pp. 20-30.)

Second, Maikovskis only belonged to Aizsargi from 1933 to 1940, prior to the German occupation of Latvia. He disclosed this fact to U.S. immigration authorities. (A111, Ex. 40, ¶18; A271, Maikovskis 9/1/81 Tr. 347.) In fact, the Aizsargi did not even exist after 1940. (A271, Maikovskis 9/1/81 Tr. 347; A140, Ex. 75.)[38] Certainly, the inquiry or investigation that would have been conducted as a result of revealing membership from 1941 to 1944 in a police organization under control of the Nazis would have been different from an investigation resulting from disclosure of pre-war membership in a totally different organization. One cannot assume, as Maikovskis seems to argue, that an investigation of the Aizsargi would necessarily have led to discovery of Maikovskis' role in the events at Audrini, which took place in December 1941 and January 1942, after Maikovskis' admitted membership had ceased and after the Aizsargi itself no longer existed. Nor did Maikovskis produce any evidence to this effect.

Furthermore, this argument is nothing more than a reiteration of the argument that materiality cannot be found unless the government proves that the investigation into his police service necessarily would have led to discovery of the disqualifying factors such as Audrini. However, none of the

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[38] Not every member of Aizsargi later became a policeman during the Nazi occupation, and not every policeman during the Nazi occupation had previously been a member of Aizsargi. For example, Maikovskis testified that Jews had been in Aizsargi. (A284, 9/1/81 Tr. 360.) Of the five Soviet witnesses who had served in the police during the German occupation, four — Zhukovskis, Kalninsh, Miglinieks, and Usne -- had not been in Aizsargi prior to the war.

legal standards discussed above requires such a finding. The BIA does not err by refusing to adopt a proposed legal standard which finds no precedential support.

4. The Fact That Other Latvian Policemen Were Granted Visas Under the DP Act Does Not Vitiate the Materiality of Maikovskis' Misrepresentations

Maikovskis argues that four members of the Latvian police who admitted their police service entered the United States under the DP Act and that, therefore, Maikovskis' misrepresentation could not be material. That argument is contrary to evidence which even Maikovskis does not contest.

The Displaced Persons Commission Inimical List (A139, Ex. 75) prohibited the entry of any member of the Schutzmannschaft, unless the applicant could prove that he had been conscripted and had not committed atrocities or otherwise persecuted civilian populations.

The members of the Latvian police cited by Maikovskis who were admitted to the United States may very well have proved (either truthfully or by misrepresentation) that their service was involuntary and that they had not assisted in persecution. Alternatively, a mistake may have been made by visa-issuing officials in not applying the requirements of the Inimical List. See Charig testimony. (A505, 520, 3/31/82 Tr. 745, 760.)

Maikovskis could not have truthfully proved that he was conscripted into the police; he has admitted that he joined voluntarily. (A272-274, 300-302, Tr. 9/1/81 348-350, 376-378.) He also could not have proved that he did not assist in the persecution of civilians; he now admits his role in the Audrini incident, which he concedes involved persecution. Accordingly, the fact that other Latvian policemen may have been able to satisfy their burden of proving

eligibility under the DP Act does not provide Maikovskis with a defense. He clearly could not have truthfully satisfied that burden.

Similarly, the fact that a mistake may have been made in other cases involving Latvian police does not mean that a mistake would have been made in Maikovskis' case if he had told the truth. It is undisputed that some people who had been in the Latvian Police were in fact rejected under the DP Act. (A177-192, Ex. 99-107.) Maikovskis cannot prove that, had he revealed this employment on his visa application, he would have mistakenly been granted a visa. The presumption must be exactly the opposite. Indeed, the State Department vice-consul who actually issued Maikovskis' visa testified at trial that she would have denied him a visa if she had known the truth.

Further, the courts have been quite emphatic in rejecting an estoppel defense in deportation or denaturalization proceedings based on an alleged mistake by government officials in granting a visa or citizenship. Even if Maikovskis had told the truth when he applied for a visa, but had been mistakenly granted entry into this country, the government would not be estopped from moving to deport him. Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976); Fedorenko v. United States, 449 U.S. at 517-518; I.N.S. v. Hibi, 414 U.S. 5, 8-9 (1973); Montana v. Kennedy, 366 U.S. 308 (1961).

G. Maikovskis Is Not Entitled to Discretionary Relief[39]

Maikovskis concedes that any person who is found deportable under Section 241(a)(19) is ineligible for any form of discretionary relief. (Brief for the

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[39] Maikovskis has requested the following discretionary relief: waiver of deportability, 8 U.S.C. §1251(f); withholding of deportation, 8 U.S.C. §1253(h); suspension of deportation, 8 U.S.C. §1254(a); and asylum, 8 U.S.C. §1158.

Petitioner pp. 14-15.) See Matter of Laipenieks; Matter of Fedorenko, Interim Decision 2963 (BIA 1984). The BIA's denial of discretionary relief was therefore proper.

Further, even if Maikovskis were found deportable only under Section 241(a)(1), he would still be ineligible for discretionary relief because of his activities at Audrini and his misrepresentation of those activities.

1. Waiver of Deportability (8 U.S.C. §1251(f))

Waiver is available only to an alien who "was otherwise admissible to the United States at the time of such entry." Maikovskis concedes that he would not be eligible for such a waiver if he assisted in persecution of civilians or war crimes. Accordingly, the BIA correctly held that "[a]s we have found the respondent deportable on the ground that he engaged in persecution, he is not 'otherwise admissible,' and is thus ineligible for a section 241(f) waiver." (A772, Decision p. 38.) See Reid v. INS, 420 U.S. 619 (1975).

2. Withholding of Deportation (8 U.S.C. §1253(h))

Withholding of deportation is not available if:

> there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States. [8 U.S.C. §1253(h)(2)(C).]

In the instant case there certainly are "serious reasons" for considering that Maikovskis committed a serious nonpolitical crime at Audrini. War crimes are not considered political crimes. In re Gonzalez, 217 F.Supp. 717, 721-722 (S.D.N.Y. 1963); Ornelas v. Ruiz, 161 U.S. 502 (1896); Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981). Maikovskis' role in the destruction of that village must therefore be deemed to disqualify him for withholding of deportation.

3. Suspension of Deportation (8 U.S.C. §1254(a))

Apart from the bar to suspension of deportation by virtue of his deportability under Section 241(a)(19), Maikovskis is ineligible for suspension of deportation for several additional reasons. First, he is not entitled to this relief because he has not been "of good moral character" for seven years immediately preceding the date of his application for suspension, as required by the statute. Section 101(f)(6) of the INA, 8 U.S.C. §1101(f)(6), provides that:

> For the purposes of this Act —
>
> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was --
>
> * * *
>
> (6) one who has given false testimony for the purpose of obtaining any benefits under this Act.

Maikovskis repeatedly lied under oath when he was questioned in August 1975 and February 1976 by INS investigators, as shown by his own testimony at trial. On August 14, 1975, Maikovskis swore that he had not signed Exhibit 47/62. (A61-62, Ex. 15 p. 5.) At trial, Maikovskis reversed his testimony after a handwriting expert testified that the signature on the document was Maikovskis'. (A309-312, 9/1/81 Tr. 385-388.) On February 12, 1976, Maikovskis stated that no policemen under his command were involved in burning Audrini. (A78, Ex. 16 p. 21.) At trial, he admitted that policemen under his command had taken part in burning the village. (A288-291, 295-296, 9/1/81 Tr. 364-367, 371-372.)

Maikovskis applied for suspension of deportation on March 30, 1982, within seven years of these false statements. (Ex. 116.) He therefore is statutorily barred from obtaining suspension.[40]

Second, Maikovskis lacks the good moral character required for suspension of deportation because of his participation in the arrest of the Audrini inhabitants and the burning of the village, even though this occurred more than seven years prior to his application for suspension. See United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, 103 S.Ct. 179 (1982); United States v. Demjanjuk, 518 F.Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 103 S.Ct. 447 (1982); United States v. Koziy,540 F.Supp. 25 (S.D. Fla. 1982), aff'd, 728 F.2d 1314 (11th Cir. 1982), cert. denied, ___ U.S. ___ (No. 83-2154 (1984)); United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981).

Third, Maikovskis is ineligible for suspension of deportation because he has not established that his deportation "would * * * result in extreme hardship to the alien or to his spouse." Maikovskis has failed to present any evidence identifying the specific hardship which would purportedly result from his deportation. The burden is on the alien to show that he meets the statutory requisites for discretionary relief, such as supsension. Kimm v. Rosenberg, 363 U.S. 405 (1960); Gambino v. INS, 419 F.2d 1355, 1358 (2d Cir. 1970), cert. denied, 399 U.S. 905 (1970); Brownell v. Cohen, 250 F.2d 770

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[40] False testimony in deportation proceedings, in order to avoid deportation, requires a finding of lack of good moral character under Section 101(f)(6). Bufalino v. Holland, 277 F.2d 270, 276 (3d Cir. 1960), cert. denied, 364 U.S. 863 (1960). Similarly, someone who gives false testimony under oath to INS investigators lacks good moral character under Section 101(f)(6) and is, for that reason, not entitled to suspension of deportation. Petition of Moy Wing Yin, 167 F.Supp. 828, 830 (S.D.N.Y. 1958).

(D.C. Cir. 1957); Matter of Fereira, 14 I&N Dec. 509 (BIA 1973). Maikovskis has not even attempted to meet that burden.

4. Asylum (8 U.S.C. §1158))

An alien may apply to the Attorney General for asylum in the United States if the alien can be defined as a "refugee" within the meaning of Section 101(a)(42)(A) of the INA, 8 U.S.C. §1101(a)(42)(A). The latter section defines a refugee as someone who is unable or unwilling to return to a prior country of residence based on a "well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." However, someone may not be deemed a refugee if that person was himself a persecutor of other people on the basis of race, religion, nationality, membership in a particular social group, or political opinion.

It is quite clear that, if this Court upholds Maikovskis' deportation pursuant to Section 241(a)(19), he is not entitled to asylum. Further, even if he is only found deportable pursuant to Section 241(a)(1), he cannot establish entitlement to asylum because he has not submitted any evidence to carry his burden of proving that he would be persecuted if deported. 8 C.F.R. §208.5. At the present time, the only country of deportation which has been designated is Switzerland, which was selected by Maikovskis himself. He does not claim that he faces persecution in that country. He does allege that he would face persecution if he were ultimately deported to the Soviet Union. However, that statement is purely conclusory and fails to distinguish -- as the case law requires him to distinguish — between persecution and prosecution. See Yiu Sing Chun v. Sava, 550 F.Supp. 90 (E.D.N.Y. 1982), reversed on other grounds, 708 F.2d 869 (2d Cir. 1983); Re Sibrun, I&N Interim Dec. 2932

(BIA 1983). The fact that Maikovskis might face prosecution in the Soviet Union for war crimes is not proof that he will be persecuted within the meaning of Section 101(a)(42). In sum, Maikovskis has not carried his burden of establishing his entitlement to the designation "refugee" and therefore cannot claim entitlement to asylum.

In sum, if this Court affirms deportability under any of the grounds alleged by the government, it should also rule as a matter of law that he is not entitled to any of the discretionary relief which he has requested. Remand on this issue is not necessary. See generally NLRB v. American Geri-Care, Inc., 692 F.2d 56, 64 (2d Cir. 1982), cert. denied, 103 S.Ct. 1876 (1983). A remand on these issues would be especially inappropriate in view of the nature of the allegations in this case and the fact that this litigation has been in administrative proceedings for over seven years.

CONCLUSION

For the reasons stated above, this Court should affirm the BIA's conclusion that Maikovskis is deportable under Section 241(a)(19) of the Immigration and Nationality Act, because, as a Latvian policeman during World War II, he assisted in the persecution of persons because of political opinion. Alternatively, the Court should conclude that Maikovskis is deportable under Section 241(a)(19) because he assisted in the persecution of Jews. The Court should also affirm the BIA's conclusion that Maikovskis' visa misrepresentations rendered him ineligible for a visa under Section 10 of the DP Act and, therefore, deportable under Section 241(a)(1) of the INA. Finally, this Court

should affirm the BIA's conclusion that Maikovskis is statutorily ineligible for discretionary relief.[41]

If the Court does not so find, then it should affirm the BIA's findings that Maikovskis assisted in the persecution of civilians and made material misrepresentations, making him deportable under Section 241(a)(1),and remand to the BIA for a determination of:

1. Whether Maikovskis is eligible for and entitled to any form of discretionary relief for which he applied.
2. Whether Maikovskis assisted in the persecution of Jews
   a. on the basis of the facts already found by the BIA;
   b. on the basis of the Soviet depositions not viewed by the BIA.

Respectfully submitted,

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[41] If the Court determines that the Audrini residents were persecuted because of political opinion but that Maikovskis was deprived of due process because of statements made at the April 28, 1982 hearing, the case should be remanded to the BIA for Maikovskis to introduce whatever evidence he wants on this issue or make whatever arguments he wishes to make.