

THIRD CIRCUIT COURT OF APPEALS

U.S.A. :

vs. : NO. 83-1571

KOWALCHUK, SERGE, etc. :

Philadelphia, PA, April 23, 1984

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

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APPEARANCES:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Your Honors will see, if you compare

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

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

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

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

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

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

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

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

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

25 And the judge said, "Apparently that

1 was done all the time."

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

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

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

16 MR. CARROLL: Correct, sir.

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

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

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

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

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

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

11 MR. CARROLL: Correct.

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

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

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

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

23 THE COURT: What is the DPC?

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

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

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

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

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

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

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

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

25 Mr. Chapin pretended that it was the

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

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

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Yes.

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

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

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

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

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

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

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

25 MR. CARROLL: The Court found as a

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

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

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

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

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

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

17 MR. MAUSNER: Yes, sir.

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

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

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

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

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

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

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

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

25 MR. MAUSNER: The Court held that

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

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

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

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

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

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

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

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

9 THE COURT: Judge Hackett's opinion?

10 MR. MAUSNER: Yes, Your Honor.

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

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

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

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

5 MR. MAUSNER: No, Your Honor.

6 Is Your Honor referring to the Riela
7 case?

8 THE COURT: Yes, sir.

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

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

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

1 rather than the naturalization stage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. MAUSNER: Well, assigning members

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

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

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

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

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

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

17 THE COURT: Mere membership.

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

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

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

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

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

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

8 MR. MAUSNER: That's correct.

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

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

16 THE COURT: Is that a factual finding?

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

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

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

1 disqualified and therefore --

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

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

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

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

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

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

25 THE COURT: Now, is it the

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

4 MR. MAUSNER: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: If you do that, then

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

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

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

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

24 The review as you say is limited.

25 As to the defendant's

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

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

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

25 THE COURT: Is that a matter of

1 record?

2 MR. MAUSNER: Yes, Your Honor.

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

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

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

11 THE COURT: Yes, sure.

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

1 done in this case where Kowalchuk never revealed --

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

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

6 THE COURT: When did they say that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 At this time we have not yet.

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

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

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

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

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

1 allege, he was either 21 or 22.

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

4 MR. MAUSNER: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

10 THE COURT: What page?

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

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

25 The Court left the matter of our

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

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

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

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

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

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

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

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

25 "We believe that this humane and

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

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

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

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

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

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

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

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

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

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

8 THE COURT: Is there an appendix
9 reference?

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

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

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

18 THE COURT: Thank you.

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

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

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

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

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

1 the intentional element.

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

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

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

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

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

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

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

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

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

1 applicable at that time.

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

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

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

25 We will take the matter under

1 advisement.

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Transcribed by Florence M. Foster

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