United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A8 194 566 - New York City

In re: BOLESLAVS MAIKOVSKIS

AUG 14 1984

IN DEPORTATION PROCEEDINGS

APPEAL

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

ON BEHALF OF SERVICE: Neal M. Sher, Acting Director
Jeffrey N. Mausner, Trial Attorney
Office of Special Investigations
Criminal Division
U.S. Department of Justice
1377 K Street, N.W., Suite 195
Washington, D.C. 20005

ORAL ARGUMENT: January 31, 1984

CHARGE:

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

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)] - Excludable at time of entry, to wit, an alien not entitled under section 10 of the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, to enter because immigrant visa procured by willful misrepresentation of material facts

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)] - Excludable at time of entry, to wit, a person whose admission would be prejudicial to the interest of the United States under the Act of May 22, 1918, as amended by the Act of June 21, 1941, Presidential Proclamation No. 2523 issued on November 14, 1941, as amended by Presidential Proclamation No. 2850 issued on August 17, 1949, and section 175.53 of Title 8 of the Code of Federal Regulations

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

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

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

Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)] - Excludable at time of entry, to wit, person who, under section 13 of Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950, was inadmissible as one who was a member of or participated in a movement hostile to the United States or the form of government of the United States

APPLICATION: Termination of proceedings; alternatively waiver of deportability under section 241(f); suspension of deportation; asylum/withholding of deportation; voluntary departure

In a decision dated June 30, 1983, an immigration judge ordered the deportation proceedings against the respondent terminated. The Government appealed. Oral argument was heard before the Board on January 31, 1984. The appeal will be sustained and the respondent will be ordered deported.

HISTORICAL BACKGROUND

The alleged events leading to the issuance of the Order to Show Cause (Form I-221) took place primarily in and around Rezekne, Latvia in 1941 and 1942, during World War II. Latvia is one of three small Baltic nations located on the eastern shore of the Baltic Sea. It is located between the other Baltic states, Estonia to the north and Lithuania to the south. Across the Baltic Sea to the west is Sweden. Latvia's eastern border is with the Soviet Union. Latvia encompasses an area of approximately 25,000 square miles. Its capital is Riga. The small city of Rezekne is located approximately 125 miles east of Riga.

Latvia was a part of the Russian empire from the time of Peter the Great's defeat of the Swedish empire early in the 18th century until the collapse of the Russian empire in 1917. Following the Russian Revolution and Russia's withdrawal from World War I, Latvia, as well as Estonia and Lithuania, were briefly occupied by German forces. In 1918, all three Baltic states declared their independence. They remained independent until 1940, at which time they were annexed by the Soviet Union following the 1939 German-Soviet non-aggression pact. On June 22, 1941, Nazi German armed forces invaded the Baltic states, forced out the Soviet troops, and quickly drove to Leningrad where the war front stabilized. Nazi Germany then established occupation governments in Latvia and the other Baltic states. They remained under Nazi German rule from 1941 until the German Army was driven out of the Baltic states by the Soviet Union in 1944-1945. Following the defeat of Germany, the Soviet Union once again annexed the three Baltic nations. The United States has never recognized the legitimacy of the Soviet annexation. 1/

PROCEDURES UNDER THE DISPLACED PERSON ACT

Because the respondent was admitted to the United States under the Displaced Persons Act of June 25, 1948, as amended by the Act of June 16, 1950 (hereinafter the DPA), and many of the charges of deportability relate directly or indirectly to the lawfulness of that admission, we think it would be helpful to briefly describe the immigration procedures under that Act, and

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1/ See generally A. Clark, Barbarossa--The Russian-German Conflict, 1941-1945 (1965); Times Atlas of World History, 144 (2d ed. 1979); Country Reports on Human Rights Practices for 1983, 689, U.S. Department of State (1984).

the provisions of the Act which are pertinent to this case. 2/ Congress enacted the DPA in 1948 in order to enable European refugees who had been driven from their homelands by the war to emigrate to the United States without regard to the regular immigration quotas. Under the normal procedures, a person who sought to come to the United States under the DPA first filed an application for I.R.O. (International Refugee Organization) assistance. In order to determine if a person was an eligible refugee, an I.R.O. eligibility officer interviewed the applicant regarding his personal and family history, with emphasis on the war years. The primary source of information for the I.R.O. report was the applicant himself.

If found to be qualified, the refugee was granted I.R.O. assistance. It was only at this point, after I.R.O. eligibility had been established, that the refugee could apply for status as an eligible displaced person under the DPA. 3/ The I.R.O. file containing the applicant's history and the I.R.O. certification was forwarded to the Displaced Persons Commission, the agency in charge of implementing the DPA. Security checks were then made by a case analyst and further investigation was conducted if deemed necessary. If the applicant was found eligible, the case analyst issued a Displaced Persons Commission report certifying that the applicant was a person who qualified for admission into the United States under the DPA.

Following certification by the Displaced Persons Commission, the applicant's file was sent to the appropriate American consulate. The applicant appeared at the consular office, and, assisted by an interpreter-typist, filled out an application for an immigrant visa. An American vice-consul then reviewed the entire file and interviewed the applicant regarding the contents of the file and the visa application. The vice consul then determined if the applicant did in fact meet all the criteria of the DPA and other immigration laws. If so, the visa was issued.

2/ Our description of the procedures is drawn from the testimony of witnesses who appeared in these proceedings, and from consistent descriptions provided in the case law. See e.g. United States v. Demjanjuk, 518 F.Supp. 1362, 1378-1379 (N.D. Ohio 1981), aff'd 680 F.2d 32 (6th Cir. 1982).

3/ See section 2(b) of the DPA, which specifically required eligibility under the I.R.O.

The portions of the DPA which are especially pertinent to the instant case are sections 2(b), 10, and 13. Section 2(b) defined "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization 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. 4/ These persons included:

> 1. War criminals, quislings and traitors.
>
> 2. Any other persons who can be shown:
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> (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 States.

Section 10 of the DPA 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.

4/ Counsel for the respondent has suggested that the I.R.O. Constitution may not apply to Latvia, apparently because that Constitution is a United Nations document and Latvia, as an independent nation, is not a member of the United Nations, and, additionally, the Constitution was never ratified by the Soviet Union. Counsel states that the Government has never established what protection, if any, the United Nations gives Latvia. Counsel has cited no authority for the proposition that the I.R.O. requirements, which had to be met by all persons seeking admission to the United States as displaced persons, did not apply to applicants from Latvia, and we are aware of no cases to that effect.

Finally, section 13 of the DPA 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 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.

BACKGROUND OF THE CASE AND NATURE OF THE CHARGES

The respondent is an 80-year-old native and citizen of Latvia. He was admitted to the United States as a lawful permanent resident on December 22, 1951, having been issued a visa under the provisions of the Displaced Persons Act. Deportation proceedings were initially begun against the respondent in October of 1976, and a superseding Order to Show Cause was issued on December 20, 1976. Hearings were held before the immigration judge on eight separate days from October 18, 1977 to December 14, 1977. Six Government witnesses were presented at the 1977 proceedings. The Government also sought to have the respondent testify, but he refused to do so. At the close of the December 14, 1977, session, the immigration judge issued a subpoena compelling the respondent to testify. The United States District Court for the Southern District of New York, on March 10, 1978, issued an order also compelling the respondent to testify (Exh. 88). This order was upheld by the United States Court of Appeals for the Second Circuit on September 13, 1978 (Exh. 78).

In the meantime, on April 15, 1978, the Government filed a motion to take depositions in Latvia. The immigration judge denied that motion on August 22, 1978, and the Acting Commissioner of the Immigration and Naturalization Service certified the immigration judge's decision to us for review in March of 1980. In a January 9, 1981, decision, we ordered that depositions in Latvia be allowed if necessary to the disposition of the case. The depositions were taken in Riga, Latvia, in May of 1981.

Following the taking of these depositions, deportation proceedings were resumed before the immigration judge on July 20, 1981. Additional allegations and charges were brought against

the respondent at that time. 5/ After 10 additional sessions, the Government and the respondent concluded their cases. Another hearing was held before the immigration judge on April 28, 1983, at which counsel for both parties reviewed with the immigration judge the final lists of allegations and charges made against the respondent. These final allegations and charges are found in Exhibits 133 and 134, respectively.

The general nature of the allegations against the respondent is that he was employed as a policeman in the Second Police Precinct of the Rezekne County Police Department in Rezekne, Latvia, during the years 1941 to 1943; that in that capacity he participated or assisted in various acts of persecution against the civilian population; and that he misrepresented his wartime activities in order to establish his eligibility as a displaced person and gain admission to the United States. The Government charged that on the basis of his activities, his employment as a Latvian policemen, and his misrepresentations with regard to his activities and employment, he was deportable on seven separate grounds.

First, the respondent was charged with deportability under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1) (hereinafter the Act), in that he was excludable at entry as an immigrant not entitled to enter the United States under the Immigration Act of May 26, 1924, because his immigrant visa was procured by fraud or misrepresentation. While the Immigration Act of May 26, 1924, did not contain a specific statutory ground of excludability based on misrepresentation, it did provide that an alien is excludable unless he has an unexpired immigrant visa. See section 13(a)(1) of that Act. Cases interpreting section 13(a) of the 1924 Act have held that a visa obtained through a material misrepresentation "is not a valid visa and hence is no visa." Ablett v. Brownell, 240 F.2d 625, 629 (D.C. Cir. 1957). See also United States v. Shaughnessy, 186 F.2d 580 (2d Cir. 1951).

5/ By letter dated August 3, 1981, the Government withdrew certain allegations and charges made against the respondent (Exh. 89). These allegations and charges were based primarily on the testimony of five of the witnesses heard during the 1977 proceedings (witnesses Jacob Noy, Chawa Ljak, Ida Treger, Lea Kaner, and Lea Rosenberg Gordon). The Government has stated that it does not now rely on any of that testimony to prove any of the current allegations and charges. Government's brief on appeal at 6, n. 2. We have not relied on any of this testimony in making our decision.

The respondent was next charged with deportability under section 241(a)(1) of the Act for being excludable at entry under section 10 of the Displaced Persons Act, as amended. As noted above, section 10 provided, inter alia, 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."

The third charge against the respondent is that he is deportable under section 241(a)(1) of the Act for being excludable at entry as a person whose entry would be prejudicial to the interests of the United States under the Act of May 22, 1918, 6/ as amended by the Act of June 21, 1941, Presidential Proclamation No. 2523 issued on November 14, 1941, as amended by Presidential Proclamation No. 2850 issued on August 17, 1949, and section 175.53 of a prior version of Title 8 of the Code of Federal Regulations. The Presidential Proclamations and the old version of Title 8, as well as the Act of May 23, 1918, all relate to the inadmissibility of aliens whose entry into this country would be prejudicial to the interests of the United States.

The respondent was further charged with deportability under section 241(a)(1) of the Act as an alien excludable at entry under section 13(a) of the Act of May 26, 1924. This alternate charge under section 13 of the May 26, 1924, Act apparently relates to subsection (a)(5) of section 13, which requires that an alien be "otherwise admissible." The theory here is that if the respondent was inadmissible under the Displaced Persons Act, then he was excludable under the Act of May 26, 1924, as well.

The respondent was also charged with being deportable under section 241(a)(1) of the Act as an alien excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act, as a person who advocated or assisted in the persecution of any person because of race, religion, or national origin.

He was charged as well with deportability under section 241 (a)(19) of the Act in that, between March 23, 1933, and May 8, 1945, he 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

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6/ Although the Order to Show Cause speaks of the Act of May 23, 1918, the correct date of the Act is May 22, 1918.

in any area occupied by the military forces of that government, 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.

Finally, the Government charges the respondent with being deportable under section 241(a)(1) of the Act in that he was excludable at the time of entry under section 13 of the Displaced Persons Act because he was a member of or participated in a movement that was hostile to the United States or the form of government of the United States.

Among the some 135 exhibits (some consisting of several parts) presented during these proceedings were the documents relating to the respondent's original admission to the United States. Included was an "Application for I.R.O. Assistance," signed by the respondent on December 31, 1949 (Exh. 40). In the employment history section of that form, the respondent indicated that he had been employed as a farm worker in Rezekne District, Latvia from October 1939, to December 1941, and as a bookkeeper employed by the Latvian Railway Department in Riga from December 1941 to October 1944. On January 11, 1950, the I.R.O. certified the respondent as a displaced person eligible for care and maintenance. Exh. 40.

Exhibit 38 consists of the respondent's Application for Immigration Visa and Alien Registration (Form 256a), signed by the respondent on November 13, 1951, and his Immigrant Visa and Alien Registration. The visa package reflects that the respondent was found eligible for an immigrant visa based on a report of the Displaced Persons Commission. This report, dated November 8, 1951, is Exhibit 59. It states that a thorough investigation into the respondent's background has been conducted and it was found that the respondent was employed as a farm worker from October 1939, to December 1941, and as a bookkeeper from December 1941, to October 1944. The report further states that the respondent has not advocated or assisted in the persecution of any person because of race, religion, or national origin, and has not been a member of any movement hostile to the United States or our form of government.

Exhibit 41 consists of the respondent's "Curriculum Vitae," prepared by the respondent in connection with his application for an immigrant visa, and signed on October 2, 1950. This document states that the respondent worked on a farm from 1940 to 1941, and then worked as a bookkeeper until 1944.

Based on these documents, the respondent was found to be admissible to the United States. When he reached this country he executed, on December 22, 1951, an "Affidavit as to Subversive Organizations or Movements" (Form I-144) (Exh. 39). The affidavit states, inter alia, that the respondent has not been a member of or participated in any movement which is or has been hostile to the United States or our form of government, and that he never advocated or assisted in the persecution of any person because of race, religion, or national origin.

In addition to the above-described documents relating to the respondent's admission to the United States as a displaced person, the Government also submitted into evidence five prior sworn statements of the respondent, dated January 21, 1966 (Exh. 13), February 15, 1966 (Exh. 14), August 14, 1975 (Exh. 15), February 12, 1976 (Exh. 16), and September 2, 1976 (Exh. 17). In the first of these statements, the respondent continued to assert, as he had on his immigration papers, that he was employed as a bookkeeper after the Germans invaded Latvia. In the second statement, he admitted that he acted as a temporary "keeper of order" after the Germans occupied Latvia, but denied that he was ever a police officer, that he ever arrested people or ordered arrests, that he ever cooperated with the German Government, or that he knew of the arrests and killings of Jews and gypsies in the Rezekne area.

By the time of the respondent's 1975 statement, he was no longer denying that he was a police officer during World War II. By the time the respondent's deportation hearing reconvened in July of 1981, he had stipulated that he was in fact the Chief of Police of the Second Police Precinct in Rezekne from August of 1941 until 1944, when the Germans began their retreat. The respondent now also admits to limited involvement in an incident involving the residents of Audrini, a small village within his precinct, which culminated in the executions of all the villagers. According to numerous accounts, the trouble in Audrini began when two or more Latvian policemen were shot to death in the village by Soviet partisans who had been hiding there. There was evidence to the effect that the village was known to harbor Soviet partisans. Tr. at 75, 424, 430; 7/ Exh. 24-10. The killing of the policemen occurred on or about December 18 and 21, 1941. On or about December 22, 1941, all of the 200-300 Audrini residents were arrested. The respondent conceded that he ordered the arrests of all the villagers, but

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7/ Unless otherwise noted, transcript pages refer to the transcripts from the proceedings held in 1981 and 1982.

stated that he had no choice: his orders came from his Latvian Superior A. Eichelis, the Chief of Police of Rezekne District, who in turn received his orders directly from the Germans. Tr. at 365-367, 371-372. The respondent also now admits that following the arrests, he ordered that Audrini itself be burned. Again, he testified that his orders to burn the village were based on directives from his superiors. The village was burned to the ground on approximately January 2, 1942.

The respondent has continued to deny, however, that he in any way participated in subsequent events. He denies that he had any role in the public executions, in the Rezekne market square, of 30 of the Audrini villagers. These people were apparently executed in public as a warning to all Rezekne residents not to aid the Soviets. The respondent testified that he was in church when these executions were carried out. Tr. at 362-364. He states that he did not know who shot these people, but that he "heard" it was both Germans and Latvians. Tr. at 364. He also denies any involvement in the massacre of all the rest of the villagers, who apparently were trucked to an area within the respondent's precinct, known as the Ancupani hills, and there shot to death.

It is the Government's position that the respondent is deportable even on the facts now admitted by the respondent, and found by the immigration judge. The Government asserts that the respondent's failure to reveal that he was a Latvian police chief when he applied for displaced person status was a willful misrepresentation of a material fact which warrants a finding of deportability. It is further asserted that the respondent's membership in the Latvian police in and of itself made him ineligible as a displaced person and thus deportable. In addition, the government claims that the respondent did in fact assist in the persecution of persons and that he is deportable on those grounds as well.

THE DEPOSITIONS TAKEN IN LATVIA

Before beginning our analysis of the charges made against the respondent, we find it appropriate to comment on an issue which has been the subject of considerable attention both at the hearings below and on appeal. This is the issue of the seven videotaped depositions taken in Riga, Latvia in May of 1981. The Government has placed considerable reliance on six of these depositions in order to prove certain aspects of its case. The immigration judge gave virtually no weight to the videotaped depositions, finding them "unconvincing as testimonial evidence on their face." Immigration judge's decision at 13. The Government, which presented witnesses at the hearing to show that

the depositions were reliable, argues at some length on appeal that the Soviet witnesses were credible, that the depositions as a whole were reliable, and that the Board should view and consider the videotapes independently. Counsel for the respondent also presented a witness on the issue of the reliability of the depositions, to show that the Soviet-controlled conditions under which they were taken rendered them inherently unreliable. He asserts that the immigration judge gave the depositions the weight they deserved.

We find it unnecessary to decide the thorny question of what weight these depositions should be given, since we have been able to make determinations of deportability without relying in any way on that disputed evidence. 8/ Since we have not relied on these depositions, it is also unnecessary for us to address those arguments made by the respondent which relate to the depositions, such as his assertions that he was given an inadequate time to prepare for the depositions, and was denied the right to cross-examination.

We turn now to the merits of the case.

PERSECUTION UNDER SECTION 241(a)(19)
Evidence Presented

The first witness called by the Government during the 1981 phase of these proceedings was Dr. Wolfgang Scheffler, an historian who is an expert on the National Socialist Regime and the persecution of Jews. Counsel for the respondent stipulated to Dr. Scheffler's expertise regarding those subjects. Tr. at 26. 9/ The witness provided general background testimony and also testified in some detail on the role of local police units in Latvia during World War II. Dr. Scheffler testified at length on the organization of German police units and their relationship to the local indigenous Latvian police groups. Dr. Scheffler's testimony was supported by a number of captured Nazi documents which were admitted at the Nuremberg trials. These documents were admitted into evidence as exhibits 24-1 through 24-15. Counsel for the respondent did not object to the admission of these documents. The gist of Dr. Scheffler's testimony was that the Germans exercised ultimate control over the civilian police and the security police in

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8/ We have not viewed the videotapes.

9/ We note that Dr. Scheffler was accepted as an expert historical witness in the case of United States v. Demjanjuk, supra.

Latvia. 10/ According to Scheffler "[a]ll Latvian police forces were under German supreme command." Tr. at 52. See also exhibit 24-15, a December 7, 1942 letter from a Dr. Drechsler to the "Reich Commissar for the Ostland (Eastern Regions)" describing the chain of authority from the Reich Commander of the SS "down to the last police official," and stating that "[a]ll police personnel located in the General District of Latvia are directly under the German police authorities." Scheffler referred to the Latvian units variously as "self defense units," "auxiliary police forces," and as "regular police forces." The witness further testified that "all of these police forces were then taken together and summarized by or put together by the SS in the so called Schutzmannschaften." Tr. at 49.

Dr. Scheffler testifed that while much of what the local police units did consisted of maintaining security and order, they also participated in clearing the ghettos and sometimes participated in mass executions of Jews and other civilians. Tr. at 47, 51, 77. The Nuremberg documents corroborated this testimony. See Exhs. 24-1, 24-2, 24-3, 24-6, 24-8. The witness testified that the Germans had to rely on the indigenous auxiliary forces because there were not enough German forces to carry out their policies against Jews, Communists, and other undesirables. As an example, the witness stated that as of October 1941, there were only 170 members of "Einsatzgruppe "A", 11/ while there were 7000 Latvian police. Tr. at 56-58.

10/ A lengthy analysis of the organizational structure of the Latvian police units and their role during the German occupation was provided in our decision in Matter of Laipenieks, Interim Decision 2949 (BIA 1983). The analysis provided in that case was based on the expert testimony of another witness, Dr. Raol Hilberg, as well as on captured German documents, many of which were also placed in evidence in this case. Hilberg's testimony, as reflected in the decision, was consistent with that provided by Dr. Scheffler in this case.

11/ The Einsatzgruppen were small, mobile units of the Reich Security Main Office (RSHA), Tr. at 31. Einsatzgruppe "A" was the unit active in Latvia. Tr. at 34. Their mission included collecting secret materials and files, but according to Dr. Scheffler, "its major role was to eliminate what

(Continued)

Dr. Scheffler stated that it is his opinion that "in Rezekne as in other cities, the local forces participated in what was called self-purges." Tr. at 71. Again, this testimony is supported by documentary evidence of record. See, e.g., Exh. 24-6, the August "Report for the War Diary," stating that hundreds of Jews were shot in Rezekne "by Latvian Self-Defense." Scheffler also stated that it would be difficult for a police chief to avoid such participation and stated his opinion that they usually did so willingly. Tr. at 72-74.

The respondent, having been compelled to testify by a second district court order, dated August 4, 1981 (Exh. 90), took the stand on September 1, 1981. He stated that he joined the Aizsargi, a Latvian self-defense organization, in 1932 after leaving the Latvian Army. Tr. at 347. According to the respondent, the Aizsargi was abolished in 1940 when the Communists took over in Latvia. Tr. at 347. He further testified that after the Russian Army left Latvia but before the Germans arrived he assisted in protecting the people. Tr. at 348. After the Germans arrived he became a member of the self-defense league and in August, 1941, became chief of the Second Police Precinct in Rezekne. He stated that the self-defense forces were absorbed into the formal police force in November or December of 1941. The respondent testified that he wore an Aizsargi uniform until the end of 1942, and that he then wore a German officer's uniform until 1944 when the Germans retreated from Latvia. Tr. at 351-352.

The respondent insisted that it was not his duty as police chief to deal with the Jews or the Communists in his district and he further stated that there were only 50 Jews in his precinct, in the village of Kaunata. Tr. at 354-356. However,

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was called undesirable elements, which included the annihilation of Jews." Tr. at 34. Dr. Scheffler's testimony regarding the role of Einsatzgruppe "A" was corroborated by exhibit 24-1, a lengthy report from the commander of Einsatzgruppe "A", General Dr. Stahlecker, to Reichsfuehrer Heinrich Himmler, chief of the Nazi SS and second in command to Adolf Hitler. This report, dated October 15, 1941, was captured by the allies and was one of the documents used in the Nuremburg Trials. It describes in some detail the German policy of inducing the local police to cooperate in the "cleaning job" of eliminating "vermin-that is mainly the Jews and Communists." Exh. 24-1 at 5 (translation). See also Matter of Laipenieks, supra, for a detailed discussion of the role of Einsatzgruppe "A".

the respondent conceded that he thought that the Latvian police were involved in killing Jews in Rezekne generally, but he testified that he was not himself involved. Tr. at 361. He also stated that he did not believe that men under his own command were involved in the killings. Tr. at 361-362. The respondent admitted that his police assisted in the arrests of the residents of Audrini, and in the burning of that village. The respondent testified that he passed the order on for the police to be there but that he was not present himself during the arrests and the burning. Tr. at 365-367. He stated that he had no choice but to order the arrests in that the Germans through his Latvian superior Eichelis ordered him to do it. The respondent stated that he was not present when 30 of the villagers from Audrini were shot in the Rezekne market square, and that he knew nothing about these public executions. Tr. at 362-364. The respondent further maintains that he was not in any way involved in the massacre of the rest of the Audrini villagers in the Ancupani Hills. He insisted that it was not his job to kill civilians and that he could not have stopped the killing in any event. He stated that he does not know who shot the villagers in the Ancupani Hills but he heard a rumor that they were shot. Tr. at 369-370. The respondent denies that he ever engaged in any form of persecution. Tr. at 385.

To further support its charge that the respondent engaged in persecution, the Government submitted into evidence several documents specifically relating to the respondent's duties as police chief and his role in the Audrini incident. Among these were documents from the Central Historical Archives of the Latvian Soviet Socialist Republic. They were certified as authentic by the Soviet Embassy in Washington, D.C. Included in these was Exhibit 84, a January 9, 1942, memorandum from the "Rezekne Dist. Police Prec't. 2 Chief" to the "Vice Prosecutor in the 2nd Precinct, Daugavpils Area Court." The report details the continuing efforts being made to apprehend "the Communist bandits" who killed Latvian policemen in and near Audrini in December of 1941. The memorandum also states that on December 22, on the order of the Territorial Commissar at Daugavpils, all Audrini residents were arrested, and on January 2, 1942, the village was burned. The report concludes with this unelaborated sentence: "Also, the inhabitants were shot to death, with 30 of the death sentences carried out in the Rezekne market square." This document carries a "copy correct" notation, indicating that it is not the original. The respondent's name appears on the document, along with the Latvian word for "signature," but the copy of the report is not actually signed. The Government on p. 18, n. 15 of its brief on appeal asserted that Exhibit 84 is a typed

copy of the original sent to the Daugavpils Vice Prosecutor, and that the secretary to the prosecutor typed the copy, noting that the respondent had signed the original. No explanation is offered as to why the original was not offered: presumably it was not found in the archives.

Counsel for the respondent contends that Exhibit 84 is ambiguous in that it does not make the date of the executions clear, and "does not come out and say that respondent participated." Respondent's brief at 10. He also questions why other exhibits produced by the Soviets (from the Latvian archives), such as Exhibit 62 (described below), were signed by the respondent, but Exhibit 84 was not. Counsel describes the Government's explanation for the lack of a signature on Exhibit 84 as "glib," and asserts that the Government "totally underestimate[s] the Soviets." Id. at 10-11. While it is not altogether clear, counsel appears to be suggesting that the Soviets fabricated this document for their 1965 in absentia trial of the respondent. 12/ No such showing has been made, however. 13/

Exhibit 62 is a January 3, 1942, report from the Chief of Rezekne District Police Precinct 2 to the Vice Prosecutor in the Second Precinct, Daugavpis Area Courts. It is a brief memorandum which states, inter alia, that "on orders of the German authorities, all the residents of Audrini village, Makaseni County, were imprisoned, but the village itself was

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12/ The respondent was tried for war crimes in the Soviet Union in 1965. He was convicted and sentenced to death.

13/ We note that even the respondent's witnesses were unable to cite any instance where the Soviet Union provided fraudulent documents for a trial in the United States. Tr. at 507; Exh. 131 (April 9, 1982 Deposition of Imants Lesinskis, made in the case of United States v. Kaiyrs (Civ. Action No. 80 C 4302 (N.D. Ill.), at 45). See also discussion in United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), at 433-434, in which the court notes that "the defense witnesses were unable to cite any instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied by the Soviet Union to a court or other governmental authority." (Emphasis in original.)

burned." This authenticated document, which like Exhibit 84 came from the Central Historical Archives of the Latvian Soviet Socialist Republic, is signed by the respondent. 14/

Another authenticated document from the Latvian archives is exhibit 85, a December 31, 1941, memorandum entitled "Order 12," addressed to the Rezekne District Police. Like exhibit 84, it is not actually signed, but the Latvian words for "original signed by" appears over the name A. Eichelis, the Rezekne District Police Chief and the respondent's immediate supervisor. The order thanks the police for work performed in 1941 and wishes them the best for 1942. The order expresses "deep confidence and trust" in "the bearer of the new era-Adolf HITLER." Reviewing the past year, the report notes that "[d]uring 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." Exhibit 83, a December 17, 1943, memorandum to the Rezekne District Police from W. Celms, Police Major, Rezekne District Chief announces that the "Supreme SS and Police Commander in the Ostland" has awarded the "Iron Cross, 2nd Class, with swords," to the respondent.

The first witness called by the respondent was Elfrida Purgailis. This witness testified that she knew the respondent well in Rezekne, that they worked together there, and that she saw him regularly from 1934 to 1940. Tr. at 397-398. She testified that after 1940 she saw the respondent much less frequently, and did not know what he was doing, though she saw him in an Aizsargi uniform. Tr. at 399-401. The witness further testified that after the Germans arrived, many times she

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14/ A number of known examples of the respondent's signature (including signatures on his immigration documents and on a check) were admitted into evidence for comparison with the signatures on the documents originating in the Latvian Archives. William Francis McCarthy, a certified document examiner for the Immigration and Naturalization Service, appeared for the Government in order to establish the respondent's signature. Counsel for the respondent accepted McCarthy as an expert witness on forensics. Tr. at 185. McCarthy testified that the signatures on the documents from the Archives were written by the same person as the one signing the known examples. Tr. at 194, 214. See also Exh. 118, McCarthy's affidavit. We are satisfied that the respondent signed the wartime documents bearing his name.

saw truck loads of women and children being taken to the Ancupani Hills and she heard that they were shot there. Tr. at 406. She stated that it was the Germans who took them there and that there was nothing to be done about it. Tr. at 406. The witness testified that she never heard of the respondent being involved "in such inhuman activities." Tr. at 407. She says that living in such a small town she heard about other people who were involved in the atrocities but she never heard that the respondent was involved. Tr. at 407. The witness stated that she did hear that the respondent had been named Chief of Police but on cross-examination she admitted that she never saw the respondent perform any police duties since she did not live in his precinct. Tr. at 410-411.

The respondent's second witness was Constance Gaidulis. She testified that she was a good friend of the respondent in Rezekne and that they attended the same church. Tr. at 413-414. She testified that she knew the respondent well and that he was known as a honest and helpful man. Tr. at 426. She stated her belief that the executions in the Ancupani Hills were carried out by the German Security Police. She never heard that the respondent was in any way involved. Tr. at 428. She further stated that the public executions in the Rezekne market square were a warning by the Germans not to keep or hide guerrillas. Tr. at 430. The respondent admitted that she was not present when the Audrini villagers were arrested or shot, so she does not know for certain who did it. Tr. at 430-431.

Witness Marianna Dadzis testified that she met the respondent when he married her girlfriend in 1938, and that he later hired her as a clerk in the police office. Tr. at 433-436. She testified that the respondent usually dressed as a civilian, but also in an Aizsargi uniform, and that later he wore a German uniform. Tr. at 438. She stated that the respondent was always in the office. Tr. at 442. She stated that the respondent had many friends, and that she never heard of his involvement in the extermination of Jews or of his role in the Audrini village incident. Tr. at 442, 444. The witness testified that she does not know who killed the Audrini residents or who burned their village. Tr. at 446.

The final witness who testified regarding personal knowledge of the respondent in Latvia was Victoria Balodis. She testified that she met the respondent in 1938 and that they sang in the church choir together. Tr. at 447. She further testified that she and the respondent lived on the same street during the German occupation so she saw him nearly every day. Tr. at 450. She stated that she knew he was doing police work, and, like

the witness Dadzis, she said that the respondent often dressed as a civilian, but sometimes wore an Aizsargi uniform, and she later saw him in a German uniform. Tr. at 451. She testified that the respondent was respected in the town, that he was nice, gentle, and religious and that she knew of no involvement by the respondent in any atrocities. Tr. at 454-455.

Conclusions of Law

Based on the testimony and evidence described above, we conclude that the respondent is deportable under section 241(a)(19) of the Immigration and Nationality Act. That statute 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.

There is no dispute that the events in question here took place within the specified time frame. The first question, then, is whether the respondent in his role as Latvian Police Chief in the Second Police Precinct in Rezekne operated under the direction of, or in association with, the Nazi government of Germany, the government in a Nazi occupied area, or a government established with the assistance or cooperation of the Nazi government. Based on the evidence of record, as well as Board precedent and other case law, we find that he did.

As described above, the Government expert witness Wolfgang Scheffler testified that the German Nazi government exercised ultimate control over the indigenous police forces in Latvia. Documentary evidence of record fully corroborates this testimony. The Stahlecker Report, exhibit 24-1, details the Nazi policy of utilizing local police to aid them in their campaign to rid Latvia of Jews, Communists, and other "undesirables." Other evidence from the Nuremberg documents likewise describes

this policy. Moreover, other documentary evidence involving the respondent specifically, such as exhibits 62, 83, and 84, reflects the role of the Second Police Precinct in Rezekne within this scheme. Finally, the respondent himself testified at trial that he received orders from Eichelis, who in turn received orders from the Germans. Tr. at 359, 365-367, 371-372.

In addition to the evidence and testimony provided in this case which indicates that the Latvian police in Rezekne operated under the direction of the Nazi government, case law also supports such a finding. In our decision in Matter of Laipenieks, Interim Decision 2949 (BIA 1983), we held that the Latvian Political Police operated under the direction of and in association with the Nazi government, and also that it constituted part of the government in Nazi-occupied Latvia. Id. at 30-31. Other judicial decisions have reached similar conclusions regarding indigenous police forces in the Baltic states. See e.g. United States v. Kowalchuk, 571 F.Supp. 72 (E.D. Pa. 1983) (Nazis relied on help from indigenous police forces in the Ukraine); United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983) (Germans exercised ultimate control over indigenous Lithuanian forces); United States v. Koziy, 540 F.Supp. 25 (S.D. Fla. 1982), aff'd 728 F.2d 1314 (11th Cir. 1984) (indigenous police in the Ukraine were used by Germans to assist in most tasks); United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981) (German Einsatzgruppen were aided in Estonia by indigenous forces); United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981) (Ukrainian police assisted the Germans in rounding up and otherwise persecuting Jews in the town of Rawa Ruska, in the Ukraine).

Based on the foregoing, we find that the police unit of which the respondent was chief operated under the direction of and in association with the Nazi government of Germany, and constituted a part of the government in Nazi-occupied Latvia.

We turn next to the question whether the respondent "ordered, incited, assisted, or otherwise participated in" the persecution of any person. Based on the respondent's own admissions and other evidence of record, we find that the respondent did assist in persecution. The respondent has now admitted that he participated in the arrests of all the inhabitants of Audrini, and that he subsequently ordered that the village be burned. The immigration judge characterized these actions as a "reprisal against the killing of one or more Latvian policemen." Decision at 18. He notes that these events "ultimately led to the Audrini massacre," but he said that the massacre "has not been shown to be predictable, planned or inevitable." Id. at 18. He

therefore concluded that the Government had not proven that the respondent engaged in persecution. Other than simply calling the arrests and burning a "reprisal," the immigration judge does not explain why he does not consider those acts to constitute persecution. In his brief on appeal, counsel for the respondent contends that the arrests and burning were a military necessity, similar to actions carried out by American soldiers in Vietnam. He argues that "there is nothing illegal or immoral about arresting villagers for the purpose of investigating and ascertaining the scope and nature of their activities so that proper preventive measures can be taken and the guilty ones who have been harboring guerrillas segregated from the innocent ones." Respondent's brief at 16. The Government, on the other hand, contends that the respondent's admitted actions constituted assistance to the enemy in persecuting civilian populations. The Government also argues that the acts constituted war crimes.

We agree with the Government's position that even on the facts admitted by the respondent and found by the immigration judge, the respondent engaged in persecution of civilian populations. While it may be true, as the respondent argues, that mass arrests and interrogations are sometimes necessary in time of war to prevent guerrilla activity, the actions admitted by the respondent went beyond that. Counsel suggests that the arrests were simply for the purpose of ascertaining which villagers were guilty of harboring Soviet partisans, and segregating them from the innocent villagers. No evidence has been presented as to how long the villagers were held and interrogated, and under what conditions. However, we know that the homes of all the villagers, innocent and "guilty," were burned. The burning of the entire village of Audrini hardly served the claimed purpose of ferreting out and punishing only the guilty villagers. In our view, the arrests of every inhabitant closely followed by the burning of their village constituted persecution of the civilian population. We note that the respondent in his brief contends that "[t]he government has not established that the villagers were innocent." Respondent's brief at 15. We do not believe that the Government was required to prove that some of the villagers were innocent. Rather, we think it fair to assume, absent evidence to the contrary, that not every man, woman, and child in Audrini assisted Soviet partisans.

In Matter of Laipenieks, supra, we held that where persons were arrested, interrogated, incarcerated, deprived of their liberty, and frequently beaten with hands or clubs, such treatment constituted persecution within the meaning of section 241 (a)(19) of the Act. Id. at 34-35. In the present case (even leaving out consideration of the villagers' ultimate fate),

every inhabitant of the village of Audrini was arrested, and their village was burned. This, too, constituted persecution. In Laipenieks, we quoted from the legislative history of the so-called "Holtzman Amendment" (Pub. L. 95-549, 92 Stat. 2065), of which section 241(a)(19) is a part. The legislative history reveals that Congress found it unnecessary to set forth a statutory definition of "persecution." General Congressional intent, however, is reflected in that history. The Congressional report, H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4700, notes that case law had fashioned workable definitions of persecution without the aid of a statutory definition, and states:

> Generally this case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. (Emphasis added.)

Id. at 4704. Clearly, then, Congress contemplated that deprivation of housing could constitute persecution. The burning of Audrini not only deprived its inhabitants of housing, but also would have imposed upon them severe economic disadvantage and the loss of other essentials of life.

In enacting the "Holtzman Amendment," the Congress made clear that reference to "international material," including opinions of the Nuremberg tribunals, was also appropriate in making individual determinations regarding persecution. 15/ The Charter of

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15/ The report states:

> 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.

Id. at 4706.

the Nuremberg International Military Tribunal included within the definition of war crimes the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Article 50 of the Hague Regulations states: "[n]o general penalty, pecuniary or otherwise, shall be inflicted on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." The burning of Audrini was clearly the kind of wanton destruction and general penalty contemplated by these and other documents.

Our finding that the arrests of the inhabitants of Audrini and the burning of that village constituted persecution is further supported by the case law. In United States v. Dercacz, 530 F.Supp. 1348 (E.D.N.Y. 1982), for example, the court granted summary judgment for the Government in a case involving an Ukrainian policeman who as part of his duties reported Jews who failed to wear the required armbands and those who sold food to Jews. The court found that in so doing, the respondent assisted the Nazis in persecuting civilians within the meaning of the I.R.O. Constitution and section 2 of the Displaced Persons Act. In United States v. Kowalchuk, supra, the court found assistance to the Nazis in persecuting civilians where the respondent occupied a responsible, but largely clerical, position in the Ukrainian militia. The court noted that the respondent may not have actually been personally involved in any atrocities, but he "must have known of the harsh repressive measures which the schutzmannschaften were carrying out pursuant to German direction." Id. at 81. In United States v. Osidach, supra, the court held that a Ukrainian policeman, while not proved to have actually engaged in persecution himself, had assisted in persecution by virtue of his membership in the Ukrainian police. It is obvious that the role played by the respondent in the Audrini incident alone was more clearly assistance in persecution than the actions taken by the respondents in these cases.

After consideration of all the testimony and evidence, as well as the case law and the legislative history of section 241(a)(19), we have no trouble in concluding that the respondent assisted in the persecution of civilian populations in Latvia. The respondent's attempted analogy to American actions in Vietnam does not persuade us that the burning of Audrini and the arrests of all its inhabitants was a military necessity, and not persecution. Furthermore, the fact that he may have been acting on orders from his Latvian and German supervisors is not a defense. See Fedorenko v. United States, 449 U.S. 490 (1981).

The final issue to be resolved in determining whether the respondent is deportable under section 241(a)(19) is whether the persecution he assisted in was "because of race, religion,

national origin, or political opinion." The inhabitants of Audrini, who were Latvian, and whose faith was apparently Orthodox (Tr. at 363), were persecuted because Soviet partisans had been found hiding in the village. As a result of the fact that some of the villagers were apparently sympathetic to the Soviet cause, all were arrested, and eventually killed, and the village was burned. The dragnet was large, and no doubt encompassed some who were not sympathetic to the Communists, and who in fact may have held no political views at all. Nevertheless, the actions carried out against the Audrini villagers were initiated because of the political opinions held by some of the inhabitants. Under these circumstances, we have no difficulty in concluding that the persecution in which the respondent assisted was based on political opinion and comes within the meaning of section 241(a)(19). 16/

In view of all the foregoing, we find, by clear, unequivocal, and convincing evidence that the respondent, under the direction of, and in association with, the Nazi German government, assisted and otherwise participated in the persecution of persons because of political opinion. Therefore, the respondent is deportable under section 241(a)(19) of the Act, and the sixth charge made against the respondent is sustained.

MISREPRESENTATION CHARGES
Legal Standards

We turn next to the question whether the respondent is deportable based on the admitted misrepresentations he made in applying to immigrate to the United States. The first, second and fourth charges of deportability are based on those misrepresentations. We begin with the premise that the respondent is deportable based on his misrepresentations only if those misrepresentations were material. See Fedorenko v. United States, id. at 508. Hence, the question is, was it a material misrepresentation for the respondent to claim he was a bookkeeper during World War II when in fact he was the chief of police in a small precinct in Rezekne, Latvia?

In his decision, the immigration judge applied this test for determining whether or not a misrepresentation made in a visa application is material: "The Government must establish not

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16/ In Matter of Laipenieks, supra, we specifically rejected the argument (not made here) that Communism is not an included form of "political opinion under the Holtzman Amendment." Id. at 39-41.

only a misrepresentation which cut off a relevant line of inquiry but one which would have led to a proper determination that he was ineligible for a visa." Decision at 17. The immigration judge found that the Government had not met its burden: he concluded that the respondent would have been allowed to enter the United States even if he had revealed his true employment.

The immigration judge cited no authority for the test of materiality which he applied in this case. In fact, the question of what constitutes a material misrepresentation has been the subject of considerable litigation, and the issue has not yet been finally resolved. In a denaturalization case, Chaunt v. United States, 364 U.S. 350 (1960), the Supreme Court held that a misrepresentation made on a citizenship application is material if either facts were suppressed which, if known, would have warranted denial of citizenship, or if "their disclosure might have been useful in investigation possibly leading to the discovery of other facts warranting denial of citizenship." Id. at 355. In a more recent case involving a man who was an armed guard at the notorious death camp Treblinka during World War II, Fedorenko v. United States, supra, the court held that Fedorenko's failure to disclose such employment on his visa application was a material misrepresentation and that his visa had thus been illegally procured. In reaching this conclusion, however, the court distinguished Chaunt, supra, on the ground that in Chaunt the misrepresentation was made in a citizenship application, whereas in Fedorenko, the misrepresentation was made in the visa application. Because the court found that disclosure of the true facts about Fedorenko's service as an armed guard at Treblinka would, in and of itself, have made him ineligible for a visa under the Displaced Persons Act as a matter of law, they found it unnecessary to decide whether Chaunt's two part materiality test would govern false statements in visa applications as well as in citizenship applications.

Moreover, as the concurring and dissenting opinions in Fedorenko make clear, Chaunt's materiality test is subject to wide interpretation. Justice Blackmun in a concurring opinion stated his view that under either Chaunt test, "the Government's task is the same: it must prove the existence of disqualifying facts, not simply facts that might lead to hypothesized disqualifying facts." Fedorenko at 523-524. Justice White, dissenting, expressed the opinion that it is sufficient under Chaunt for the Government to prove "only that such an investigation might have led to the discovery of facts justifying denial of citizenship." Id. at 529. (Emphasis in original.) Finally, Justice Stevens, dissenting on different grounds, expressed his opinion that Chaunt really involved three inquiries, not two. He stated and explained these tests as follows:

> (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.

Lower court decisions which have attempted to apply Chaunt have also reflected confusion as to its meaning. Cases which suggest that a misrepresentation is material if knowledge of the true facts might have led to the discovery of facts warranting denial of a visa or of citizenship include Kassab v. INS, 364 F.2d 806 (6th Cir. 1966); United States v. D'Agostino, 338 F.2d 490 (2d Cir. 1964) (the present case arises in the Second Circuit); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961); United States v. Kowalchuk, supra; United States v. Schellong, 547 F.Supp. 569 (N.D. Illinois 1982), aff'd 717 F.2d 329 (7th Cir. 1983), cert. denied ___ U.S. ___, 104 S. Ct. 1022 (1984); and United States v. Koziy, supra. Other cases have required a finding that knowledge of the true facts would have led to outright denial of a visa or citizenship, or have cited Chaunt but found it unnecessary to go beyond the first prong of the test set forth there. See e.g. United States v. Sheshtawy, 714 F.2d 1038 (10th Cir. 1983); La Madrid-Peraza v. INS, 492 F.2d 1297 (9th Cir. 1974); United States v. Riela, 337 F.2d 986 (3rd Cir. 1964); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962); United States v. Kungys, 571 F.Supp. 1104 (D. N.J. 1983); United States v. Linnas, supra; United States v. Demjanjuk, 518 F.Supp. 1362 (N.D. Ohio 1981), aff'd 680 F.2d 32 (6th Cir. 1982).

The Attorney General has also enunciated a rule of materiality regarding misrepresentations made in connection with applications for visas. 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 misrepresentation 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 Bosuego, 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 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."

EVIDENCE PRESENTED

It is in the contexts of all these cases that the materiality of the respondent's admitted misrepresentations must be considered. A number of witnesses testified at the hearing regarding the effect the misrepresentations made by the respondent would have had on his admissibility. Rosemary A. Carmody, who in 1951 was a Foreign Service vice consul processing people under the Displaced Persons Act in Hamburg, Wenthoff, Germany, was the first such witness. Carmody identified her signature on Exhibit 38, the respondent's application for an immigrant visa. Tr. at 242. The witness testified that had that application revealed that the respondent was a police chief in Rezekne, he would have been per se ineligible for displaced person status and she would have denied the visa. Tr. at 250. According to Carmody, such a person "invariably" would have been involved in some collaboration with the Nazis, and an alien who made such a misrepresentation would have been ineligible as a matter of law. Tr. at 250-253. Carmody also testified that the respondent's application was processed near the end of the displaced persons program when she and other officials were working 14 hour days, 7 days a week in order to use up all the allocated visas before the program expired on December 31, 1951. Tr. at 254-256.

The next witness called by the Government was Abraham P. Conan, who worked for the Displaced Persons Commission in Hamburg from July, 1950 to February, 1951, as the senior officer in charge of the British zone of Germany. Tr. at 264. All applications for displaced persons status which were rejected were referred to him for review. Tr. at 265-266. Like Carmody, Conan testified that the respondent would have been ineligible as a displaced person if he had revealed the true

facts of his employment during World War II. Tr. at 290. The witness stated that he knew of no case where Latvian policemen had admitted such employment and obtained a visa. Tr. at 296-297.

Conan also testified regarding the so called inimical list. He stated that this was a document used by the Displaced Persons Commission which listed foreign organizations or movements deemed inimical to the United States. According to Conan, any member of an organization or movement named on the list "was deemed ineligible for admission to the United States and would be rejected, his application would be rejected." Tr. at 286. The original inimical list as well as a revised version and a list of deletions from the list were identified by Conan, and were placed into evidence as exhibits 75 through 77. These exhibits reflect that the Aizsargi was originally on the list, but was later deleted. 17/ The exhibits also reflect that the organization Schutzmannschaften was always on the inimical list. Conan testified that the term Schutzmannschaften "would include the police forces, the local police," and specifically stated that the term would cover the Latvian auxiliary police in Rezekne. Tr. at 291. On cross-examination, however, Conan stated that while not every single policeman in Latvia would necessarily be considered a member of the Schutzmannschaften, the burden would be on the applicant to show that he was not. Tr. at 293-294.

A third Government witness, who testified as to these matters during the Government's rebuttal, was Gerard F. Charig. Charig was with the Displaced Persons Commission in Frankfurt, Germany from July of 1950 to March of 1952. He was a member of the three member (with one alternate) review panel which reviewed denials of displaced person applications. The decisions of the review panel were final. Tr. at 727. Charig testified that it was "unequivocally a material misrepresentation" for the respondent to say on his visa application that he was a bookkeeper when in fact he was a member of the Latvian Police. Tr. at 757-758.

17/ The respondent's application for displaced person status was in fact initially denied because of his admitted membership in the Aizsargi. Exhs. 70-71. However, when the Aizsargi was later deleted from the inimical list, the respondent's application was approved. Exh. 74.

Like Conan, Charig testified regarding the inimical list, and stated that membership in a listed organization would result in denial of an application for displaced person status. Tr. at 737-738. When asked how the review panel interpreted the term "Latvian Schutzmannschaften," Charig replied "[t]he review panel interpreted that as all Latvian police, all Latvian police." Tr. at 744. See also Tr. at 755. The witness did state that it was possible for a Latvian policeman to "exculpate himself" if he could show that he was conscripted and did not commit atrocities or persecute civilians. Tr. at 745. The witness also testified that mistakes were sometimes made in processing the applications and that the expedited processing toward the end of the program increased the possibility of error. Tr. at 760-762.

On cross-examination by counsel for the respondent, Charig reiterated that the Latvian police and other police organizations were considered part of the Schutzmannschaften (Tr. at 786-787), and he stated that the Schutzmannschaften was included on the inimical list because the Latvian police "were part and parcel of the German occupation force [and] collaborated with the Germans." Tr. at 781. He testified that he came to the conclusion that all Latvian policemen were members of the Schutzmannschaften through the training he received and through "the consistent decisions from the beginning to the end until I left." Tr. at 786. He stated that the decisions on this issue were precedents and had to be followed. Tr. at 786.

The respondent's primary witness on the issue of Displaced Persons Commission procedures was Melbourne Hartman. Hartman worked as an investigator for the Displaced Persons Commission in Hamburg from mid-1949 to December, 1950. His job was to investigate whether or not an applicant was a member of a movement hostile to the United States or to our form of government. He testified that the overall chief of the Hamburg office was the Government witness Conan. Hartman strongly disagreed with both Conan's and Carmody's testimony that mere membership in the Latvian police would per se result in denial of displaced person status. Tr. at 552-553. He stated that he personally processed numerous applicants who admitted they were police, and he certified that these people "met the requirements of the securities section" (section 13 of the Displaced Persons Act). Tr. at 553. He also stated that he knew of people who disclosed their police service during the German occupation of Latvia, and were admitted to the United States, including the head of the Latvian police, a man named Pommers. Tr. at 578. He testified that he had never heard of the inimical list, though he noted that that document was classified "Secret" and no investigator for the

Displaced Persons Commission had clearance to handle secret documents. Tr. at 561-562. He further testified that he totally disagreed with Conan's opinion that all policemen were part of the Schutzmannschaften. Tr. at 569-572. He also stated that Conan was an administrator with "no substantive knowledge," and he often had to explain details to Conan. Tr. at 569.

During his testimony, Hartman emphasized that the displaced persons were a burden to the German authorities and the British Government, and there was great pressure to relocate them. Tr. at 554-555. He testified that therefore "[y]ou took a quick look" at most cases, and went ahead and certified, because there simply was not time to "dilly dally with individual cases because some minor question mark appeared in somebody's mind." Tr. at 556-557.

On cross-examination, Hartman stated that the Germans would have made, or at least approved, all chief of police appointments in Latvia, but he stated that "these were pro forma appointments" and did not constitute anything "sinister or serious." Tr. at 618. He reiterated that the term Schutzmannschaften did not include all Latvian police, and he stated his view that the Displaced Persons Commission did not so consider it. Tr. at 619-625. He further testified that during his tenure, membership in the Schutzmannschaften did not per se warrant denial of displaced person status in any event. Tr. at 625.

Hartman testified on cross-examination that if an applicant initially lied on his application for displaced person status, but later recanted and told the truth, he could have his application approved as long as he had not persecuted people. Tr. at 638-641. However, if he never revealed the true facts, and the Displaced Persons Commission learned of them, his application would be denied. Tr. at 639, 642-643. When specifically asked whether he would have permitted a person who said he was a farmer when in fact he was a Latvian police chief to come to this country if he never told the truth, Hartman replied that he would not. Tr. at 643.

The second witness called by the respondent to testify regarding Displaced Persons Commission procedures was Earnest R. Acker, Jr. He testified that he was a "selector" for the Displaced Persons Commission in Hamburg from June, 1949 to August, 1950, and that his job was to gather together and select documents, such as birth and marriage certificates, relevant to an individual's immigration to the United States. Tr. at 646, 653.

When asked for his recollection as to the eligibility of policemen to enter the United States under the Displaced Persons Act, the witness answered, "[a]s far as I know they were eligible unless there was some other damaging evidence against them." Tr. at 647. When confronted with the inimical list on cross-examination, Acker stated that he had never seen the document before. Tr. at 652. He stated that he had heard the term Schutzmannschaften, but had forgotten its meaning. Tr. at 652. Acker testified that he was not involved in making actual determinations as to eligibility, but that if he saw documents which suggested possible ineligibility, the case would go to investigations, or to the person who made the final determinations. Tr. at 653-654.

The final witness called by the respondent on this issue was Gunars Meierovics. Meierovics testified that he was a camp commandant at the British zone resettlement center at Wenthoff, and was himself a displaced person there. Tr. at 661. He stated that one of the main fears of those in the camps was forced return to Soviet-occupied Latvia. Tr. at 666. He also testified that many people failed to disclose their military or police service because it was so easy: "they just asked questions and whatever you said, it went on a form and that's the way it was." Tr. at 666-667. Meierovics stated his understanding that the term Schutzmannschaften was not applied to local police in Latvia and he further stated that there was no prohibition against members of the Schutzmannschaften coming to the United States. Tr. at 672.

On cross-examination, Meierovics testified that he knew that the Latvians sometimes assisted the Germans in killing civilians. Tr. at 678. He admitted that he did not know what the Displaced Persons Commission meant when they used the term Schutzmannschaften. Tr. at 680. He testified that he had never heard of the inimical list. Tr. at 680-681. He stated that the Latvian auxiliary police did not collaborate with the Nazis during the war, but then agreed that if the Germans gave an order to a local police chief which he was obliged to carry out, that would be assisting the Nazis. Tr. at 684. The witness conceded that one of the things the Displaced Persons Commission was interested in was a person's activities during the war, but he added "as far as I know, they had very little material information to go with." Tr. at 683.

Further evidence was offered by the respondent on this issue after the hearing, with the submission of exhibit 123, the March 29, 1982, deposition of Robert G. Printz. Printz was an investigator/security agent for the Displaced Persons Commission in

Hamburg from January of 1949 to 1952. In that capacity he conducted investigations into the backgrounds of applicants for displaced person status. Exh. 123 at 7-8. Printz stated that to the best of his recollection, policemen were not per se ineligible to come to the United States. Id. at 16-17. However, he also stated that if an application revealed employment as a policemen, "I would have to ascertain how long he had been a policeman, what his position in the police department was, whether he was privy to any of the directions of the police department; or whether he was just an order follower. In other words, a traffic policeman, patrol, beat patrol policeman." Id. at 18. On cross-examination, Printz elaborated on this point, stating that if an applicant admitted to police service, he was likely to be interviewed as many as three or four times to determine whether he had taken part in any persecution. Id. at 27-28. Further outside investigation would also have been conducted. Id. at 29. Asked what he would have done if an applicant was a chief of a police unit that participated in burning an entire village and arresting all the inhabitants, and if he ordered his men to assemble at the village prior to the burning, he stated that he did not believe he would have approved the application. Id. at 33.

Another post-trial exhibit relating to the effect the respondent's misrepresentations would have had on his visa application was exhibit 125, which was also offered by the respondent. This exhibit consists of the April 6, 1982, deposition of Brigitta Borchers. Borchers testified that she worked for the Displaced Persons Commission in Hamburg under the supervision of Robert G. Printz. Exh. 125 at 3. Her job was basically that of a secretary and interpreter. She had no authority to make eligibility determinations, but she stated that her job was "to find out the flaws in the application" (for displaced person status). Id. at 25. Borchers testified that there was a temporary hold placed on applications where membership in the Latvian Legion was revealed, but the hold was later rescinded and the Legionnaires had their applications approved. Id. at 15. She stated that as far as she knew there was never a hold placed on policemen as such, and they were processed and allowed to come to the United States. Id. at 16-18. Borchers stated that she had never heard of the inimical list. Id. at 18-19. On cross-examination, the witness stated that if an applicant admitted that he was a policeman, further investigation would have been conducted. Tr. at 32-35.

In addition to the witnesses and depositions, both parties also presented documentary evidence on the misrepresentation issue. The Government offered as exhibits 10 memoranda and

notices of rejections under the Displaced Persons Act (Exhs. 99-108). These Exhibits reflected that the applicants were found ineligible for displaced person status because of their membership (or in one case the applicant's husband's membership) in, variously, the "Latvian Schutzmannschaft" (Exh. 99), the "'Schutzmannschaft' (Latvian Police)" (Exh. 100), the "'Schutzmannschaft' at Riga, Latvia" (Exh. 101), the "Latvian Police" (Exhs. 102, 104); the "Hilfspolizei" in Riga, Latvia (Exh. 103), the "Schutzmannschaft" (Exh. 105), the "Latvian Political Police" (Exh. 106), the "Lithuanian Schutzmannschaften" (Exh. 107), and the "Galician Waffen SS" (Exh. 108). The applications shown in Exhibits 99-107 were all rejected under section 13 of the DPA, as the organizations named were said to be movements hostile to the United States or our form of government. The application found in Exhibit 108 was rejected under section 10 of the DPA: the applicant had concealed his membership in the Galician Waffen SS, and was found ineligible for that misrepresentation, even though the Galician Waffen SS had been removed from the list of hostile movements. These documents were offered to prove that police in Latvia and the other Baltic states were found ineligible for displaced person status, and that the respondent, too, would have been found ineligible had he revealed his employment with the Rezekne police.

The respondent offered other documentary evidence to establish that, on the contrary, Latvian policemen were not per se ineligible and in fact were allowed to immigrate to this country even after revealing such employment. Exhibit 132 includes various documents relating to the immigration of one Elmars Sprogis. The documents reflect that Sprogis stated on his Application for I.R.O. Assistance that he had been employed as the Chief of Police in Madona, Latvia, from July, 1941 to August, 1944. The Displaced Persons Commission Report mentions this employment, yet concludes that Sprogis is an eligible displaced person.

Exhibit 113 is an October 19, 1981 letter to the respondent's counsel from the Assistant Deputy of the Justice Department's Office of Special Investigations. The letter reflects that the Displaced Persons Commission Report on Peter Vilhelm Celms stated the Celms was "chief of the order police at various places in Latvia" from July, 1941, to July, 1944. Exhibits 109 and 110 further reflect Celms employment as a police chief. Celms was approved for displaced person status and was admitted to the United States.

The Government asserts that Sprogis and Celms were admitted to the United States mistakenly, or, possibly, were able to show that they were conscripted and did not persecute. Government

Response Brief at 9-10. See also testimony of Government witness Charig at 760-762. The respondent in his reply brief argues that the Government failed to show that these Latvian policemen were admitted by mistake. Respondent's Reply Brief at 3-4.

Conclusions of Law

We find that the misrepresentations made by the respondent in order to gain admission to the United States were material, and thus render him deportable. All of the witnesses who testified or gave depositions regarding Displaced Persons Commission procedures, including the respondent's witnesses, stated that, at the very least, further inquiry would have been made if the respondent had revealed that he was the police chief of the Second Precinct in Rezekne during World War II. It is fair to assume that further inquiry would have led the discovery of other true facts, including disclosure of the respondent's role in the fate of Audrini, a village within his precinct, and its inhabitants. As we have found that the respondent's participation in the arrests of the Audrini villagers, and the burning of the village itself constituted persecution, we find that disclosure of such participation would have led to outright denial of displaced person status, and, hence, of a visa. As pointed out previously, a person who engaged in persecution was, per se, ineligible for I.R.O. assistance and for displaced person status. Hence, had the true facts been known, the respondent would not have obtained his visa. Regardless of what standard of materiality is applied, then, the respondent's misrepresentations were material. We therefore find that the first, second and fourth charges of deportability are sustained.

We further find that even if we had concluded that the respondent's admitted actions did not constitute persecution, he would still be deportable on grounds of material misrepresentation. As discussed above, the respondent's concealment of his true employment cut off a relevant line of inquiry. Inquiry would likely have uncovered "facts possibly justifying denial of a visa or admission to the United States." Matter of Bosuego, supra. Under Bosuego, the respondent then had to prove that "no proper determination of inadmissibility could have been made." Given the respondent's admitted activities as a Latvian police chief, we find that the respondent has not and could not make such a showing. In reaching this conclusion we reaffirm the rules set forth in Matter of Bosuego, id., and in Matter of S- and B-C-, supra. The Supreme Court has not yet established a

rule of materiality in any way inconsistent with those decisions, and recent decisions on the issue from lower federal courts which suggest other possible tests (cited above) have not persuaded us to reconsider the rules set forth by the Attorney General and this Board. Moreover, we know of no case where a court has held that concealment of employment as a policeman, or similar employment, in the Baltic states during World War II was not a material misrepresentation regardless of the test of materiality applied. See e.g. Fedorenko v. United States, supra (material misrepresentation to state was a farmer when in fact was concentration camp guard); United States v. Kowalchuk, supra (statement that applicant was government clerk when in fact was member of Ukrainian militia was material misrepresentation); United States v. Palciauskas, supra (material misrepresentation to state was store clerk when in fact was mayor of town in Lithuania); United States v. Koziy, supra (material misrepresentation to claim employment as tailor when in fact was member of organization of Ukrainian Nationalists and of Ukrainian Police); United States v. Dercacz, supra (statement that he was dairy farmer when in fact was member of Ukrainian police was material misrepresentation); United States v. Linnas, supra (material misrepresentation to claim was student when in fact was chief of concentration camp, and member of Home Guard in Estonia).

We note that when asked at the hearing why he did not reveal his police employment when seeking displaced person status, the respondent replied, "I was never asked for it," and "they didn't ask me." Tr. at 379. We find these statements to be totally incredible since the Application for I.R.O. Assistance, which the respondent completed in December of 1949, specifically asked for his employment over the last 10 years (Exh. 40). In addition, other entry documents reflect that the respondent was a bookkeeper during most of the war years; the information for these documents was presumably provided by the respondent.

On appeal, it is also claimed that the respondent did not reveal his police employment because he feared forced repatriation to the Soviet Union. Respondent's brief at 19. At least two courts have specifically rejected this defense, the Fifth Circuit in United States v. Fedorenko, 597 F.2d 946, 953 (5th Cir. 1979), and the United States District Court for the Northern District of Ohio in United States v. Demjanjuk, supra, at 1382. The Fifth Circuit in its decision in Fedorenko stated that

> it is irrelevant whether the defendant perpetrated the fraud to avoid repatriation to Russia, as he also has asserted, since the immigration law does not allow a defense that a material misrepresentation was motivated by fear of what might have resulted if the applicant had told the truth. See 8 U.S.C. §1451(a).

Id. at 953.

The Supreme Court in affirming the Fifth Circuit in Fedorenko did not directly address this issue, but did indicate that it would not allow such a claim, even if proven, to be a defense against a misrepresentation charge. The Court, at n. 26, stated, "[t]hat respondent gave these false statements because he was motivated by fear of repatriation to the Soviet Union indicates that he understood that disclosing the truth would have affected his chances of being admitted to the United States and confirm that his misrepresentation was willful." We also reject this defense, while noting as well that the respondent has not established such a motivation for making his misrepresentation in any event.

THE HAZNERS, DETLAVS AND KUNGYS DECISIONS

Counsel for the respondent asserts that the instant case is very much like two "companion" cases involving alleged Nazi war criminals, where this Board found that the Government had failed to sustain its burden of proof. The Government argues that the two cases, Matter of Hazners, A10 305 336 (July 15, 1981, unpublished), and Matter of Detlavs, A7 925 159 (October 15, 1981, unpublished), are distinguishable from the case now before us. We agree with the Government's position. While it is true that there were some common issues of fact and law in the three cases, and the cases shared some common witnesses, we agree with the Government that there are crucial differences between this case and Hazners and Detlavs.

In Hazners, the respondent was charged with deportability as an alien excludable at entry for having advocated or assisted in persecution. No charges were made regarding possible misrepresentations on entry documents or regarding membership in a hostile movement or an organization that engaged in persecution. The allegations to support the persecution charge were based only on incidents in Riga and Dwinsk, Latvia, in which the respondent was alleged to have taken part in arresting Jews who were then subjected to assaults, beatings, and other indignitites, and in forcing Jews into a ghetto. Those allegations

in turn were supported solely by witnesses whose testimony and identifications were weak and often conflicting. On those facts, we found the charge of persecution not to have been sustained.

In Detlavs, the respondent admitted that he had been a member of the Latvian Legion during World War II, and that he did not disclose this association when applying to immigrate to the United States. Noting that the Government had introduced only very limited evidence regarding the effect of this misrepresentation, and that the respondent's witness had testified that disclosure of such membership would not have affected his application for displaced person status, we concluded it was far from clear that the respondent was not qualified for entry based on the true facts. We therefore held that the Government had not proven that the respondent was deportable on the basis of a material misrepresentation. We also found that the Government had failed to sustain its burden of proving that the respondent was a member of the Latvian security police and that he persecuted Jews in the Riga ghetto. As in Hazners, we found that the testimony and identifications offered to support the persecution charges were conflicting and unconvincing.

In the present case, on the other hand, the respondent has admitted membership not in the Latvian Legion, which, it is clear, would not have barred his admission, 18/ but in the Latvian police. He has admitted that in his capacity as a Latvian police chief he participated in acts which we find to constitute persecution. Unlike Hazners and Detlavs, where the Government had to rely for its case almost entirely on witnesses whose testimony was found to be unreliable, we are basing our findings on the respondent's own admissions and testimony, supported by other reliable documentary evidence and testimony. We note also that in the Hazners case, the Government failed to make any allegations or charges relating to misrepresentation or membership in a proscribed organization. The present case suffers from no such infirmities.

We also find the case of United States v. Kungys, supra, relied upon by the respondent, to be wholly distinguishable from the present case. In Kungys, the respondent admitted that in

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18/ Although there was apparently a temporary "hold" placed on applicants for displaced person status who had been members of the Latvian Legion, such applicants were not actually denied status as displaced persons, and eventually the hold was lifted and such persons were allowed to immigrate, See e.g. Tr. at 575-576.

seeking to immigrate, he misrepresented the date and place of his birth, and failed to disclose that he had been employed as a bookkeeper-clerk in Kaunas, Lithuania from 1941-1944, stating instead that he had lived part of that time in Telsiai, Lithuania, and had been employed as a student, dental technician, and farm and forest worker. The court found that these misrepresentations were not material under any test of materiality. It concluded that the Government had failed to prove even that further investigation would have been conducted had the respondent revealed the true facts of his birthdate and place, his residence, and his employment. The court further found that the Government had failed to prove that the respondent had engaged in persecution, emphasizing that proof of such facts depended largely on Soviet depositions, which the court found to be unreliable as to the respondent's alleged participation in atrocities.

In Kungys, id., there was no showing that the respondent was a Lithuanian policeman during the war, while in the present case Maikovskis now admits he was a Latvian policemen, and all of the evidence, without exception, shows that disclosure of that fact would have led at least to further investigation. Nor was there sufficient proof that Kungys engaged in persecution, while we have found that certain acts Maikovskis admits to committing constituted persecution.

We note also that much of the Kungys decision relates to the weight to be given to depositions taken in Lithuania. Inasmuch as we have not relied in any way on the depositions taken in Latvia, that portion of the Kungys decision is simply not relevant to our disposition of this case.

RELIEF FROM DEPORTATION

In the event that he should be found deportable, the respondent made applications for various forms of relief from deportation. He first sought a waiver of deportability under section 241(f) of the Act, 8 U.S.C. 1251(f). However, the respondent in the August 2, 1982, memorandum on discretionary relief filed with the immigration judge, conceded that he would not be eligible for this relief if the Government "sustained its burden of proof on the war crimes, persecution and hostile movement theories." Id. at 2. As 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. Moreover, under the 1981 amendments to the

Immigration and Nationality Act, aliens who are deportable under section 241(a)(19) are specifically barred from obtaining section 241(f) relief. Immigration and Nationality Act Amendments of 1981, Pub. L. 97-116, §8, 95 Stat. 1611. 19/

In addition to section 241(f) relief, the respondent has also sought asylum and withholding of deportation, suspension of deportation, or, alternatively, voluntary departure. By virtue of our finding that the respondent assisted in persecution, he is statutorily ineligible for all these forms of relief. In order to qualify for asylum under section 208 of the Act, 8 U.S.C. 1158, the respondent must establish that he is a refugee within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A). Section 101(a)(42)(A) specifically excludes from the definition of refugee "any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Similarly, an alien is barred from obtaining withholding of deportation if he engaged in such acts. Section 243(h)(2)(A) of the Act, 8 U.S.C. 1253(h)(2)(A). Section 244(a) of the Act, 8 U.S.C. 1254(a), as amended by Pub. L. 97-116, §18(h)(2), 95 Stat. 1611 (1981), precludes granting suspension of deportation to aliens, like the respondent, who are deportable under section 241(a)(19). Section 244(e), contains a similar bar to voluntary departure. See also Matter of Fedorenko, Interim Decision 2963 (BIA 1984); Matter of Laipenieks, supra.

As we find that the respondent is statutorily ineligible for relief from deportation, his applications for such relief are denied.

CONCLUSION

We have found, by clear, unequivocal, and convincing evidence, that the respondent is deportable on four separate grounds because he assisted in the persecution of persons based on their political opinion, and because his immigrant visa was procured by willful misrepresentation of material facts. These findings make it unnecessary to address the remaining three charges of

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19/ The respondent argues that the 1981 Amendments should not apply to him because to do so would reward the Government for proceedings so slowly in this case. We reject this contention. Although this case has dragged on for a long time, we find no undue delay on the part of the Government.

deportability, and the arguments surrounding them. 20/ As the immigration judge ordered these proceedings terminated, and we have found the respondent to be ineligible for any form of relief from deportation, the immigration judge's order will be vacated, and the Government's appeal based on the first, second, fourth, and sixth charges of deportability will be sustained.

The respondent at his hearing designated Switzerland as the country of deportation should he be ordered deported. Tr. at 829. The respondent named his country of citizenship, the Republic of Latvia, as the alternate country of deportation, with the stipulation that deportation to Latvia would occur only when the Soviet occupation of Latvia ends. Tr. of April 28, 1983, proceedings, at 63-64. The Government, stating that "any attempt to deport the respondent to Latvia would be futile" since the United States has never recognized the incorporation of Latvia into the Soviet Union, recommended that Latvia not be named as a country of deportation. The Government proposed that the Federal Republic of Germany be named instead, since it is both "the country from which [the respondent] last entered the United States" and "the country in which is located the foreign port at which [the respondent] embarked for the United States." Exh. 124. See section 243(a)(1) and (2) of the Act, regarding place of deportation. Inasmuch as the respondent designated Switzerland, we shall, in accordance with section 243(a), order him deported there. Should Switzerland be unwilling to accept the respondent, alternate countries of deportation as provided in section 243(a) may of course be named in reopened proceedings.

ORDER: The decision of the immigration judge ordering the proceedings terminated is vacated, and the appeal is sustained.

20/ Among the issues we find it unnecessary to decide today are whether the respondent engaged or assisted in persecution based on race, religion, or national origin, whether or not all Latvian policemen were per se excludable, whether or not the Latvian police in general or the Latvian police in the Second Precinct in Rezekne constituted a movement hostile to the United States or our form of government, and whether the Order to Show Cause was sufficient regarding the charge of membership in a hostile movement.

FURTHER ORDER: The respondent shall be deported from the United States to Switzerland.

David L. Milhollan

Chairman