

Soviet-archive visits. In United States v. Kairys, 600 F.Supp. at 1261, the Court found to be admissible a document that "was properly certified as coming from the Soviet archives," although no inspection of the Soviet archives appears to have occurred in that case. See also United States v. Kairys, 782 F.2d at 1378 n.7, and 1380. With respect to his other request, the respondent has not adequately explained how visits to sites where atrocities may have occurred 45 years prior to the depositions would have materially assisted him in preparing for the testimony of the witnesses against him. 22/ See United States v. Kowalchuk, 773 F.2d at 497. We conclude that the respondent had no "discovery" right to archive and site visits, and that, in any event, he has not demonstrated how such visits would appreciably have bolstered his preparation of a defense.

The respondent argues too that according to Soviet law, the Soviet authorities had to commence a criminal investigation against Kalejs if the authorities received any information that he had committed a crime under Soviet law. The respondent states that if such a criminal investigation was commenced, he should have been provided with a copy of the investigatory files. We find no merit to this argument. First, although the respondent raised this matter with the procurator during the Soms deposition, there is positively no indication from the exchange between respondent's counsel and the procurator that the Soviet authorities had commenced a criminal investigation against Kalejs (Gov. Exh. 81CT at 61-62). Second, the respondent's request for evidence in this connection is but another camouflaged request for discovery in deportation proceedings.

The respondent further alleges that Government counsel asked their deposition witnesses leading questions, and invited them to recite hearsay testimony. He also argues that Government counsel, while cross-examining the respondent's deposition witnesses, went beyond the scope of matters raised by the respondent on direct examination by prompting the witnesses, and eliciting hearsay testimony from them. Respondent's brief at 26-27. Hearsay evidence is admissible in deportation proceedings, however, and thus the respondent's objections concerning any hearsay testimony from the deposition witnesses go to the evidentiary weight to be given that testimony. See, e.g., Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988). As we observed with the respondent's argument about the procurator's tendency to elicit hearsay testimony, the respondent had the opportunity on cross-examination or redirect examination to identify the origins of the witnesses' hearsay knowledge, and thereby guard against the risk that too much weight might be given to hearsay testimony. Moreover, we have reviewed

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22/ We note too that considering our finding below that the respondent's alleged participation in the destruction of a village did not establish his deportability under section 241(a)(19) of the Act, the denial of a visit to this site caused him no prejudice. See pages 39-40, infra.

the specific passages of testimony about which the respondent complains, and we do not find a pervasive practice of Government counsel asking the witnesses leading questions such that the witnesses' answers were not spontaneous. Cf. United States v. Kungys, 571 F.Supp. at 1128 ("The government attorneys persisted time and again to pose blatantly leading questions").

Accordingly, based upon our review of all the circumstances surrounding the Riga depositions, we find that there are sufficient indicia of reliability to conclude that the immigration judge did not err in relying on the deposition testimony as evidence of the respondent's deportability. 23/ We furthermore conclude that the procedures followed during the depositions, as authorized by the immigration judge's November 12, 1986, order (Gov. Exh. 5-A), did not deprive the respondent of due process of law.

C. Reliability of the Identification Testimony

The respondent submits that the identification testimony of the Government deposition witnesses was unreliable and unworthy of evidentiary weight. He argues that the procedure whereby the Government deposition witnesses were shown photographs of Kalejs was improper, and that the resulting identifications were unreliable. He argues too that the Government deposition witnesses' physical descriptions of Kalejs were conflicting.

The record reflects that during their depositions, Soms, Strazds, and Rozkalns confirmed their prior photographic identifications of Kalejs (Gov. Exh. 81CT at 53-54, Gov. Exh. 83CT at 157-58, Gov. Exh. 92CT at 23-25, respectively). The respondent charges that these photographic identifications were unreliable because they occurred prior to the parties' arrival in Riga for the depositions, and because they were "carried out by the Soviets in their own fashion unseen by any Western eyes." Respondent's brief at 29. The respondent's claim that these witnesses received "training in the art of photo identification" is not supported by any evidence in the record. 24/

The respondent asserts that the photospreads shown to Soms, Strazds, and Rozkalns were suggestive because, of the eight photographs in the spread, two were of Kalejs. The two

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23/ An individual assessment of the deponents' testimony whom the immigration judge relied on in finding the respondent deportable under section 241(a)(19) of the Act will be conducted below.

24/ We find unpersuasive the respondent's references to a "Freudian slip" in Soms' testimony, and an "improper translation" of Rozkalns' testimony, as evidence that the Soviet authorities "coached" the witnesses before their photographic identifications. Respondent's brief at 29-30.

photographs of Kalejs were not duplicates, however, and we do not consider their usage to have rendered the display invalid. See United States v. Hamilton, 792 F.2d 837, 840 (9th Cir. 1986). We also find no merit to the respondent's contention that Strazds' photographic identification of the respondent conflicts with Soms and Rozkalns,' since Strazds selected only one photograph in the spread, whereas Soms and Rozkalns placed their initials under two photographs. 25/ Strazds' ability to select one photograph of the respondent is probative of the issue of his ability to recall Kalejs, regardless of his failure to identify the remaining photo of Kalejs in the same spread. Considering all of the circumstances of these photographic identifications, we are not persuaded that the photospreads were impermissibly suggestive, or that the witnesses' identifications were otherwise unreliable. See United States v. Kairys, 600 F.Supp. at 1261-62; United States v. Koziy, 540 F.Supp. at 31 n.13; see also United States v. Linnas, 527 F.Supp. at 431-32.

Moreover, we find that any lingering doubt regarding the reliability of the deposition witnesses' photographic identifications was removed following the respondent's presentation of his own photographic exhibits at the depositions. During the Soms deposition, respondent's counsel presented a series of photographs to Soms to see whether Soms could identify anyone in the photographs. Soms reviewed 240 yearbook-size pictures before pointing to a photograph which, he said, could be Kalejs. 26/ Respondent's counsel insisted that the paper strips covering the names of the persons in his photographic exhibits not be removed. Strazds subsequently identified a photograph, which he believed to be of Kalejs, on respondent's deposition exhibit nineteen. Ennitis was also shown respondent's deposition exhibit nineteen, but he did not recognize anyone in the photographs.

At the respondent's deportation hearing, the Government introduced into evidence a reproduction of a book containing photographs of the 1937 graduating class of the Latvian Military Academy (Gov. Exh. 108). The immigration judge's acceptance of this exhibit followed the respondent's willingness to reveal only that he obtained the photographs for his deposition exhibits "from

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25/ The respondent offers no insight as to why such a discrepancy would exist if Strazds, Soms, and Rozkalns had all been "coached" concerning which photographs to select.

26/ The respondent argues that Soms' identification of the photograph on respondent's deposition exhibit nineteen was equivocal. While Soms did not state with absolute certainty that the photograph which he selected was of Kalejs, we find that, in the context of reviewing 240 small photographs, Soms evidenced a distinct recognition of a photograph of the respondent. See Gov. Exh. 81A at 19:13:30 to 19:20:40; Gov. Exh. 81CT at 74.

a collector of photographs" (Tr. at 1358). The immigration judge found that the photographs in respondent's deposition exhibit nineteen corresponded to the photographs on page 35 of the Latvian Military Academy book "Kadets" (i.j. dec. at 33).

The respondent now argues that "clear, convincing, and unequivocal" evidence does not support the immigration judge's correlation of the photographs in respondent's deposition exhibit nineteen with the photographs in "Kadets," which includes a photograph of Konrads Kalejs (Gov. Exh. 108 at 35). The respondent's argument is untenable. First, we note that respondent's counsel apparently would have revealed the names of the persons in his photographic exhibits only in the event that Soms and the other deposition witnesses had failed to recognize any of the photographs. The respondent cannot abuse his right to present evidence by submitting photographic evidence subject to the condition that the evidence has an exculpatory effect. Cf. United States v. Ziegler, 583 F.2d 77, 80 (2d Cir. 1978) (prosecution may submit inculpatory evidence on a conditional basis only where that evidence is subsequently linked to the accused). Second, the immigration judge's acceptance of the "Kadets" reproduction (Gov. Exh. 108) followed the respondent's unwillingness to divulge, in a meaningful way, the source of his photographic exhibits. Under these circumstances, we find no error in the immigration judge's finding that respondent's deposition exhibit nineteen included a photograph of the respondent.

The respondent attacks the reliability of Soms and Strazds' identification of the photograph in respondent's deposition exhibit nineteen by claiming that Soms generally may have been "coached" on how to identify photographs of Kalejs, and that, because Strazds succeeded Soms at the depositions, Strazds may have been told which photograph to select. These arguments are meritless. Concerning Soms' identification of the photograph presented by respondent's counsel, the respondent vacillates between arguing that Soms did not unequivocally identify the respondent, and arguing that Soms had been "coached" on how to identify photographs of the respondent. As to the accusation that Strazds was told, presumably by the Soviet authorities, which photograph to select, the respondent overlooks the significance of Ennitis' failure to recognize a photograph on respondent's deposition exhibit nineteen. The respondent would have us believe that, following Soms' selection of a photograph on respondent's deposition exhibit nineteen, the Soviet authorities told Strazds which photograph to select, but they did not tell Ennitis, who also was deposed subsequent to Soms. 27/ Considering all the circumstances of Soms and Strazds' photographic identification of

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27/ Ennitis' explanation for his failure to recognize any photographs was that he had a poor memory for faces, but that he was able to recall people better when he heard their voices (Gov. Exh. 90CT at 61-62).

the respondent in the respondent's deposition exhibit nineteen, we find no error in the immigration judge's conclusion that their identifications of the respondent were reliable. Moreover, we find that the photographic identifications of these deposition witnesses contributes to the reliability of their testimony concerning the respondent.

The respondent also argues that the Government deposition witnesses gave conflicting physical descriptions of Kalejs, and that these conflicts render their testimony unreliable. The immigration judge did not attribute significant weight to the discrepancies in the witnesses' testimony about Kalejs' physical characteristics (i.j. dec. at 33). Nor do we.

We observe initially that the respondent makes repeated reference to a "Kalejs" in connection with this argument, implying that the witnesses were describing the physical characteristics of someone other than the respondent. There is no indication in the record, and the respondent submitted no evidence to establish, that there was more than one "Kalejs" in the "Arajs Kommando" during the Nazi occupation of Latvia, let alone more than one "Arajs Kommando" officer named "Kalejs." Moreover, we are satisfied from our review of the documentary evidence in the record, which will be analyzed below, that the respondent did serve in the "Arajs Kommando." We therefore find no merit to the respondent's implication that there is a mistaken-identity issue in this case.

The respondent contends that in 1941, he was 5' 8" tall, weighed 73.5 kilograms, and had blond hair. Respondent's brief at 36. This description is consistent with the information in the respondent's application for an immigrant visa, executed in 1958, with one important exception. The respondent's application for an immigrant visa reflects that he was 5' 8" tall (1.74 meters), weighed 160 pounds (72.7 kgs.), had blue eyes, but had brown hair (Gov. Exh. 16). 28/ The respondent argues that inconsistencies in the deposition witnesses' testimony about the color of Kalejs' hair reveal that their testimony was unreliable. Considering that these witnesses, for the most part, were recalling Kalejs as he would have appeared in uniform with headgear, the significance of hair color as an identifying characteristic is diminished. Nonetheless, the majority of the Government deposition witnesses did state that Kalejs' hair was dark, rather than "blond" as the respondent now claims.

We similarly find unpersuasive the respondent's charge that the Government deposition witnesses' conflicting descriptions of Kalejs' uniform are significant. The Government's expert witness,

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28/ We are satisfied that the information in the visa application (Gov. Exh. 16) relates to the respondent. See note 42, infra.

Dr. Hilberg, testified that members of the "Arajs Kommando" wore different types of uniforms during the Nazi occupation of Latvia (Tr. at 150-51). Some of the deposition witnesses recalled that the "Arajs Kommando" members did not all wear the same uniforms (e.g., Jurgitis, Gov. Exh. 82CT at 41-42; Jansons, Gov. Exh. 91CT at 13). The respondent also testified that he had worn different kinds of uniforms during the war (Gov. Exh. 17 at 33, 55-56). Thus, since the witnesses did not necessarily observe the respondent in the same uniform, we do not accord significant weight to any discrepancies in their testimony about his uniform.

The respondent also points to alleged differences in two of the Government deposition witnesses' testimony about Kalejs' height as evidence that their recollections of the respondent were not reliable. He contends that there was a 10 1/4" inch difference in the testimony of Soms (1.52 meters) and Pimanis (1.78 meters) about Kalejs' height. Respondent's brief at 37. The respondent has not specified where in the record Soms said that Kalejs was only 1.52 meters tall. When Soms was asked during his deposition to stand next to respondent's counsel, the videotape of that deposition reflects that Soms indicated that Kalejs was a few inches shorter than respondent's counsel (Gov. Exh. 81A at 18:15:00 to 18:15:15; Gov. Exh. 81CT at 57-58). Respondent's counsel indeed is about 3" taller than the respondent (Tr. at 1210-11; Respondent's brief at 36). In addition to his photographic identifications of Kalejs, Soms also appears to have recalled Kalejs' height with a reasonable degree of precision. Furthermore, the remaining Government deposition witnesses were generally consistent in their recollections of Kalejs' height, weight, and age. 29/

Based on our review of the Government deposition witnesses' descriptions of the respondent's physical characteristics, we find that the respondent's claim of an "utterly preposterous composite physical description" is not supported by the record. Respondent's brief at 37. Neither the Government deposition witnesses' photographic identifications of the respondent, nor their recollections of his physical appearance, in our view, indicate that the testimony of these witnesses was unreliable. The immigration judge did not err in relying on the identification testimony as further evidence that the Soviet deposition testimony was reliable. Accordingly, we will now turn to a consideration of the issues which the respondent has raised regarding his deportability.

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29/ Concerning the respondent's height (1.74 meters), the witnesses testified as follows: Strazds--Kalejs came up to his nose, and Strazds was 1.85 meters; Bahsteins--Kalejs was shorter than 1.75 meters; Ennitis--Kalejs was about 1.78 meters; Rozkalns--Kalejs came up to his nose, and Rozkalns was

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II. DEPORTABILITY UNDER SECTION 241(a)(19)

Based upon his review of the evidence, the immigration judge found that the respondent was deportable under section 241(a)(19). The immigration judge did not find, however, that the Government had established all of the allegations in support of the section 241(a)(19) deportability charge. For instance, the immigration judge found that the respondent's participation in the self-defense unit near Litene in June and July 1941 did not establish that, under the direction of the Nazis, the respondent had persecuted persons on the basis of their political opinions (i.j. dec. at 27-28). The immigration judge further found that although the evidence in the record documented the respondent's membership in the "Arajs Kommando" between July and December 1941, such membership alone did not establish that the respondent had "assisted" or "participated" in persecution within the meaning of section 241(a)(19) (i.j. dec. at 29-31).

On the other hand, the immigration judge found that the evidence of the respondent's activities as a company commander of the "Arajs Kommando" on the eastern front in 1942 proved that the respondent had assisted or participated in Nazi persecution (i.j. dec. at 32-34). He found that the evidence of the respondent's activities in Porkhov and Skaune in 1943, again as an "Arajs Kommando" company commander, established that the respondent had assisted or participated in Nazi persecution (i.j. dec. at 34-35). Finally, the immigration judge ruled that the evidence established that the respondent was the commander of guard units at the Sauriesi and Salaspils concentration camps, and that this service also rendered him deportable under section 241(a)(19) (i.j. dec. at 35-36).

On appeal, the respondent urges that the immigration judge erred in finding sufficient evidence to support the section 241(a)(19) charge of deportability. He submits that the immigration judge's finding that the respondent was a member of the "Arajs Kommando" is erroneous. He argues that he did not engage in persecution when he was on the eastern front in 1942, because his service there was "purely military." Respondent's brief at 41. He contends that contrary to the immigration judge's findings, the respondent was not at Porkhov and Skaune, and he also did not

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 1.85 meters; Pimanis--Kalejs was 1.78 meters, or a bit taller. They recalled Kalejs' weight (73 kilograms) as follows: Soms--Kalejs weighed well over 56 kgs.; Strazds--over 70 kgs.; Bahsteins--over 70 kgs.; Ennitis--over 66 kgs.; Rozkalns--under 75 kgs.; Pimanis--over 72 kgs. They recalled Kalejs' age in 1942 (Kalejs' 29th birthday was in June 1942), as follows: Soms--Kalejs was 29; Strazds--27; Bahsteins--under 40; Ennitis--over 23; Rozkalns--over 30; Pimanis--about 30. Rozkalns also recalled that Kalejs' eyes were blue.

serve at the Salaspils or Sauriesi camps. Finally, the respondent argues that the immigration judge erred by disregarding the statements of Viktors Arajs which exonerated the respondent.

#### A. The Respondent's Credibility

The respondent appeared as a witness before the immigration judge in this case, and the immigration judge, as the trier of fact, was in the best position to observe the respondent's demeanor and to assess the credibility of his testimony. See Matter of Kulle, supra, at 331-32; Kulle v. INS, supra, at 1193; United States v. Kairys, 782 F.2d at 1380. The courts have recognized that the general rule of deference to a trial court judge's credibility findings applies with even greater force in war-crimes cases, where the testimony of the witnesses concerns events over 40 years ago, and the trier of fact must carefully evaluate the testimony presented before him. 30/ United States v. Kowalchuk, 773 F.2d at 499 (Aldisert, J., dissenting); United States v. Sprogis, 763 F.2d 115, 121-22 (2d Cir. 1985). The immigration judge here found the respondent's explanation for the documents which reflected his service in the "Arajs Kommando" to be not credible (i.j. dec. at 29-30, 33-34). We find ample support in the record for this adverse credibility determination.

Although the respondent admitted that he had submitted documents to the University of Riga indicating that he was serving as a first lieutenant and company commander in the "Arajs Kommando" (Gov. Exhs. 23, 25, 44, 45), the respondent claimed that the contents of these documents were false. He said that he obtained these documents from an acquaintance, and that the respondent submitted them to the university as part of his registration there. The immigration judge properly discredited the respondent's testimony about these documents by noting first, that the respondent had not adequately explained why he could not obtain a certificate of military service from the unit he claimed to be serving in, and second, that one of the documents reflecting the respondent's "Arajs Kommando" service was in the respondent's own handwriting (Gov. Exh. 45).

The respondent claimed he was unable to acquire a certificate of military service from the German unit that he actually served with, and that he accordingly had to resort to obtaining fraudulent "Arajs Kommando" documents. But this claim is contradicted by the certificate which reports that the respondent was serving with the "Arajs Kommando" on the eastern front in 1942, corresponding precisely with the period in which the

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30/ While this Board is in an equally good position as the immigration judge to review the videotaped testimony of the deposition witnesses, we must defer to the immigration judge's credibility findings concerning the witnesses who appeared before him, provided that a reasonable basis is offered for such findings.

respondent admitted that he had served on the eastern front (Gov. Exh. 25). It is not believable that if the respondent had resorted to obtaining false certificates from the "Arajs Kommando," an organization he claimed he had nothing to do with, the false certificates which he ultimately acquired would accurately reflect his period of service on the eastern front. The more reasonable explanation for the certificate concerning the respondent's eastern front service with the "Arajs Kommando" is that the certificate is genuine. We therefore find no basis to disturb the immigration judge's credibility finding concerning the respondent, 31/ and we reject as not credible the respondent's steadfast denial as to membership in the "Arajs Kommando."

Based on our rejection of the respondent's explanation for the documents he submitted to the university, we find that those documents are reliable evidence of the respondent's service in the "Arajs Kommando." The cumulative effect of this evidence establishes that the respondent was a member of the "Arajs Kommando" from July 1941 until at least May 1943 (Gov. Exhs. 23, 45). The evidence further establishes that the respondent served as a company commander and first lieutenant in the "Arajs Kommando" (Gov. Exhs. 23, 45). 32/ This evidence discredits the respondent's testimony about his non-military activities during

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31/ We also agree with the immigration judge's observation that the respondent's testimony was implausible that he was not engaged in any military or police service for over 2 years, but that he nonetheless continued to receive pay from German military authorities during this period (i.j. dec. at 35). Further testimony of the respondent which strained credulity was his claim that, although he admitted to being present in Riga in November and December 1941, he then knew nothing about the mass executions of Jews in the forests near Riga. Cf. Gov. Exh. 22 at 70 ("the ghetto evacuation had become a city-wide topic of conversation in all Riga"), and 132 ("the fate of the Jews shot on [November 30, 1941] was generally known in Riga").

32/ The respondent contends that if he had been a "high ranking officer" in the "Arajs Kommando," he would have received promotions during the war "as a matter of course." Respondent's brief at 46. Because the respondent's rank apparently remained at first lieutenant throughout the war, the respondent points to the absence of a promotion as evidence that he did not serve actively during the war. Although the respondent was free to do so, he submitted no evidence concerning the frequency of promotions received by officers in Nazi-occupied countries. The respondent was also free to cross-examine Dr. Hilberg concerning the significance of this matter. We do not consider evidence of promotions, or absence of promotions, to be part of the Government's burden of proof in establishing the respondent's membership in the "Arajs Kommando."

the Nazi occupation of Latvia, while it corroborates the testimony of those Government deposition witnesses, and the respondent's deposition witness Jurgitis, who testified unequivocally that they had known the respondent as a member and officer of the "Arajs Kommando."

B. Evidence of Deportability under Section 241(a)(19)

1. Respondent's Service on the Eastern Front

We begin our analysis of the respondent's deportability based on his activities on the eastern front by emphasizing that the respondent admitted that in early 1942, he had served on the eastern front under General Stahlecker, the "Einsatzgruppe A" Commander of the German Security Police. <sup>33/</sup> In his report dated October 15, 1941, Stahlecker describes how the "Einsatzgruppe A" forces were carrying out the anti-partisan campaign on the eastern front:

Whoever aided partisans by supplying shelter and food, or providing messenger service, or purposely gave false information, was shot or hanged. Houses in which partisans had received shelter and food were burned down. If a larger number of village residents had aided the partisans in this manner, the entire village was burned down as a punishment as well as a deterrent.

Gov. Exh. 20, appendix 9, at 7-8. This Stahlecker report serves as background evidence for the respondent's participation in anti-partisan operations on the eastern front.

We do not find, however, that the testimony regarding specific incidents in which the respondent allegedly participated in the burning of villages and killing of inhabitants establishes the respondent's involvement in the "persecution" of persons because of their "political opinions." The immigration judge relied on the testimony of Soms and Rozkalns to conclude that the respondent was the commander of the company which executed civilians as a reprisal for Stahlecker's death, and that this testimony supported the charge that the respondent had assisted and participated in "persecution" within the meaning of section 241(a)(19) (i.j. dec. at 32, 34).

We have reviewed carefully the testimony of Soms and Rozkalns concerning the battle at Sanniki in which Stahlecker was fatally wounded in March 1942 (See Soms, Gov. Exh. 81CT at 32-35, 95-97; Rozkalns, Gov. Exh. 92CT at 11-12, 19-21). There were no apparent

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<sup>33/</sup> We find wholly unpersuasive the respondent's subsequent testimony in which he attempted to distance himself from Stahlecker by claiming that the respondent's commanding officer on the eastern front was a "Wehrmacht general" whose name he could not recall.