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

File: A8 085 626 -

In re: KARL LINNAS

IN DEPORTATION PROCEEDINGS

APPEAL

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

ON BEHALF OF SERVICE: Neal M. Sher
Acting Director

Jeffrey N. Mauser
Trial Attorney
Office of Special Investigations
Criminal Division
United States Department of Justice

ORAL ARGUMENT: September 8, 1983

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)] - Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(2), I&N Act [8 U.S.C. 1251(a)(2)] - Entered in violation of sections 2, 10 and 13 of the Displaced Persons Act of 1948.

Sec. 241(a)(19), I&N Act [8 U.S.C. 1251(a)(19)] - Participation in Nazi persecution

APPLICATION: Termination of proceedings; waiver of deportability; suspension of deportation; asylum; withholding of deportation; voluntary departure

In this appeal the respondent challenges the immigration judge's May 19, 1983 decision finding the respondent deportable as charged and denying him relief from deportation. We affirm the immigration judge's decision in substantial part.

The respondent is a 65-year-old male who is a native of Estonia. 1/ He entered the United States in 1951 as an immigrant pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, as amended ("the DPA"). In 1960 he became a naturalized citizen of the United States.

In 1979 the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of New York. See United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981). The Government alleged that the respondent illegally procured his citizenship because he failed to disclose at the times of his admission and naturalization that he had been a member of the Selbstschutz, an Estonian organization which aided the Nazis during World War II, and had served as a member of the security forces at a concentration camp in Tartu, Estonia. Id. The district court found in favor of the Government and entered a judgment of denaturalization revoking the respondent's citizenship and cancelling his certification of naturalization. Id. The United States Court of Appeals for the Second Circuit affirmed the judgment of denaturalization and the United States Supreme Court declined to review the matter. (Government's Exh. 5 and 5A).

On June 25, 1982, the Immigration and Naturalization Service commenced deportation proceedings against the respondent charging him with deportability: (1) pursuant to section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as an alien who was excludable under sections 2, 10, and 13 of the DPA at the time of entry; (2) pursuant to section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), as an alien who entered the United States in violation of sections 2, 10, and 13 of the DPA; and (3) pursuant to 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19), an an alien who assisted the Nazi government of Germany in the persecution of persons because of their race, religion, national origin, or political opinion during the period between March 23, 1933 and May 8, 1945.

1/ After the defeat of Germany in World War II, the Soviet Union annexed the Baltic State of Estonia, along with Latvia and Lithuania. See Matter of Laipenieks, Interim Decision 2949 (BIA 1983). The United States has never recognized the legitimacy of that annexation. Id.

At the deportation hearing held before the immigration judge the respondent denied the charges of deportability. 2/ To prove its case the Service relied entirely upon the testimony, exhibits, and judgment in the denaturalization case, all of which were admitted into evidence by the immigration judge. In defense of the Service's charges, the respondent submitted various pleadings and memoranda from the denaturalization proceeding. The respondent argued that he was eligible for the statutory waiver of deportability available in section 241(f) of the Act, 8 U.S.C. 1251(f) and, contending that he faced execution before a firing-squad if deported to the U.S.S.R., he also applied for the following forms of relief from deportation: asylum pursuant to section 208 of the Act, 8 U.S.C. 1158; withholding of deportation to the U.S.S.R. pursuant to section 243(h) of the Act, 8 U.S.C. 1253(h); suspension of deportation pursuant to section 244(a) of the Act, 8 U.S.C. 1254(a); voluntary departure pursuant to section 244(e) of the Act, 8 U.S.C. 1254(e); and adjustment of status pursuant to section 245 of the Act, 8 U.S.C. 1255. In the event he was found deportable, the respondent designated the Repubic of Estonia as the country to which he wished to be deported.

In a written decision dated May 19, 1983, the immigration judge applied the doctrine of collateral estoppel to the factual and legal issues resolved by the denaturalization judgment to find the respondent deportable as charged and ineligible for relief from deportation. The immigration judge ordered the respondent deported to Estonia, designating the U.S.S.R. as the country of deportation in the event Estonia refused to accept him. In a timely appeal the respondent has challenged the immigration judge's use of collateral estoppel to establish deportability and ineligibility for relief from deportation.

2/ The deportation hearing was held over the course of five days: October 27, 1982, December 2, 1982, January 17, 1983, January 19, 1983, and April 28, 1983. The respondent appeared in person only at the December 2nd hearing in order to be present when his attorney answered the Service's allegations and charges. The respondent specifically waived his appearance at the October 27th and January 17th hearings, and at the January 19th hearing he attested, by phone, to his desire to apply for various forms of relief from deportation.

THE LEGAL EFFECT OF THE JUDGMENT IN THE DENATURALIZATION PROCEEDING

In order for the judicially-developed doctrine of collateral estoppel to be applied in a deportation proceeding there must have been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect and the parties must have been accorded a full and fair opportunity to litigate the issues in the prior suit. Matter of Fedorenko, Interim Decision 2963 (BIA 1984). In addition, the use of collateral estoppel must not be unfair to the parties. Id.

These prerequisites are satisfied in the respondent's case. The district court's denaturalization judgment is a final judgment and may be accorded conclusive effect because it was affirmed by the court of appeals and was denied review by the Supreme Court. In addition, because the denaturalization proceeding was before a federal district court and subject to the strict judicial rules of evidence, the respondent was given a full and fair opportunity to litigate the issues in his case. We also find it fair to apply collateral estoppel in this proceeding. The respondent and the United States, who were the parties in the denaturalization proceeding, are also the parties in this proceeding, and the Government's burden of proof in the denaturalization proceeding was the same as its burden in this proceeding. See Woodby v. INS, 385 U.S. 276, 285-86 (1966); Matter of Fedorenko, supra. 3/ Moreover, both the respondent and the Government reasonably could have foreseen that issues raised in the denaturalization proceeding might be raised in a subsequent deportation proceeding. 4/

3/ It is not the case, as the respondent contends, that the district court improperly shifted the burden of proof to him in the denaturalization proceeding. The district court's conclusion that the respondent failed to show the unreliability of evidence obtained from the U.S.S.R. reflects the respondent's failure to support his objections to the admissibility of evidence; it does not constitute a shifting of the ultimate burden of proof. See U.S. v. Linnas, supra, at 431-34.

4/ Several of the issues that were resolved by the outcome of the denaturalization judgment, such as issues pertaining to the respondent's inadmissibility under the DPA at the time

(Continued)

The respondent has argued against application of the doctrine of collateral estoppel on the ground that the denaturalization proceeding did not provide him with a fair opportunity to litigate the issues in his case. He has raised the following objections to that proceeding. First, the respondent contends his fifth amendment privilege against self-incrimination was violated because the district court imposed sanctions upon him for refusing to answer certain Government interrogatories and improperly relied upon uncertified evidence that he was convicted of war crimes in absentia in the U.S.S.R. See U.S. v. Linnas, supra, at 429. Secondly, he contends he was deprived of the opportunity to confront the witnesses against him because the Government was not required to pay for his attorney to attend depositions taken by the Government in the U.S.S.R. See id. at 434. Thirdly, he contends he was denied adequate discovery because the district court excused the Government from answering his interrogatories, withheld a list of Government witnesses from him, and denied his motion to depose the Soviet officials who participated in the trial against him in the U.S.S.R. Fourthly, he contends the district court improperly relied upon false evidence contained in four taped depositions of Soviet citizens, in which the deponents identify the respondent as chief of the guards at Tartu concentration camp and place him in charge of several mass executions of Jews and non-Jews. The Second Circuit has already rejected the respondent's arguments, concluding that the question of a violation of his privilege against self-incrimination was moot, that the Soviet depositions and documentary evidence were properly admitted and considered by the district court, that the respondent was not entitled to Government funds to pay for his attorney's presence at the Soviet depositions, and that the district court did not abuse its discretion in rejecting the motion to depose Soviet officials. (See Government's Exh. 5A). We are bound by the Second Circuit's resolution of these issues. Matter of Bowe, 17 I&N Dec. 488, 490 (BIA 1980). Moreover, as

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he entered the United States and the issue of whether he assisted the Nazis in persecuting others, also pertain to grounds of deportability under the Act. See, e.g., sections 241(a)(1), (a)(2), and (a)(19) of the Act and discussion infra, pp. 11-14.

we indicated, supra, we are convinced that the respondent received a full and fair opportunity to litigate the issues in the denaturalization proceeding. Thus, we reject his argument that it is not appropriate to apply collateral estoppel to the issues resolved by the denaturalization judgment.

(1) Findings of fact conclusively established by the denaturalization judgment.

Under the doctrine of collateral estoppel, the denaturalization judgment conclusively establishes the "ultimate facts" of this deportation proceeding, i.e., those facts upon which the respondent's deportability and eligibility for relief from deportation are to be determined. The Evergreens v. Nunan, 141 F.2d 927, 931-32 (2d Cir.), cert. denied, 323 U.S. 720 (1944); Matter of Fedorenko, supra. There are three general categories of facts which we consider to be "ultimate" in this case. The first category consists of facts which pertain to the respondent's citizenship and nationality. These are "ultimate facts" because they are relevant to the issue of the respondent's alienage and thereby determine whether he is subject to the various deportation provisions of section 241(a) of the Act. 5/ The second category consists of facts which pertain to the respondent's activities during World War II, and in particular to his activities at the Tartu concentration camp. These are "ultimate facts" because they determine the respondent's deportability under sections 241(a)(1), (a)(2), and (a)(19), for being excludable under, and for entering in violation of, the DPA and for assisting the Nazis in persecuting others. In addition, these facts are relevant to the respondent's eligibility for various forms of relief from deportation. See discussion, infra, pp. 14-15. The third category of "ultimate facts" consists of facts pertaining to the respondent's application for a visa under the DPA and his immigration to this country in 1951. These are "ultimate facts" because they, too, determine the respondent's deportability under sections 241(a)(1) and (a)(2). The following facts established by the denaturalization judgment come within one of these three categories:

5/ Section 241(a), which is the basis for the Service's charges of deportability, pertains only to an "alien." The term "alien" means any person who is not a citizen or national of the United States. Section 101(a)(3) of the Act, 8 U.S.C. 1101(a)(3).

The respondent was born in Tartu, Estonia, on August 6, 1919. U.S. v. Linnas, supra, at 429-30. In 1941, the Nazis occupied Estonia and, as part of their policy of exterminating Jews in the occupied territories, the Nazis established mobile killing units known as the "Einsatzkommandos". Id. at 430. The Einsatzkommandos accomplished their duties in Tartu with the assistance of the Estonian "Home Guard" or "Self-Help" forces, referred to as the "Selbstschutz" by the Germans and as the "Omakaitse" by the Estonians. Id. at 430, 431. The Selbstschutz carried out most of the arrests and executions of Jews in Estonia in order to minimize the public's awareness of the Nazis' plan for exterminating the Jews. Id. In Tartu over 1200 persons were arrested at the direction of the Nazis; the majority were taken into custody because they were suspected of communist activity. Id. at 431 n. 8. Of the 1200 people arrested, almost 300 were imprisoned at the concentration camp in Tartu, while another 405 were executed, including at least 50 Jews. Id. By mid-January, 1942, the Nazis achieved the goal of making Estonia "judenfrei" (free of Jews). Id. at 431.

In the fall of 1941, the respondent was an active, ranking member of the Selbstschutz in Tartu and occupied a supervisory role in the management at the concentration camp located at the Kuperjanov Barracks. Id. at 431, 434. 6/ Sometime between 1942 and 1944, the respondent volunteered for membership in a Nazi-controlled security force in Tartu, and by 1944 he had become a member of the 38th Police Battalion which went into battle under the Nazis, in an effort to halt a Soviet counter-offensive. Id. at 435.

6/ There was considerable evidence in the denaturalization proceeding that the respondent also supervised several mass executions of Jewish and non-Jewish prisoners at a site outside Tartu. Id. at 431-34. This evidence consisted of taped depositions of Soviet witnesses whom the district court found to be credible. Id. at 434 n. 15. However, because of prejudicial language used by Soviet prosecutors during the depositions, the district court gave limited weight to the depositions, considering them only as corroborating evidence of the respondent's supervisory position at the concentration camp at Tartu. Id. at 434 n. 16. Since the district court gave limited weight to the Soviet depositions, we do not consider the respondent's participation in mass executions to be a finding of fact established by collateral estoppel.

In 1948 the respondent's father began the process leading to the respondent's admission to the United States by filing an application for assistance with the Preliminary Commission for the International Refugee Organization. Id. at 437. The application represented that the respondent had been a student and technical artist in Estonia from 1940 through 1943. Id. Based on the information in this applicaiton, the respondent was certified by the International Refugee Organization as a refugee and a displaced person. Id. Subsequently, in seeking admission to this country as a refugee, the respondent knowingly and willfully misrepresented, both to members of the intelligence forces of the United States Army and in his visa application, the facts about his activities during World War II. Id. at 437, 439, and nn. 33, 34. On May 21, 1951, when examined about his admissibility to this country by an officer of the Service, the respondent twice falsely swore that he had never participated in the persecution of any person because of race, religion, or national origin. Id. at 438.

Since the foregoing facts found in the denaturalization proceeding are also "ultimate facts" in this case, we consider them to be conclusively established by operation of the doctrine of collateral estoppel. The Evergreens v. Nunan, supra, at 931; Matter of Fedorenko, supra.

(2) Matters of law conclusively resolved by the denaturalization judgment.

In the denaturalization proceeding the district court reached several conclusions of law which are material to issues in this proceeding. First, the district court concluded that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA 7/ and was ineligible for his visa

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7/ Section 2 of the DPA defined those eligible for admission as a "displaced person" by reference to the definition of "refugee or displaced person" found in Annex I of the Constitution of the International Refugee Organization of the United Nations. Fedorenko v. United States, 449 U.S. 490, 495 nn. 3-4 (1981). That definition excluded the following classes: "any persons who . . . have assisted the enemy in persecuting civil populations of countries, members of the United Nations . . . ." Id.

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under section 13 of the DPA 8/ because he participated in the persecution of others. U.S. v. Linnas, supra, at 439 and n. 32. The district court also concluded that the respondent was inadmissible under section 10 of the DPA 9/ because he knowingly and willfully misrepresented material facts about his participation in Nazi atrocities. Id. at 439 and nn. 33, 34.

The doctrine of collateral estoppel may be applied to preclude reconsideration of issues of law, as well as of fact, so long as the issues arise in both the prior and subsequent suits from virtually identical facts and there has been no change in the controlling law. Matter of Fedorenko, supra. These conditions are met in this case. The issues of the respondent's inadmissibility under sections 2, 10, and 13 of the DPA arise in this proceeding because the respondent is charged with deportability under sections 241(a)(1) and (a)(2) of the Act for entering this country in violation of the DPA. Moreover, the issues arise in this proceeding out of the identical facts and the same principles of law that were considered by the district court.

We note that the published version of the district court's opinion incorrectly attributes the definition of a "displaced person" to section 13 of the DPA. U.S. v. Linnas, at 439. However, the actual district court decision, which is part of the record in this proceeding, correctly attributes the definition to section 2 of the DPA, thus concluding that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA. (See Government's Exh. 4).

8/ Section 13 of the DPA, as amended in 1950, provided that no visa would be issued under the Act to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin . . . ." U.S. v. Linnas, supra, at 439 n. 32.

9/ Section 10 of the DPA placed the burden of proving eligibility as a "displaced person" on the person seeking admission and provided that "[a]ny person who shall wilfully 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." Fedorenko v. United States, supra, at 495.

The respondent argues, however, that collateral estoppel should not be applied to bar relitigation of his admissibility under sections 2, 10, and 13 of the DPA because the district court's resolution of these issues was not strictly "necessary" to the outcome of the denaturalization proceeding. His argument rests on the fact that the district court's judgment is based upon three separate and independent grounds: (1) the respondent was not lawfully admitted to the United States because he was inadmissible under sections 2, 10, and 13 of the DPA; (2) the respondent lacked the requisite good moral character to become a citizen because he was voluntarily involved in atrocities against men, women, and children during World War II; and (3) the respondent procured his certificate of naturalization by willfully misrepresenting the material facts about his activities during World War II. See U.S. v. Linnas, supra, at 439-40.

In the Second Circuit, application of the doctrine of collateral estoppel is not to be abandoned merely because a prior judgment rested on multiple independent grounds. Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978); Williams v. Ward, 556 F.2d 46 (2d Cir.), cert. denied, 434 U.S. 944 (1977). The controlling rule is that collateral estoppel should be applied whenever an issue was raised, litigated, and adjudged in a prior action, even if the court in the prior action determined two or more issues, each of which would have been sufficient to support the judgment. 10/ Winters v. Lavine, supra; Williams v. Ward, supra; 1B J. Moore, Federal Practice and Procedure ¶0.443, at 789-90 (2d ed. 1981). Thus, since the issues of the respondent's inadmissibility under sections 2, 10, and 13 of the DPA were raised, litigated, and adjudged in the denaturalization proceeding, the immigration judge properly applied collateral estoppel to bar relitigation of these issues. Winters v. Lavine, supra; Williams v. Ward, supra.

10/ In at least one case, Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970), the Second Circuit did refuse to apply collateral estoppel to a prior decision for the reasons urged by the respondent. The Second Circuit subsequently declined to follow Halpern on at least two occasions, however. See Winters v. Lavine, supra; Williams v. Ward, supra. Accordingly, we consider the controlling rule to be one which allows collateral estoppel to be applied to a prior judgment even if it rests on several independent grounds.

THE RESPONDENT'S DEPORTABILITY

The district court's conclusion that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA renders the respondent deportable pursuant to section 241(a)(1) of the Act as an alien who was excludable under the law at the time of his entry. Similarly, the district court's conclusions that the respondent was inadmissible under section 10 of the DPA and ineligible for his visa under section 13 of the DPA render the respondent deportable pursuant to section 241(a)(2) of the Act as an alien who is in the United States in violation of the law. Thus, given the conclusions of law established by collateral estoppel, the immigration judge correctly found the respondent deportable pursuant to sections 241(a)(1) and (a)(2) of the Act.

The question of the respondent's deportability pursuant to section 241(a)(19) of the Act was not actually litigated in the denaturalization proceeding and therefore collateral estoppel does not automatically resolve this issue. Nevertheless, the facts conclusively established by collateral estoppel show the respondent to be deportable pursuant to section 241(a)(19). That section provides for the deportation of aliens 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.

The fact that the respondent's activities for the Selbstschutz occurred in 1941 shows that his conduct clearly falls within the period of time specified by section 241(a)(19). The elements of that section which are at issue are whether: (1) the

respondent "assisted or otherwise participated in the persecution of any person" (2) "because of religion or political opinion" and did so (3) "under the direction of, or in association with" the Nazi government of Germany.

(1) "Assisted or otherwise participated in the persecution of any person".

The term "persecution" as used in section 241(a)(19) contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in the ways specified by the Act, i.e., race, religion, national origin, or political opinion. Matter of Laipenieks, supra. The harm or suffering inflicted may take various forms but it most certainly includes physical confinement. Id. The facts established by collateral estoppel show that almost 300 persons were confined at the Tartu concentration camp as of 1941 either because they were Jews or because they were suspected of Communist activities. The imprisonment of the inmates of the Tartu camp clearly constitutes "persecution" of them within the meaning of section 241(a)(19). Id. See also Matter of Fedorenko, supra.

The respondent argues that the findings of the district court are not sufficient to meet this element of section 241(a)(19) because the district court did not find the respondent was the commandant of the Tartu concentration camp or that he personally persecuted others. This argument ignores the provision in section 241(a)(19) which makes an alien deportable if he "assisted" in the persecution of others. We have already held that the actions of a Ukrainian prisoner of war who was forced by the Nazis to guard the perimeter of a concentration camp constituted assistance in persecution within the meaning of section 241(a)(19) because his actions would have aided the Nazis, in some small measure, in their confinement of the prisoners of the camp. Matter of Fedorenko, supra. It follows, a fortiori, that the respondent's involvement in supervising the management of the Tartu concentration camp constituted assistance in persecution with the meaning of section 241(a)(19) because his actions would have significantly aided the Nazis in their confinement of the prisoners at the camp. Id.

(2) Persecution "because of religion . . . or political opinion".

The facts established by collateral estoppel show that the Nazis confined almost 300 persons at the Tartu concentration camp because they were suspected of having Communist sympathies

or were Jewish. The respondent aruges, however, that to come within section 241(a)(19) of the Act there must be a finding that he, himself, was motivated by religious or political prejudice and he correctly points out that there was no finding in the denaturalization proceeding about his motivations for joining the Selbstschutz. See U.S. v. Linnas, supra, at 431 n. 9. We have recently held, however, that an alien's motivation and intent are irrelevant to the issue of his deportability under section 241(a)(19). Matter of Laipenieks, supra; Matter of Fedorenko, supra. The absence of a finding that the respondent had either religious or political motivations for his actions does not alter the fact that he "assisted" in physical persecution which occurred "because of" official policies directed against people of the Jewish religion and people with Communist sympathies. Thus, his conduct clearly constituted assistance in persecution "because of religion or . . . political opinion."

(3) "Under the direction of, or in association with" the Nazi government of Germany.

The facts established by collateral estoppel show that the respondent engaged in his activities at the Tartu concentration camp as a member of the Selbstschutz and that the Selbschutz was an Estonian organization which assisted the Nazis in their plan to arrest and execute Jews and Communists in Estonia. These findings clearly show that the respondent's activities at the Tartu concentration camp were "under the direction of, or in association with" the Nazi government of Germany.

The facts discussed above show clearly, unequivocally, and convincingly that in the fall of 1941, under the direction of, or in association with, the Nazi government of Germany, the respondent assisted in the persecution of persons because of their religion or political opinion. Thus, the immigration judge correctly found the respondent deportable pursuant to section 241(a)(19) of the Act.

The respondent argues that he may not be found deportable pursuant to section 241(a)(19) because it is an unconstitutional ex post facto law or bill of attainder. This argument lacks any merit whatsoever. See Artukovic v. INS, 693 F.2d 894 (9th Cir. 1982). It is well settled that the creation of a retroactive ground for deportation does not violate the ex post facto prohibition. Marcello v. Bonds, 349 U.S. 302, 314 (1955); Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952). That prohibition applies only to criminal statutes and deportation laws are civil, not criminal, in nature. Id. Moreover, the courts have rejected the

argument that a deportation provision is an unconstitutional bill of attainder. See e.g., MacKay v. McAlexander, 268 F.2d 35 (9th Cir. 1959), cert. denied 362 U.S. 961 (1960); Quattrone v. Nicolls, 210 F.2d 513, 519 (1st Cir.), cert. denied, 347 U.S. 976 (1954). The constitutional prohibition against bills of attainder was intended to prevent legislative punishment and trial by legislature. U.S. v. Brown, 381 U.S. 437, 442-44 (1965). This is clearly not the effect of section 241(a)(19): deportation is not punishment, Harisiades v. Shaughnessy, supra, at 594, and section 241(a)(19) does not deprive an alien of his right to a full evidentary hearing on the issue of his deportability, with the right to judicial review. See sections 106(a) and 242(b) of the Act, 8 U.S.C. 1105(a) and 1252(b).

THE RESPONDENT'S ELIGIBILITY FOR RELIEF FROM DEPORTATION

The respondent has argued that the immigration judge erred in finding him ineligible for a waiver of deportability under section 241(f), suspension of deportation under section 244(a), and voluntary departure under section 244(e). Under each of these sections of the Act, the particular relief afforded is unavailable to an alien who is deportable pursuant to section 241(a)(19) of the Act. See sections 241(f)(1)(A) and 244(a) of the Act, as amended by Pub. L. No. 97-116, §§8,18(h)(2), 95 Stat. 1611, 1616, 1620 (1981) (codified at 8 U.S.C. 1251(f)(1)(A) and 1254(a) respectively); section 244(e) of the Act, as amended by Pub. L. No. 95-549, §105, 92 Stat. 2065, 2066 (1978) (codified at 8 U.S.C. 1254(e)); see also Matter of Laipeneiks, supra. Since the respondent is deportable pursuant to section 241(a)(19), he is precluded as a matter of law from obtaining the relief sought and the immigration judge correctly denied the respondent's various applications.

The respondent has also argued that he is eligible for either a discretionary grant of asylum or for mandatory withholding of deportation to the U.S.S.R. By law, neither asylum nor withholding of deportation is available to an alien ". . . who ordered, incited, assisted, or otherwise participated in the persecution of any persons on account of race, religion, nationality, membership in a particular social group, or political opinion." See the definition of "refugee" in section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A), made applicable to claims for asylum by section 208 of the Act; see also section 243(h)(1) of the Act. The fact that in 1941 the respondent assisted the Nazis in persecuting the inmates of the Tartu

concentration camp because of their religion or political opinion clearly excludes him from eligibility for asylum and withholding of deportation under the quoted provision. Thus, the immigration judge correctly denied the respondent that relief.

MISCELLANEOUS MATTERS

The respondent has argued that the Service should be estopped from seeking his deportation because Government attorneys in the denaturalization proceeding suppressed exculpatory evidence and failed to emphasize the unfairness of the Soviet trial in which he was sentenced to death for his actions under the Nazis. These are frivolous arguments. An estoppel can be invoked against the Government, if at all, only when Government conduct toward an alien amounts to "affirmative misconduct." INS v. Miranda, ___ U.S. ___, 103 S. Ct. 281, 282-84 (1982) (per curiam); INS v. Hibi, 414 U.S. 5, 8-9 (1973) (per curiam). Neither the "exculpatory evidence," which apparently consisted of information that the Selbstschutz, or Omakaitse, was no longer considered inimical to the United States, nor the unfairness of the respondent's Soviet conviction was relevant to the issues in the denaturalization proceeding. Therefore, the Government attorneys did not engage in affirmative misconduct in failing to call these matters to the district court's attention.

The respondent has also argued that he is a "refugee" within the meaning of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) (the Convention), and as such must be given reasonable time to find a country, other than Estonia in the U.S.S.R., which will accept him. In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967 [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. That Protocol binds the parties to it to comply with the substantive provisions of the Convention. INS v. Stevic, ___ U.S. ___, 52 U.S.L.W. 4724, 4727 (U.S. June 5, 1984). Article 32.3 of the Convention provides that a refugee who is expelled from a host country must be given a reasonable period of time to seek legal admission to another country. 19 U.S.T. at 6275-76. However, the Convention specifically excludes from the definition of "refugee" any person who has committed a crime against peace, a war crime, or a crime against humanity. Article 1.F(A) of the Convention, 19 U.S.T. at 6261-63. We consider the respondent's assistance in Nazi persecution of Jews and Communists at the Tartu concentration camp to constitute a crime against humanity which

excludes him from the Convention's definition of a "refugee." Thus, he is not eligible to claim the benefits of the Convention. In any event, the issue raised by the respondent would appear to be moot: the immigration judge found the respondent deportable in May, 1983, thus he has already had over 1 year to seek admission to a country other than the U.S.S.R.

The respondent also contends the immigration judge's designation of the U.S.S.R. as the country of deportation amounts to cruel and unusual punishment because he is under sentence of death in that country. Deportation is not punishment; it is a refusal to harbor a person whom the Government does not want. Harisiades v. Shaughnessy, supra, at 394. Thus, the respondent's deportation to the U.S.S.R. does not come within the eighth amendment's prohibition of cruel and unusual punishment. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Crain v. Boyd, 237 F.2d 927 (9th Cir. 1956).

Lastly, the respondent has argued that the immigration judge's designation of the U.S.S.R. is unreasonable in light of the fact that the United States has refused to recognize the legitimacy of the Soviet annexation of Estonia. We are unable to assess the merits of this argument because the immigration judge's decision is silent as to the basis for his designation of the U.S.S.R. Moreover, on appeal the Service failed to state its position on the effect of the Soviet annexation of Estonia upon designation of a country of deportation. 11/ Thus, a remand on this issue is appropriate.

ORDER: The appeal is dismissed as to all of the issues except that of the reasonableness of the immigration judge's designation of the U.S.S.R. as the country of deportation. Inasmuch as we are unable to ascertain the reasons for that designation, the case is remanded to the immigration judge so that he may consider the implications of the United States'

11/ In Matter of S-Y-L-, 9 I&N Dec. 575 (BIA 1962), we refused to deport a national of Communist Mainland China to that country because the United States did not recognize the legitimacy of the Communist government there. Our policy against deporting aliens to Communist China was not discontinued until we recognized the legitimacy of that government. Matter of Cheung, 10 I&N Dec. 690 (BIA 1979).

refusal to recognize the Soviet annexation of Estonia, designate a country of deportation pursuant to the appropriate provisions of section 243(a) of the Act, 8 U.S.C. 1253(a), and articulate the statutory basis for selecting whichever country is designated. Upon remand both the respondent and the Service may be given an opportunity to submit additional evidence or arguments on these issues.

David L. Milhollan

Chairman