IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

SERGE KOWALCHUK, a/k/a
SERHIJ KOWALCZUK,

Appellant.

COURT OF APPEALS NO. 83-1571

Appeal from the United States District Court
for the Eastern District of Pennsylvania

PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING IN BANC

NEAL M. SHER
Director

MICHAEL WOLF
Deputy Director

JEFFREY N. MAUSNER
Trial Attorney

Office of Special Investigations
Criminal Division
Department of Justice
1377 K St., N.W., #195
Washington, D.C. 20005
(202) 633-2240 or 633-2502

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MISCELLANEOUS

On September 11, 1984, a panel of this Court reversed the decision of the District Court for the Eastern District of Pennsylvania (Fullam, J.) in United States v. Kowalchuk, 571 F.Supp. 72 (E.D. Pa. 1983). Chief Judge Aldisert and Circuit Judge Weiss voted to reverse; Circuit Judge Rosenn dissented. The government petitions for rehearing and suggests rehearing in banc.

I. STATEMENT OF THE ISSUES PRESENTED FOR REHEARING IN BANC

1. Did the majority err in its interpretation of the materiality standard set forth in Chaunt v. United States, 364 U.S. 350, 355 (1960) and United States v. Riela, 337 F.2d 986, 989 (3d Cir. 1964)?

2. Did the majority err in its interpretation of the prohibition in the Displaced Persons Act against the entry into the United States of any person who "voluntarily assisted the enemy forces"?

II. STATEMENT OF THE CASE

This case is an action brought by the United States, pursuant to 8 U.S.C. §1451(a), to revoke the United States citizenship of the defendant. The amended complaint alleged, inter alia, that the defendant served in the Ukrainian police (also known as the Schutzmannschaft or militia) in the city of Lubomyl during the Nazi occupation of the Ukraine; that the Ukrainian police in Lubomyl assisted the occupying Nazi forces in the persecution of Jews and other civilians; that the defendant assisted in these persecutions; and that the defendant voluntarily assisted the enemy forces of Nazi Germany.

The government also alleged that in order to gain entry into this country under the Displaced Persons Act defendant misrepresented his employment and residence during the Nazi occupation,

as well as various other facts. Specifically, defendant asserted in his immigration questionnaire that he had been a tailor's assistant in the town of Kremianec, Poland from 1939 to 1944. Such misrepresentations, the government claimed, were willful and material, resulting in defendant's citizenship having been procured illegally and making it subject to revocation.

The case was tried before the Honorable John P. Fullam, sitting without a jury, in October and December 1981. On July 1, 1983, the Court rendered its decision. The District Court found that Kowalchuk had occupied "a position of some responsibility" in the Schutzmannschaft during the Nazi occupation of Lubomyl. 571 F.Supp. at 81. The District Court held that Kowalchuk had lied about his wartime employment and place of residence when he applied for a visa to enter the United States, and that this misrepresentation was material. 571 F.Supp. 82. Kowalchuk admitted that in his position in the Lubomyl Schutzmannschaft, he prepared duty rosters for the other militia men which included assigning them to patrol the Jewish ghetto in Lubomyl (A 1299-1300, 1302, 1307, 102-103) where approximately 5,000 Jews were forced to live, under guard, in the most extreme conditions and subject to inhumane and brutal treatment. (A 1301-1303, 1167-1168, 967-986, 476-500, 628-670.) The District Court found by clear, convincing and unequivocal evidence that the Lubomyl Schutzmannschaft regularly and routinely beat Jews, assisted the Germans in confiscating valuables from the Jews, arrested and participated in harshly punishing persons involved in anti-German activities, and accompanied German police when persons were rounded up for forced labor, arrested, or executed. 571 F.Supp. at 81.

The District Court entered judgment denaturalizing defendant on three distinct grounds, that: (1) defendant was ineligible for a visa under the Displaced Persons Act because, in the course

of his Schutzmannschaft service, he had (a) assisted the Nazis in persecuting civilians and (b) voluntarily assisted the enemy forces; and (2) he obtained his visa through a willful misrepresentation of material fact. 571 F.Supp. at 82-83. The majority in the Court of Appeals reversed on all grounds; Judge Rosenn dissented, stating that he would affirm on all grounds.

III. REASONS FOR GRANTING THE PETITION

The government seeks rehearing and suggests the appropriateness of rehearing in banc on legal issues that not only troubled this panel, but also have been decided directly contrary to the panel majority's holding in the majority of Courts of Appeals that have considered the issues. While the importance of these issues to the administration of the statutory scheme in question and the conflict that has arisen between these various courts might in and of itself well justify consideration of this case by the full Court, the majority and dissenting opinions further demonstrate that such consideration is necessary to resolve a conflict over the interpretation of this Court's own prior decision in United States v. Riela, 337 F.2d 986 (3d Cir. 1964).

1. THE MAJORITY ERRED IN ITS INTERPRETATION OF THE SECOND PRONG OF THE CHAUNT MATERIALITY TEST

It is undisputed that when defendant sought to procure a visa to enter the United States he lied about his employment and place of residence during the Nazi occupation, claiming that he was a tailor in a city other than Lubomyl. While the District Court found this misrepresentation to be material, the members of the panel disagreed over the correct test of materiality to be applied.

The leading case on what constitutes materiality for purposes of revoking citizenship under 8 U.S.C. §1451(a) is

Chaunt v. United States, 364 U.S. 350 (1960). The Supreme Court held that to prove misrepresentation or concealment of a material fact in a denaturalization proceeding, the government must prove by clear and convincing evidence:

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

Contrary to the Supreme Court's ruling, the majority in this case held that, in order for a misrepresentation to be material, the government must prove at trial the existence of actual disqualifying facts, even under the second prong of the materiality test in Chaunt. (Slip Op. at 22-28.) While holding that this interpretation of the second prong of the Chaunt test was mandated by United States v. Riela, 337 F.2d 986, 989 (3d Cir. 1964), the majority recognized that its decision was contrary to the literal language of Chaunt, and at odds with the decisions of several Courts of Appeals. The Court held that "[t]he lack of unanimity, both within this panel and among the various courts of appeals that have wrestled with the second prong of Chaunt, bears witness to the fact that it is not an opinion whose import is clear on its face." (Slip Op. at 25.)

However, as stated by Judge Rosenn, "[t]he majority mischaracterizes the law of this court by misinterpreting the Riela decision" to even apply to the second prong of Chaunt. (Slip Op. at 50.) The correct test of materiality under the second prong of Chaunt, as stated by Judge Rosenn, is whether "disclosure would have led to an investigation that might have uncovered other disqualifying facts." (Slip Op. at 49.)

a. The Majority Misinterpreted the Riela Decision

Riela arrived in the United States as a stowaway. He filed fraudulent papers of admission and a petition for citizenship, concealing his true identity by substituting the name, birthday, place of origin, time and manner of arrival and information concerning the examination by admitting immigration officers that applied to another alien who had entered the U.S. legally. The Court of Appeals, after noting that mere provision of false answers would be insufficient to revoke Riela's citizenship, noted that "[t]he false answers given by the defendant were material if they resulted in the suppression of facts which, if known, would have warranted denial of citizenship." 337 F.2d at 989. The court found that the false answers given by Riela "were material because they resulted in the suppression of facts which, if known, would have barred the naturalization of the defendant because of his obvious failure to meet the statutory requirements." Id. at 989. If Riela had revealed his true identity and manner of entry as a stowaway, he would have been immediately ineligible for citizenship, as noted by the court. 337 F.2d at 989. Because the truthful answers to the questions on the forms themselves disqualified Riela, an investigation to uncover additional facts was unnecessary. Riela was denaturalized under the first prong of the Chaunt test, and the court therefore did not address the second prong, an alternative ground on which to find materiality. The language used by the court in Riela ("resulted in the suppression of facts which, if known, would have warranted denial of citizenship") is almost identical to the language of the first prong of Chaunt ("facts were suppressed which, if known, would have warranted denial of citizenship"). Riela, therefore, does not support the panel majority's interpretation of the second prong of the Chaunt test.

b. The Majority Failed to Follow Third Circuit Precedent on the Standard of Materiality, Resulting in Inconsistent Decisions by Different Panels of this Court

Even prior to the Chaunt decision, the Third Circuit followed the rule of materiality advocated by Judge Rosenn. In United States v. Montalbano, 236 F.2d 757 (3d Cir. 1956), cert. denied sub nom. Genovese v. United States, 352 U.S. 952 (1956), a denaturalization proceeding, defendant argued that his concealment of his arrest record should not result in denaturalization since the arrest record itself would not have justified denial of citizenship. The court answered:

> The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity. If the government thinks it important enough to ask a question which it has authority to ask, the answer cannot be considered immaterial and meaningless. That the answer may not lead to a refusal of citizenship is not the only consideration. The government is entitled to know all the facts which it requires. [236 F.2d at 759.]

Significantly, in Montalbano this Court followed the rule announced in Corrado v. United States, 227 F.2d 780, 784 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956), that:

> It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship. [236 F.2d at 760 (emphasis added).]

Montalbano has never been overruled, either by Chaunt or Riela, but has been cited by this Court subsequent to both Chaunt and Riela. See In re Haniatakis, 376 F.2d 728, 730 (3d Cir. 1967). Indeed, the language used in Chaunt, "possibly leading to the discovery of other facts warranting denial of citizenship" (364 U.S. at 355), is not significantly different from that used in Montalbano. The commentators thus have uniformly recognized that Chaunt does not require the government

to prove ultimate facts if it proves that the truth would have prompted an investigation relevant to eligibility. See Comment, Misrepresentation and Materiality in Immigration Law -- Scouring the Melting Pot, 48 Fordham L. Rev. 471, 491-493 (1980); Appleman, Misrepresentation in Immigration Law: Materiality, 22 Fed. B.J. 267, 271-272 (1962); 3 C. Gordon & H. Rosenfield, Immigration Law and Procedure §20.4b, at 20-14 (rev. ed. 1979). Even the panel majority in the case at bar concedes that "[a]pplied literally, [the language of the second prong of Chaunt] does not require the government to prove that, had the truth been told, other disqualifying facts would have been discovered." (Slip Op. at 25.)

In addition, shortly after Chaunt was decided, the Attorney General, who is charged with the administration of the Immigration and Nationality Act and whose rulings on questions of law are controlling within the Executive Branch under 8 U.S.C. §1103(a), issued a ruling on materiality in the deportation context. In re S- and B-C-, 9 I.&N. Dec. 444 (1961). The Attorney General concluded that the government may satisfy the materiality requirement either by proving ultimate facts or by showing that the misrepresentation "tend[ed] 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." Id. at 447. This test, the Attorney General noted, was consistent with the Chaunt test for denaturalization. Ibid.

Kowalchuk and Montalbano are therefore clearly inconsistent decisions by different panels of this Court.[1]

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[1] Furthermore, it is clear that if the panel majority's interpretation of Riela is correct, Riela and Montalbano are also inconsistent. If the panel in Riela had intended the interpretation made by the majority in Kowalchuk, it certainly would have stated that Montalbano was overruled.

c. The Panel Majority's Interpretation of Chaunt is Directly Contrary to the Majority of Circuits

The standard of materiality urged by Judge Rosenn is also the standard which has been adopted by the majority of circuits that have ruled on the issue since Chaunt was decided. United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984) ("The evidence at trial showed unequivocally that had Palciauskas made full disclosure of his position as Mayor [in a Nazi occupied town], he would not have been allowed to enter the United States unless he could pass a much more rigorous inquiry into his background."); United States v. Koziy, 728 F.2d 1314, 1320 (11th Cir. 1984), cert. denied, __ U.S __ (misrepresentation is material if "it would have led to an investigation into other facts which might have warranted a denial of citizenship"; case involved a policeman in the Nazi occupied Ukraine); United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981); Kassab v. INS, 364 F.2d 806 (6th Cir. 1966); United States v. D'Agostino, 338 F.2d 490 (2d Cir. 1964); United States v. Oddo, 314 F.2d 115 (2d Cir. 1963) (citing Montalbano in support), cert. denied, 375 U.S. 833 (1963); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).

d. The Materiality Standard Adopted By The Panel Majority Encourages Visa and Citizenship Applicants to Lie

As noted by Judge Rosenn (Slip Op. at 52) and the cases cited above, requiring the government in every denaturalization case to prove the existence of ultimate facts that, in and of themselves, warrant denial of citizenship can only encourage an applicant to lie about his background, thereby forestalling an investigation that might reveal those ultimate facts at a time

when the applicant has the burden of proving eligibility.[2] See Berenyi v. Immigration Director, 385 U.S. 630, 636-637 (1967); United States v. Fedorenko, 597 F.2d at 951 ("an applicant with something to hide would have everything to gain and nothing to lose by lying under oath."). In many cases, the lie will never be discovered and the applicant will retain his fraudulently obtained citizenship without a challenge. But even if his deception is eventually bared, the applicant is better off for having lied because the passage of time no doubt will have made it more difficult for the government to uncover the disqualifying facts, and the burden of proving ineligibility, by clear and convincing evidence, will have shifted to the government. See Schneiderman v. United States, 320 U.S. 118, 125, 158 (1943). The worst that could happen to an applicant who lies is that (a) his deception would later be discovered, (b) the government would then investigate and be able to turn up disqualifying facts, and (c) the government would then be able to prove those facts in a denaturalization trial by clear and convincing evidence. If the government cannot meet all three requirements (and each one poses separate and difficult problems that are exacerbated by the passage of time), the applicant is rewarded for his deception. Fedorenko, 597 F.2d at 951; Ganduxe y Marino v. Murff, 183 F.Supp. 565, 567 (S.D.N.Y. 1959), aff'd, 278 F.2d 330 (2d Cir. 1960), cert. denied 364 U.S. 824 (1960). If the government does succeed in meeting all three of these requirements, the defendant is no worse off than he would have been had he told the truth at the outset. He is, in fact, better off because he has

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2 Section 10 of the Displaced Persons Act, under which defendant was admitted, provided that "[t]he burden of proof shall be upon the person who seeks to establish his eligibility under this Act." 62 Stat. 1013.

enjoyed the benefits of citizenship for some length of time. Surely Congress cannot have intended this incentive to misrepresent the truth, and this Court should not countenance such a perverse interpretation of the law.

The present case shows the extreme difficulty of proving disqualifying facts at trial by clear and convincing evidence and demonstrates the impact the panel majority's interpretation will have on the government's efforts to denaturalize persons who entered the United States by lying about their affiliation with the Nazis. The District Court found that Kowalchuk held a responsible position in a police force that collaborated with the Nazis in carrying out brutal atrocities and persecution of the civilian population, and that he willfully lied about his role in his immigration questionnaire. But the panel majority found that insufficient proof was introduced on the question of Kowalchuk's position in the Schutzmannschaft and the role of the Schutzmannschaft and Kowalchuk himself in persecution and atrocities.[3] An investigation conducted at the time of Kowalchuk's misrepresentations might have resulted in sufficient corroborating evidence on these issues. At that time, Kowalchuk would have had the burden of proving that he had not assisted in persecution. Instead, by his lies, Kowalchuk has shifted the burden of proof to the government and possibly deprived the government of credible evidence. As noted by Judge Rosenn, "[t]he misrepresentation and the accompanying facts in this case are in stark contrast to the inconsequential nondisclosures that

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[3] The government very strongly agrees with Judge Rosenn that in so holding, the majority "distorts the district court's finding of fact with regard to the defendant's role in the Lubomyl schutzmannschaft." (Slip Op. at 28.) The government urges that if the Court decides to consider this case in banc, it consider this factor as well.

Congress and the court have chosen to absolve." (Slip Op. at 53.)

e. The Materiality Standard Adopted By the Panel Majority is Contrary to the Congressional Intent

The interpretation of the panel majority not only imputes to Congress an irrational intent to establish an incentive to lie, but also makes a portion of the denaturalization statute redundant, contrary to the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v. Franklin, 439 U.S. 379, 392 (1979). See also Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); United States v. Campos-Serrano, 404 U.S. 293, 301 n.14 (1971). The denaturalization statute, 8 U.S.C. §1451(a), establishes two separate grounds for denaturalization: (1) illegal procurement or (2) willful concealment or misrepresentation of a material fact. Yet adoption of the panel majority's interpretation would make the misrepresentation and concealment provision superfluous; the government would be required to establish illegal procurement as a prerequisite to establishing a material misrepresentation. If persons may be denaturalized only when it is shown that they were ineligible for citizenship in the first place, their fraudulent behavior itself, no matter how egregious, is of no significance for denaturalization purposes.

f. The Materiality Standard Adopted By the Panel Majority is Stricter Than the Standard This Circuit Has Adopted for Criminal Cases

Materiality of a false statement is not a concept unique to immigration law. Congress' failure to provide any definition of "material" in 8 U.S.C. §1451(a) suggests that the word should be given its ordinary statutory meaning. Numerous criminal statutes

contain materiality standards, notably the perjury statutes, 18 U.S.C. §1621 (false statement as to a "material matter") and 18 U.S.C. §1623 (false "material declaration" before a court or grand jury). Because these statutes provide criminal sanctions, their definition of "material" should, if anything, be narrower than that in the immigration field. Yet the materiality standard for these criminal offenses, as set forth in Third Circuit cases, is significantly broader than the standard that the panel majority advances as the proper one under 8 U.S.C. §1451(a). In United States v. Lardieri, 497 F.2d 317, 319-20 (3d Cir. 1974) the Court stated the following:

> It is well established that a perjurious statement is material * * * [under 1621 and 1623] if it has a tendency to influence, impede, or hamper the grand jury from pursuing its investigation. * * *
>
> The purpose of a grand jury's investigation is to uncover facts which will support formal charges against an individual. Hence, leads to additional facts may be material even though they do not directly reflect on the ultimate issue being investigated.

See also United States v. Crocker, 568 F.2d 1049, 1057 (3d Cir. 1977); United States v. Gremillion, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979) (similar standard under 18 U.S.C. §1001); United States v. Tyrone, 451 F.2d 16 (9th Cir. 1971), cert. denied, 405 U.S. 1075 (1972).

Because of its investigatory purpose, the grand jury inquiry is closely analogous to the citizenship investigation involved here. In the grand jury context, the focus of the materiality test is the effect that the false statement has on the grand jury's ability to conduct its investigation; it is irrelevant whether it would have affected that body's ultimate determination. There is no reason to imply a congressional intent to make the materiality standard under 8 U.S.C. §1451(a) more stringent than

under these criminal statutes. Indeed, because false statements under oath in naturalization proceedings constitute a criminal offense under 18 U.S.C. §1015(a),[4] the panel majority's standard of materiality in a denaturalization case leads to the absurd result that a person who procures his citizenship by a misrepresentation would be immune from the civil consequence of denaturalization unless "ultimate facts" can be proven, yet would be subject to criminal penalties, including imprisonment, for the very same misrepresentation.

2. THE MAJORITY ERRED IN ITS INTERPRETATION OF THE DISPLACED PERSONS ACT

Under the Constitution of the International Refugee Organization (IRO), persons who "voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations" were ineligible for IRO assistance, and thus ineligible to enter the U.S. under the Displaced Persons Act. The majority did not disturb the District Court's findings that Kowalchuk voluntarily joined the Lubomyl Schutzmannschaft or that this force assisted the enemy, resulting in Kowalchuk having assisted the enemy. Rather, the majority reversed the District Court's finding that defendant had voluntarily assisted the enemy, even though his service in the

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[4] The standard of proof under this statute is essentially the same as for perjury. Bridges v. United States, 346 U.S. 209, 222 (1953). Accordingly, a materiality requirement analogous to that for perjury has been applied, although the statute on its face does not require materiality. See United States v. Laut, 17 F.R.D. 31, 34 (S.D.N.Y. 1955). The making of false statements to an immigration or naturalization officer would appear to be criminal under both the general perjury statute and the false statement statute as well. See 2, 3 C. Gordon & H. Rosenfield, supra, at §§9.35, 9.36, 21.5; Tzantarmas v. United States, 402 F.2d 163, 168 (9th Cir. 1968), cert. denied, 394 U.S. 966 (1969); United States v. Flores- Rodriguez, 237 F.2d 405, 408 (2d Cir. 1956).

Schutzmannschaft had been voluntary. The majority held that there was a "substantial question" whether membership alone, even if unforced, would have been sufficient to constitute voluntary assistance to the enemy, or whether the government had to prove "intent-to-aid and purposefulness-of-assistance." (Slip Op. at 14-15.)

The government agrees with Judge Rosenn that proof of voluntary membership in a unit that assisted the Nazis in their operations against the United Nations is sufficient to establish voluntary assistance. (Slip Op. at 36-38.) See also United States v. Koziy, 540 F.Supp. 25, 35 (S.D. Fla. 1982), aff'd 728 F.2d 1314 (11th Cir. 1984), cert. denied __ U.S. __, which held that voluntary employment by a Ukrainian police force establishes voluntary assistance to the enemy forces. No court other than the majority herein has ever held that the government must prove "intent-to-aid and purposefulness-of-assistance."

Respectfully submitted,

Neal M. Sher
Director

Michael Wolf
Deputy Director

Jeffrey N. Mausner
Trial Attorney

Office of Special Investigations
Criminal Division
U.S. Department of Justice
1377 K St., N.W., #195
Washington, D.C. 20005
(202) 633-2240 or 633-2502

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, to wit, the panel's decision is contrary to the decisions of this court in United States v. Montalbano, 236 F.2d 757 (3d Cir. 1956), cert. denied, sub nom. Genovese v. United States, 352 U.S. 952 (1956) and United States v. Riela, 337 F.2d 986 (3d Cir. 1964) and contrary to the Supreme Court's decision in Chaunt v. United States, 364 U.S. 350 (1960), and that this appeal involves a question of exceptional importance, to wit, the standard of materiality for misrepresentations made in visa and citizenship applications.

Jeffrey N. Mausner

Jeffrey N. Mausner
Trial Attorney

Office of Special Investigations
Criminal Division
U.S. Department of Justice
1377 K St., N.W., Suite 195
Washington, D.C. 20005
(202) 633-2240

CERTIFICATE OF SERVICE

This hereby certifies that two copies of Appellee's Petition for Rehearing with a Suggestion for Rehearing In Banc was mailed, postage prepaid, to John Rogers Carroll, Esq., Suite 1206, 615 Chestnut Street, Philadelphia, Pennsylvania, 19106, Attorney for Apellant, this 25th day of October, 1984.

Jeffrey N. Mausner