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

APPELLEE'S SUPPLEMENTAL BRIEF

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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On November 1, 1984, this Court granted the Government's petition for rehearing in banc and vacated the panel decision of September 11, 1984. This brief is filed as a supplement to the Government's Appellee's Brief; it addresses issues raised in Appellant's Supplemental Brief and the majority panel decision. On all other factual and legal issues the Government continues to rely on and directs this Court's attention to the Appellee's Brief filed on January 4, 1984 and Petition For Rehearing With a Suggestion For Rehearing In Banc filed on October 25, 1984.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DEFENDANT ILLEGALLY PROCURED HIS CITIZENSHIP BY MAKING MATERIAL MISREPRESENTATIONS IN APPLYING FOR A VISA

An application for immigration to the United States under the DP Act was first reviewed by the Displaced Persons Commission (DP Commission) and then by the State Department. This process commenced with the submission of a Fragebogen (Questionnaire) to the DP Commission.

Kowalchuk concedes that incorrect information is contained on his Fragebogen. Specifically, defendant stated in the Fragebogen that he had been a tailor in the city of Kremaniec, Poland, throughout the Nazi occupation, rather than a member of the Schutzmannschaft (Police) in Lubomyl, Ukraine, 280 kilometers away. (GA 24, 26, 18, 10: Government Ex. 15A, ¶¶28, 29, 42.) He also stated in the Fragebogen that he had been forcibly transported to Czechoslovakia by German forces in 1944 (GA 26:

Government Ex. 15A, ¶¶40, 42); in fact, as he admitted at trial, he voluntarily retreated with the German Army. (A1255.)

After completion of the Displaced Persons Commission process, Kowalchuk filed a visa application with the State Department. Kowalchuk was then personally interviewed by a vice-consul. At that interview, he swore that all of the information on the Fragebogen was correct. (A1033.) The Government believes that the District Court correctly concluded that these misrepresentations resulted in the illegal procurement of his visa and citizenship.

A. The Chaunt Test of Materiality Is Applicable to the Instant Case

The Government continues to adhere to the view that the District Court correctly held that the Supreme Court's decision in Fedorenko v. United States, 449 U.S. 490 (1981) controls the materiality issues in this case. (See Appellee's Brief at 30-31.) Even if this Court does not consider the instant case to be controlled by Fedorenko, it is clear that the materiality test in Chaunt v. United States, 364 U.S. 350 (1960) is applicable to this case and would compel denaturalization. Defendant's several arguments to the contrary lack merit.

Defendant first argues that Chaunt should never be applied to cases involving visa misrepresentations. Although Chaunt involved a misrepresentation made in an application for citizenship, all Courts of Appeals which have considered the issue have held that the Chaunt standard of materiality also applies to

misrepresentations made at the visa stage. See, e.g., United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984); United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981); Kassab v. Immigration and Naturalization Service, 364 F.2d 806 (6th Cir. 1966); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).

Despite this precedent, Kowalchuk argues that Chaunt should not apply to visa misrepresentations because the investigation conducted by the DP Commission was much more complete than an investigation which could be conducted at the citizenship application stage. According to defendant,

> while an applicant's misleading the examining officer in applying for citizenship would often foreclose avenues of investigation entirely, under the DPA, multiple investigative procedures had already been undertaken and far less reliance needed to be placed upon the answers provided in the applicant's personal history form. [Appellant's Supplemental Brief at 15.]

In fact, the opposite is true. When a visa application is made, the relevant background records are in the control of a foreign government, as opposed to the domestic records most relevant at naturalization. It is absurd to argue, as defendant does, that the State Department can make a more thorough investigation of a visa applicant's records and background in a foreign country than can be made of a citizenship applicant's background in the United States. This is especially true in Kowalchuk's case, where the misrepresented facts involved activities in the U.S.S.R.; the United States had no access to records in the U.S.S.R. at the time of the DP Act.

Further, defendant's argument is belied by an additional factual consideration. Kowalchuk's misrepresentations involved not only his wartime activities, but also his place of residence during that time.[1] He falsely stated that he had lived in Kremaniec, Poland, rather than Lubomyl, Ukraine. Therefore, if the United States investigative agencies had endeavored to interview Displaced Persons Camp residents regarding the visa application, Kowalchuk's own misrepresentations would have set investigators upon an entirely wrong track; they would have been inquiring about a tailor from Kremaniec, rather than a policeman from Lubomyl. Because of lack of access to foreign records, this duplicity was virtually undiscoverable. See A1033. In sum, immigration officials were forced to place much greater reliance on the veracity of the applicant than their counterparts at the naturalization stage. To accept Kowalchuk's proposed materiality standard would reward a visa applicant who willfully opted for prevarication in the immigration process.

Defendant alternatively argues that Chaunt should not be read as having two distinct tests for materiality, but instead

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[1] Indeed, the Government believes that Kowalchuk's misrepresentations as to his wartime residence are tantamount to concealment of the applicant's identity. The Courts and the Board of Immigration Appeals have long held that misrepresentations as to identity are per se material because they effectively preclude any useful investigation. Landon v. Clarke, 239 F.2d 631 (1st Cir. 1956); Matter of B-- and P--, 2 I&N Dec. 638 (BIA 1946), aff'd Atty. Gen. (1947). See also In re Zycholc, 43 F.2d 438 (E.D. Mich. 1930).

Following this precedent, this Court should hold that Kowalchuk's visa misrepresentations as to wartime employment and residence are per se material.

should be interpreted "as describing two methods of proving the materiality of concealments, both of which require proof of ultimate disqualifying facts." (Appellant's Supplemental Brief at 17.)

The Supreme Court held in Chaunt that the Government had to prove, in order to establish the materiality of a misrepresentation, that

> either (1) 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, emphasis added.]

On its face, this standard clearly establishes a two-fold test for materiality; the second prong is not merely a restatement of the first prong. See, e.g., United States v. Fedorenko, 597 F.2d at 951; Kassab v. INS, 364 F.2d at 807; and the other cases cited at page 8 of the Government's Petition For Rehearing. As previously stated, the Government strongly urges this Court not to abandon the second prong of the Chaunt test. To do so would reward prevarication in a context in which verification of the truth is difficult, at best. In Kowalchuk's case, verification at the time of the misrepresentation was virtually impossible.

B. The District Court Correctly Found That Defendant Made Misrepresentations to Gain Entry into the United States

As previously discussed, Kowalchuk's Fragebogen, signed by him and submitted to the DP Commission, contained several serious misrepresentations. Rather than admit to his Schutzmannschaft employment in the Ukraine, he swore that he had been a tailor in

Poland. He also misrepresented the fact that in 1944 he had voluntarily retreated with the German forces to Czechoslovakia.[2]

Defendant makes three arguments contending that the facts do not support the District Court's conclusion that he willfully misrepresented facts in order to gain entry into the United States. First, he claims that, at most, he failed to volunteer information, but that he never made any misrepresentations. (Appellant's Supplemental Brief at 12-13.) Second, he contends that he did not understand that the Fragebogen would be used to obtain a visa. (Appellant's Supplemental Brief at 5.) Third, he argues that only the visa application form is relevant and that misrepresentations on pre-visa forms, such as the Fragebogen, cannot give rise to denaturalization. None of these arguments is defensible.

As to the first argument, it is a complete misstatement of the facts to suggest that defendant's only error was a failure to volunteer information which was not explicitly requested. The Fragebogen specifically required Kowalchuk to provide the following information:

1) employment during the war (GA 24, ¶29);

2) membership in political, non-political and para-military organizations (GA 24, ¶28);

3) the reason for leaving his homeland (GA 24, ¶40);

4) a brief life history (GA 24, ¶42).

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2 Kowalchuk obviously felt the need to conceal his voluntary departure from the Ukraine because it undercut his claim to the DP Commission that he had been "displaced" from his homeland by the war and because it evidenced his trusted status in the Schutzmannschaft.

To all of these questions Kowalchuk provided false information. When asked to swear to the truth of this information before a State Department vice-consul, Kowalchuk reaffirmed the misrepresentations.[3]

Defendant similarly falls short in his pretense that none of the aforementioned misstatements were made for the purpose of obtaining a visa. It is undisputed that the express purpose of the Fragebogen was to determine eligibility for immigration to the United States. Directly above Kowalchuk's signature on the Fragebogen is the following declaration:

> I declare that the above information and answers are correct and complete according to my best knowledge and conscience. I sign this declaration in the certain knowledge that the veracity of the information given here will be checked, and if it is found to be untrue, incomplete, or misleading in any point, I may be denied entry into the United States. [GA 27, 20: Government Ex. 15A.]

Kowalchuk also does not contest the fact that his interview with the State Department vice-consul was for the sole purpose of obtaining a visa. The false affirmation in that interview, under oath, of the information in the Fragebogen was made for the

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[3] At pages 12-13 of Appellant's Supplemental Brief he argues that Section 340(a) of the Immigration and Nationality Act of 1952, which proscribes both concealment and misrepresentation, cannot be applied retroactively to this case. Instead, he argues that only Section 10 of the DP Act is applicable, which precluded issuance of visas to persons who made willful misrepresentations, but contained no explicit reference to concealment. As explained in the text, defendant contends that he made no misrepresentations, but merely failed to volunteer unrequested information. Hence, he argues that Section 10 did not bar him from obtaining a visa. The legal aspect of this argument need not be addressed in view of the fact that, even if defendant's interpretation of Section 10 were adopted, the facts establish conclusively that Kowalchuk repeatedly made affirmative misrepresentations -- to both the DP Commission and the State Department.

express purpose of immigrating to the United States. It is legally irrelevant whether those misrepresentations were a continuation of prior falsehoods purportedly made for non-immigration purposes. Once Kowalchuk repeated his misrepresentations and incorporated them into documents submitted for the express purpose of immigrating to the United States, they barred his eligibility for a visa under Section 10 of the DP Act.

Defendant's last argument -- that only a misrepresentation on the visa application form could support denaturalization -- is multi-faceted, but stil untenable. The most direct response in opposition to this argument is that it is contrary to overwhelming precedent. See Fedorenko v. United States, 449 U.S. 490 (1981); United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, 459 U.S. 883 (1982); United States v. Koziy, 540 F.Supp. 25 (S.D. Fla. 1982), aff'd, 728 F.2d 1314 (11th Cir. 1984), cert. denied, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984); United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983), aff'd, 734 F.2d 625 (11th Cir. 1984); United States v. Demjanjuk, 518 F.Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982); United States v. Dercacz, 530 F.Supp. 1348 (E.D.N.Y. 1982). In each of those cases a denaturalization judgment was based, at least in part, on misrepresentations which predated completion of the "Application for Immigration Visa."

These courts recognized that the securing of a visa involved a three-step process: International Refugee Organization (IRO), Displaced Persons Commission and State Department. Misrepresentations

made to either of the latter two U.S. agencies could lead to disqualification under Section 10 of the DP Act.[4] The language of Section 10 does not limit itself to misrepresentations on the visa application form, as argued by defendant. Misrepresentations in the State Department interview and in the Fragebogen submitted to the DP Commission are equally actionable.

Despite the previously cited judicial precedent, Kowalchuk argues that the Attorney General's decision in Matter of Altman, A-7991300-1 (GA 54-60) precludes his denaturalization. In Altman, the Attorney General held that a misrepresentation made to a person not charged with the administration and enforcement

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[4] Without any support, defendant argues at pages 8 and 11 of Appellant's Supplemental Brief that IRO or DP Commission determinations of eligibility could not be controverted by the vice consul prior to the 1950 amendments to the DP Act. That is incorrect. Even prior to the 1950 amendments to the Displaced Persons Act, the vice consul had the authority and the duty to determine the applicant's eligibility under the Displaced Persons Act, as well as the other immigration laws. The third semi-annual report of the Displaced Persons Commission to the President and the Congress, dated February 1, 1950 (Defendant's Ex. N), stated the following about the authority and duty of the consular official:

> 10. Consular interview and visa issuance * * * The consul has complete veto power if he finds that the displaced person established eligibility by fraud or that the displaced person is inadmissible under any immigration law of the United States, including the Displaced Persons Act. [Pages 14-15.]

The amendment to the DP Act was passed in June 1950. The third semi-annual report quoted above covers the six-month period ending December 31, 1949. (See page 1 of the report.)

John Chapin, the vice consul, also testified that the vice consuls were not bound by the DP Commission's determination on eligibility. (A1031.)

of the DP Act, such as an employee of the IRO or CIC,[5] would not be disqualifying so long as the false statements were not reasserted before the DP Commission or vice consul and if the true facts were revealed to the DP Commission. Kowalchuk's misrepresentations do not fall within the protection of Altman. His misrepresentations in the Fragebogen were made expressly for immigration to the United States; these misrepresentations were sworn to before a State Department vice consul who was responsible for enforcing the DP Act. Further, Kowalchuk never disclosed his true wartime activities to any official responsible for enforcement of the immigration laws. Hence, Altman is inapposite.[6] See pages 27-28 of Appellee's Brief.

It is also noteworthy that even the Attorney General expressed doubts about the correctness of the Altman decision. In Defendant's Exhibit N, a memorandum which discussed Altman, the Attorney General stated:

> At the time I approved the Board's orders in these cases, my decision was necessarily based on the individual records presented to me for review. Since the receipt of your memorandum I have reexamined the entire question and have had discussions with members of my staff. Had I had the additional background information furnished in your memorandum, as well as the discussions had with my staff, at the time I considered the Suess and Altman cases, I might have arrived at a different conclusion.

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5 Counter Intelligence Corps of the U.S. Army.

6 Additionally, Altman was limited to misrepresentations not bearing on security. (See quote at p. 10 of Appellant's Supplemental Brief.) The misrepresentations in Altman concerned the date that Altman entered Germany after the War. (GA57.) In contrast, Kowalchuk's misrepresentations involved service in a Nazi police force, a fact which would have had a bearing on national security.

In fact, the very DP Commission regulations cited by defendant at pages 6-7 of his Supplemental Brief demonstrate that misrepresentations to the CIC are misrepresentations to persons charged with enforcement or administration of the DP Act:

> "Misrepresentation for the purpose of gaining admission into the United States" refers to a willful misrepresentation, oral or written, to any person while he is charged with the enforcement or administration of any part of the act, of any matter material to an alien's eligibility for any of the benefits of the act. [8 C.F.R. §700.1(h), emphasis added.]

8 C.F.R. §700.7(b) provides:

> In order to facilitate the conduct of such investigation by the Commission, and to enable the Commission to determine admissibility under the act, and whether the admission of persons so selected would be inimical to the welfare or security of the United States, the Commission will arrange with the Department of the Army to provide the necessary investigative and administrative assistance, and to submit in writing to a duly authorized representative of the Commission a statement of the evidence found by it relative to (1) his character and history, and (2) whether he is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States. [Emphasis added.]

It is clear, therefore, that the Army CIC was charged with the administration and enforcement of the DP Act.

C. The District Court Correctly Concluded That Defendant's Misrepresentations Were Material

Despite the Government's position that both prongs of the Chaunt test are applicable to visa misrepresentations, it is also of the view that this case, like Fedorenko, can be resolved factually under the first prong of the test. As explained in more detail at pages 14-20 of this Brief, defendant's service in the Lubomyl Schutzmannschaft constituted assistance in persecution and voluntary assistance to the enemy forces, within the

meaning of Section 2 of the DP Act. Accordingly, his misrepresentations regarding his Schutzmannschaft service were material because they suppressed facts warranting denial of a visa.

This conclusion is supported by the testimony of the IRO Chief Eligibility Officer (Michael Thomas) that knowledge of defendant's mere membership in the Lubomyl Schutzmannschaft, without any further proof of personal participation in persecution, would have resulted in denial of IRO certification. (A398.) The DP Commission, in turn, expressed its position in documented decisions that members of the Ukrainain Schutzmannschaft were per se ineligible for DP visas.[7] (GA 61-60.) Finally, John Chapin, a State Department vice consul in Salzburg at the time defendant received his visa, testified that former members of the Ukrainian police were ineligible for visas under the DP Act. (A1035-1036.)

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[7] The fact that the Ukrainian Schutzmannschaft was not listed on the DP Commission's printed Inimical List did not mean that the organization was not considered a movement hostile to the United States, as argued at page 12 of Appellant's Supplemental Brief. Abraham Conan, a high-ranking DP Commission official whose responsibilities included review of eligibility determinations (A1509-1510), testified that the Inimical List did not contain the name of every organization which was considered inimical to the United States. (A1511.) For example, as well as Ukrainian Schutzmannschaft, the Inimical List did not include the Gestapo or Nazi concentration camp guards, persons who were clearly ineligible under the DP Act. See, e.g., Fedorenko v. United States.

Alternatively, were this Court to turn to the second prong of Chaunt, it could not ignore the above evidence as establishing, at the very least, that the facts suppressed by Kowalchuk (i.e., his police service) might have been useful in a visa application investigation "possibly leading to the discovery of other facts warranting denial of" a visa. Chaunt v. United States, 364 U.S. at 355. Based on that evidence, it certainly was not clearly erroneous for the District Court to find that it was quite probable that consular officials would not have issued a visa to Kowalchuk "regardless of the extent of his direct personal involvement in atrocities." 571 F.Supp. at 82.

The above is not vitiated by defendant's contention that the IRO would not reject applicants for misrepresentations if the true facts would not have resulted in ineligibility (i.e., defendant suggests, in effect, that the IRO did not adopt a second prong test). See pages 10-11 of Appellant's Supplemental Brief. While IRO determinations were generally conclusive interpretations of its own constitution, this United Nations agency was not responsible for enforcement of United States immigration laws. Only the DP Commision, U.S. Army and State Department had responsibility for administering the DP Act. In fact, the IRO Constitution did not even have a provision comparable to Section 10 of the DP Act. The IRO's position on misrepresentations was established as a matter of policy and not of statutory mandate. In contrast, United States agencies were bound by the clear language of Section 10 of the DP Act. Finally, it is clear from the IRO policy circulars quoted by

defendant (Appellant's Supplemental Brief at 10-11) that the IRO expected its interviewing officers to exercise discretion in deciding cases of misrepresentations; one circular suggested that, "except in very bad cases," penalties short of outright disqualifications be imposed for false pretenses. In the Government's view, misrepresentation of Nazi collaboration in persecution is indeed a "very bad case" and one which would result in IRO ineligibility, as well as ineligibility under Section 10 of the DP Act.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DEFENDANT'S ASSISTANCE IN THE PERSECUTION OF CIVILIANS MADE HIM INELIGIBLE FOR A VISA UNDER THE DP ACT

The terrible conditions under which the Jews of Lubomyl lived and their ultimate fate are not matters of dispute. The Lubomyl Schutzmannschaft's role in the enforcement of the Nazis' anti-Jewish policies was clearly established. These police "regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia [and] assisting the Germans in confiscating valuables from Jewish inhabitants . . . ." (571 F.Supp. at 81.) In guarding the ghetto, the Schutzmannschaft imprisoned the Jews in an overcrowded environment in which disease and starvation was rampant. Virtually all of the Jews of the ghetto, numbering approximately 5,000, were later executed by

a special SS detachment, with the assistance of Ukrainian militia men.[8]

The activities of the Lubomyl Schutzmannschaft are legally significant in this case for three reasons. First, defendant's membership in the Schutzmannschaft was concealed from immigration officials. If the misrepresentation was material, then Section 10 of the DP Act barred issuance of a visa. Second, if defendant, as a member of the Schutzmannschaft, assisted in the persecution of civilians, then he was additionally ineligible for a visa under Section 2 of the DP Act. Third, if defendant's service in the Schutzmannschaft constituted voluntary assistance to the enemy forces, then such service also barred him from eligibility under Section 2 of the DP Act. Each ground for ineligibility is distinct and separate. However, under all three theories, the activities of the Schutzmannschaft and Kowalchuk's role in its operation are of critical importance. The Government believes that the District Court did not clearly err in making the factual findings that the Schutzmannschaft participated in

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8 The panel majority made much of the fact that "not one scrap of documentary evidence has ever surfaced which reflects or even refers to the happenings at Lubomyl [or] the existence of the Lubomyl schutzmannschaft." Slip Op. at 15. But none of that is in issue; defendant admitted the existence of the Lubomyl Schutzmannschaft and his service to it. He did not contest the fact that the Jews of Lubomyl were brutally persecuted by the police.

the persecution of civilians and assisted the enemy forces of Nazi Germany, and that Kowalchuk, as a responsible official, assisted in those activities.

The District Court made the following factual determinations concerning defendant's position in the Lubomyl Schutzmannschaft:

> The evidence as a whole makes it quite clear that the defendant did occupy a position of some responsibility with the Schutzmannschaft. He had his own office there (one of only three such private offices); he typed up and issued duty rosters; he typed the daily reports of police activity, etc. He probably wore a police uniform of some kind, during at least some of his duty hours at the police station. [571 F.Supp. at 81.][9]

This finding was buttressed by the fact that Kowalchuk was singled out for a special six months training course operated and funded by the occupation forces:

> It is impossible to avoid the inference that the defendant had found favor with the Nazi occupiers of Lubomyl, and was being trained for even greater service in the future. [571 F.Supp. at 76.]

Despite the evidentiary support for the District Court's finding that defendant occupied a responsible position in the Schutzmannschaft (albeit largely clerical), the panel majority referred to Kowalchuk as a mere "police clerk." (Slip Op. at 2.) The Government agrees with Judge Rosenn that 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.) As the panel majority pointed out, a factual finding may not be set aside:

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[9] These findings did not even rely on the deposition testimony of Soviet witnesses, who described in even greater detail Kowalchuk's involvement in persecution.

> unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. [Slip Op. at 12, n.3.]

The District Court's factual determination that Kowalchuk occupied a responsible position clearly met this evidentiary test.[10]

Based on its findings as to defendant's position and responsibilities with the police, the District Court concluded that defendant "assisted the Nazis in persecuting civilian populations, through his role as a member of the Lubomyl Schutzmannschaft." The District Court made this factual determination on the basis of all of the evidence before it, including the trial testimony and demeanor of the expert historian, the defendant, defendant's brother and other defense and government witnesses. The ultimate factual determination that defendant assisted in persecution is not "completely devoid of minimum evidentiary support" Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d

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[10] The District Court in this case, without any question, held the government to the high burden of proof required in a denaturalization proceeding: "clear, unequivocal and convincing" evidence. See 571 F.Supp. at 73. Not only did the District Court state the burden of proof correctly, it clearly followed the strict standard it enunciated: it disregarded all of the testimony of all of the government eyewitnesses concerning specific acts of murder and atrocity committed by the defendant. It is very clear that the District Court found only those facts that it believed the Government had proved by "clear, unequivocal and convincing" evidence.

Cir. 1972), and therefore should not have been reversed by the panel.[11]

A. Section 2 of the DP Act Did Not Require Proof of "Personal" Participation in Persecution

The District Court found that the Lubomyl Schutzmannschaft directly carried out the Nazis' policies and orders vis a vis the city's Jewish inhabitants and further found that defendant occupied a responsible position in that police force. The Government agrees that these facts compel a conclusion that Kowalchuk assisted in the persecution of innocent civilians. Indeed, he must be deemed more, not less, culpable than the "cop on the beat." Cf. United States v. Dercacz, 530 F.Supp. 1348 (E.D.N.Y. 1982); United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981). It would indeed be an anomalous position to state that the more responsible someone became within a persecutive police force the less culpable he was.

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[11] The panel majority held that "[a]lthough [Kowalchuk] typed the duty rosters, which included assigning patrols within the Jewish ghetto, he did not decide who should go on these patrols, when they should occur, or even that they should occur at all." Slip Op. at 17. The only support the panel majority cited for this was a statement by defense counsel during the rebuttal portion of his oral argument to the Court. The panel majority then wrote that "[t]his was not controverted by the government." Slip Op. at 17, n.4. Although defense counsel's oral argument is obviously not evidence, the Government did indeed controvert this argument in its Appellee's Brief at page 12.

Defendant nevertheless argues that he did not personally participate in persecution and therefore escaped ineligibility under Section 2 of the DP Act. Appellant's Supplemental Brief pp. 12-13. However, the DP Act did not require personal participation in persecution. Section 2 of the DP Act prohibited the entry of any person who "assisted the enemy in persecuting civil populations." See Fedorenko v. United States, 449 U.S. 490, 495 n.3, 4 (1981). Compare Section 14(a) of the Refugee Relief Act, Pub.L.No. 203, 67 Stat. 400 (1953), which excluded from the United States those persons "who personally advocated or assisted in * * * persecution * * *" (emphasis added).[12] Congress obviously was able to require personal involvement in proscribed activities when it wished to do so. To judicially engraft the word "personally" onto Section 2(b) of the DP Act's prohibition against assistance in persecution would be akin to the error of implicating voluntariness in the same provision. The latter error in statutory construction led to the Supreme Court's decision in Fedorenko.

Fedorenko held that a conscripted concentration camp guard assisted in persecution, even though he was not found to have personally beat or killed prisoners. The Ukrainian Schutzmannschaft in Lubomyl served the same function as the

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[12] The Government also believes that Kowalchuk's activities did amount to personal participation in persecution. Neither the DP Act nor the Refugee Relief Act suggests that participation in persecution is limited to "hands-on" participation in killing, beating, etc. or only to those who ordered such actions. If that were the standard, then the entire stratum of mid-level officials and officers in the Nazi heirarchy would be relieved of culpability. That clearly was not Congress' intent.

Ukrainian concentration camp guards in Fedorenko -- it imprisoned the Jewish population under brutal and inhumane conditions, preventing their escape. The Jews were ultimately murdered, usually by mass shootings in which the police participated. A Ukrainian policeman who actually patrolled the Jewish ghetto is subject to denaturalization under the rationale of Fedorenko. See United States v. Dercacz; United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981). Certainly, Kowalchuk, who voluntarily joined the police and who assigned policemen to their guard duties, must also be deemed to have assisted in the persecution which resulted from his assignments.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT DEFENDANT'S VOLUNTARY ASSISTANCE TO THE ENEMY FORCES MADE HIM INELIGIBLE FOR A VISA UNDER THE DP ACT

Kowalchuk argues that he cannot be deemed to have voluntarily assisted the enemy forces, within the meaning of Section 2 of the DP Act, because of an exception for people who merely continued their normal (i.e., pre-war) occupations. (Appellant's Supplemental Brief at 9.) However, Kowalchuk does not fall within this exception.

Kowalchuk's service in the Lubomyl Schutzmannschaft did not represent a mere continuance of a peacetime occupation, as claimed on pages 29-30 of Appellant's Brief. Defendant testified that the Ukrainian militia was formed after the German occupation began in June 1941 (A1298) and that he commenced work for the militia in August 1941. (A1299.) Defendant stated that he had previously worked as a tailor. (A1246, 1252-1253.) The role of

the Lubomyl Schutzmannschaft in persecuting Jews and other civilians also shows that this police force did not merely continue to carry out normal peacetime functions. It is therefore clear that neither defendant nor the Lubomyl militia merely continued normal peacetime functions.

Accordingly, the District Court's finding that the Lubomyl Schutzmannschaft and Kowalchuk voluntarily assisted the Nazi forces was not clearly erroneous.[13]

Conclusion

The District Court concluded that Kowalchuk should be denaturalized because he illegally procured his citizenship. It was illegally procured because his entry into this country was not lawful -- a statutory prerequisite to naturalization. Specifically, Kowalchuk was not entitled to a visa to the United States under the DP Act because he had assisted the Nazis in the persecution of Jewish civilians in Lubomyl, because he voluntarily assisted the enemy forces of Nazi Germany and because he willfully misrepresented these activities when he applied for his visa. These conclusions were all premised on factual findings firmly rooted in the record of this case. Those findings are not

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[13] The panel majority cited three books at pages 19-21 of its decision to support its view that Ukrainians who collaborated with the Nazis did so involuntarily. None of those books are part of the record of this case; none was even offered into evidence. Indeed, defendant presented no evidence of lack of voluntariness in his service with the police. The testimony of record, including Kowalchuk's, clearly showed that he freely joined the police. (A1298-1300, 1250, 97-98, 110-111, 399-401, 429-432.)

clearly erroneous and therefore should not be reversed. Under prevailing precedent, these facts necessarily lead to the legal conclusion that Kowalchuk illegally procured his citizenship. The Government urges affirmance of that judgment.

Respectfully submitted,

Neal M. Sher by J.M.
Neal M. Sher
Director

Michael Wolf by J.M.
Michael Wolf
Deputy Director

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 or 633-2502

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Appellee's Supplemental Brief were mailed by express mail, postage prepaid to John Rogers Carroll, Esquire, One Independence Mall, 615 Chestnut Street, Suite 1206, Philadelphia, Pennsylvania 19106 this 8th day of April 1985.

Debby N Mauren