U.S. Department of Justice

Executive Office for Immigration Review

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Name: SCHEERER, GERMAR

A78-660-016

Type of Proceeding: Removal

Date of this notice: 02/09/2004

Type of Appeal: Case Appeal

Appeal filed by: Alien

Date of Appeal: 06/27/2003

NOTICE -- BRIEFING EXTENSION REQUEST GRANTED

Alien's original due date: 02/19/2004 DHS' original due date: 03/11/2004

- The request by the alien for an additional amount of time to submit a brief, which was received on 02/02/2004, is GRANTED.
- The alien's brief must be **received** at the Board of Immigration Appeals on or before 03/11/2004.
- The INS' brief must be **received** at the Board of Immigration Appeals on or before 04/01/2004.

PLEASE NOTE

WARNING: If you indicated on the Notice of Appeal (Form EOIR-26) that you will file a brief or statement, you are expected to file a brief or statement in support of your appeal. If you fail to file the brief or statement within the time set for filing, the Board may summarily dismiss your appeal. *See* 8 C.F.R. § 1003.1(d)(2)(i)(E).

The Board generally does not grant extensions for more than 21 days. Each party's current due date is stated above.

The Board rarely grants more than one briefing extension to each party. Therefore, if you have been granted an extension, you should assume that you will not be granted any further extensions.

If you file your brief late, you must file it along with a motion for consideration of your late-filed brief. There is no fee for such a motion. The motion must set forth in detail the reasons that prevented you from filing your brief on time. You should support the motion with affidavits, declarations, or other evidence. Only one such motion will be considered by the Board.

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Use of an over-night courier service is strongly encouraged to ensure timely filing.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual and Questions and Answers at www.usdoj.gov/eoir.

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	
Germar Rudolf (married Scheerer)	File No.: A 78 660 016
In removal proceedings	

RESPONDENT'S BRIEF IN SUPPORT OF APPEAL

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Immigration Judge properly made a finding that the respondent had knowingly filed a frivolous asylum application?

II. Whether respondent demonstrated his eligibility for asylum?

III. Whether respondent is otherwise eligible for withholding of removal?

SUMMARY OF ARGUMENT

Respondent Germar Rudolf (formerly Germar Scheerer) ("Scheerer" or "Respondent") is a German chemist who faces persecution by the German government for conducting research and publishing a report which questions whether mass gassings occurred at the Auschwitz concentration camp during World War II. While Scheerer's scientific findings were initially published together with a forward and an afterward written by others who used Scheerer's research as an opportunity to make political statements about the Holocaust, Scheerer's motivation for conducting and publishing his research is, at its foundation, one of scientific investigation. Scheerer filed a non-frivolous application for asylum based on his credible fear of persecution in Germany, evidence of past persecution, and certain future persecution as a result of severe and disproportionate prosecution by the German state under a law which prohibits pure speech and imputes political opinion to those who seek to research and question the generally held understanding of any aspect of the Holocaust.

After a hearing before an Immigration Judge ("IJ") and having presented an extensive record and two expert witnesses, the IJ, without any notice, warning, or opportunity to clear up any discrepancies, found that Scheerer knowingly pursued a frivolous application for asylum in violation of Section 208(d)(6) of the Immigration and Naturalization Act ("INA"). *See* 8 U.S.C.

§ 1158(d)(6). Since such a finding carries with it the most severe penalty of a permanent bar to any benefit under the INA, Immigration Service regulations require that there be sufficient opportunity for the applicant to account for any and all implausibilities or discrepancies. *See* 8 C.F.R. § 208.20. No such opportunity was provided by the IJ below to Scheerer, and the IJ failed to follow the requirements of 8 C.F.R. § 208.20 which is the error that requires reversal in this case. The finding makes even less sense in light of the IJ's comments about the seriousness of Scheerer's application, and the IJ's comments about the extensive record and evidence.

Moreover, on the merits, Scheerer satisfies all the elements for asylum. The IJ made an adverse credibility determination about Scheerer without any support in the record, and the IJ did not credit or adequately address Scheerer's position that he is being persecuted in Germany for his engaging in purely protected speech. Nor did the IJ analyze this case properly in terms of the German persecutors imputing a political belief upon Scheerer.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Germar Rudolf (formerly Scheerer), a native and citizen of Germany, was admitted to the United States on October 16, 2000, as a German national conditional parolee. *See* Copy of Passport, attached hereto as Exhibit A. Respondent entered the United States in search of a safe haven after having fled Germany in 1995 to avoid serving a 14-month prison sentence received for writing "revisionist" materials questioning whether mass gassings occurred at the Auschwitz concentration camp during World War II. *See* Copy of I-589, attached hereto as Exhibit B; Tr. at 238-9.

On October 17, 2000, therefore, Respondent filed a 22-page application for asylum in the United States based on past persecution in Germany and his well-founded fear of future persecution for imputed political beliefs. *See* Copy of I-589, attached hereto as Exhibit B.

On February 1, 2001, Respondent received a Referral Notice finding he had demonstrated a credible fear of persecution, but did not grant him asylum because he did not establish past persecution and a reasonable possibility of future persecution. *See* Copy of Referral Notice, attached hereto as Exhibit C. At the September 24, 2001, merits hearing, Immigration Judge Mackenzie Rast (the "IJ") found that Respondent was paroled into the United States and removable as alleged in the Services' superseding NTA. Tr. at 16-17. Under 8 C.F.R. Section 240.8(b), the burden was therefore on the Respondent to demonstrate he was not inadmissible. I.J. at 3-4.

On September 24 and 25, 2001, the Court heard extensive testimony on the merits of Respondent's applications for asylum and/or withholding of removal. Specifically, the Court heard testimony from Respondent and two expert witnesses, Drs. Gunther Amelung and Claus Nordbruch, and reviewed the application and supporting documentation submitted to the Court. The IJ repeatedly described the evidence submitted in support of Respondent's application for relief as extensive in scope and scale. Tr. at 18, 22, 25, 29, 149, 163, 208, 222, and 312. At no point during the proceedings did the IJ note factual discrepancies in Respondent's testimony, application, or supporting documents, nor did the IJ articulate any impression of frivolity in regard to Respondent's request for asylum. Rather, the IJ specifically recognized the "seriousness" with which Respondent prepared and submitted his argument. Tr. at 209.

During his hearing, Respondent presented evidence that he held a subjective fear of persecution for his publication of revisionist writings on the Holocaust in Germany.

Specifically, Respondent stated that he believes "if there is somebody who receives the harshest sentence for these alleged crimes committed in German history, I think it's going to be me" and that he would be imprisoned for "years and years" beyond his current sentence of 14 months if returned to Germany. Tr. at 245.

Regarding past persecution, Respondent offered the written and oral testimony of Dr. Gunther Amelung, a witness recognized by the Court as an expert on prosecution under Section 130 of the German Penal Code, the law under which Respondent was convicted. Tr. at 58. Dr. Amelung testified that the investigation of Scheerer in Germany was conducted by a special branch of the German state police tasked with handling political offenses, and that he was convicted under Section 130, which is used to prosecute pure speech crimes "for political reasons." Tr. at 61, 130; Amelung Report at 5-6, 25, attached hereto as Exhibit D. Dr. Amelung further stated that both versions of the law, as written when Respondent was convicted and as it was modified after his conviction, are used to suppress free speech in Germany, and to prohibit peaceful speech. Tr. at 73; Amelung Report at 10, Exhibit D. Dr. Amelung, who represented Respondent at his initial trial in Germany in 1995, stated that Respondent's ability to mount an effective defense was "none or very limited" because German law prevented any evidence regarding the veracity or scientific nature of Respondent's methods or conclusions from being heard. Tr. at 79-80; Amelung Report at 29-30, Exhibit D.

In addition, Dr. Amelung stated Respondent received an extreme sentence and an unfair verdict which was politically motivated. Specifically, that the court was heavily influenced by the recent "Deckert decision," in which the chief justice was threatened with impeachment, was "crucified by the media," and forced to retire for handing down a sentence on a historical revisionist viewed as too lenient. Tr. at 69-70; Amelung Report at 17-19, 21, Exhibit D.

Thus, while 80 percent of sentences for similar convictions were fines without jail time, and of the remaining 20 percent, three-quarters were suspended sentences, Respondent in this case received a sentence of 14 months in prison. Tr. at 83; Amelung Report at 39-40, Exhibit D. Dr. Amelung stated it to be his "conviction that this verdict was not fair, it was not just, and the only explanation you can get for that verdict is that it was politically motivated and the judges were very well aware of what happened ... in the Deckert case." Tr. at 84; Amelung Report at 31-32, Exhibit D. Finally, Dr. Amelung stated there is a "99 percent" likelihood that Respondent would be extradited to Germany should he return to the United Kingdom. Tr. at 87.

Dr. Claus Nordbruch, a court-recognized expert in the area of free speech in Germany as it relates to the prosecution of revisionism, then testified that the German government views historical revisionism, as a general rule, "as an extremist political view" and all works which question the popular understanding of the holocaust as "political ... speech." Tr. at 169-170, 178; Nordbruch Report at 5, attached hereto as Exhibit E. He testified that the theoretical guarantee of free speech in Germany "is not realized in practice," and that the prosecution of Scheerer is "now regarded as the most well-known case of suppression of freedom of speech in the Federal Republic of Germany." Tr. at 175, 178; Nordbruch Report at 8, 30, Exhibit E.

Finally, Respondent testified as to his motivation to pursue research into aspects of the Holocaust, the state-sanctioned past persecution he suffered as a result of his published findings, and his likely future persecution if removed from the United States. Tr. at 232-33, 237, 242-44 & 280-82. Respondent testified that when he began his research into the use of gas chambers by the German government, he was "pretty much convinced that the generally held views on the persecution of the Jews during the Third Reich period was genuine and true." Tr. at 282. However, after reading a report written by an American revisionist which he found to have

several shortcomings and deficiencies, he felt he had "new physical evidence that had never been presented before in any court of the world or in any historical discussion, and [he] understood it being a chemist . . . And having been massively unsettled in [his] mind about this [he] wanted to know in more detail" the truth of what happened. Tr. at 282.

Using resources available to him at the University of Stuttgart, Respondent began a study of the gas chambers at Auschwitz, which included a trip to collect samples from buildings on the site for study and which culminated in 1993 with his "Expert Report on the Formation and Detectability of Cyanide Compounds in the 'Gas Chambers' of Auschwitz." Tr. at 224-28; *see* Certified Translation of "Expert Report," attached hereto as Exhibit F.

Respondent testified that this "Expert Report," which was a scientific summary of his findings of the residual evidence of the use of Zyklon B gas at Auschwitz, concluded that cyanide gas could not have been used at Auschwitz to the degree described in eyewitness accounts. Tr. at 228. Respondent further stated that his report was first published with an epilogue and prologue not written or authorized by him in 1992. Tr. at 231.

There was nothing contained in Respondent's report, which he sought to publish himself and has since published, other than his research methods, findings, and conclusions regarding the use of poisonous gas based on his findings. Tr. at 230. Further, he has never written or verbally encouraged anyone to commit any act of violence, but rather, has discouraged any such acts. Tr. at 243.

While Respondent testified that he has never incited or encouraged anyone to engage in acts of violence, and the prosecution in his German trial did not present evidence of violence, he was convicted in 1995 of "incitement to racial hatred, incitement of the people, defamation of the dead, and libel" and sentenced to 14 months in prison. Tr. at 232, 236-38.

The German court in its decision found the respondent "categorized as a fanatical criminal of conviction," who had carried out "massive attacks on social peace" by publishing his report. *See* Certified Translation of Stuttgart Verdict at 123, attached hereto as Exhibit G.

The German court specifically recognized the scientific nature of Respondent's report, but found that because he corresponded with established historical revisionists, his intent was political:

> The accused followed the strategy of scientific objectivity very closely in his "Expert Report," which he began around the end of 1990. This work, which forms the basis of all his journalistic activities, is written in a scholarly style. It addresses a specific subject of chemistry (the problems connected with hydrogen cyanide) and avoids general political conclusions. In keeping with general revisionist strategy, however, its real intent is to present a specific point, then imply and suggest general conclusions.

See id. at 12, Exhibit G.

Respondent testified that before his conviction, the German authorities searched his home and confiscated his possessions in 1993 with approximately 10 police officers and two public prosecutors; they searched his home and that of a friend in 1994; and his home again in 1995. Tr. at 231-32, 237. In these searches, Respondent stated, the German government was not looking for unlawfully published materials "because the material was published. So there wasn't need to search for it anymore because it was public, they had it already. No, they were looking for evidence of my political opinion . . . ." Tr. at 280.

Respondent stated he was suspended from his job at the Max Planck Institute and then dismissed after the Industrial Court "decided that an employee with . . . dissenting views on history as [he had] can always be dismissed and as such has no rights as an employee." Tr. at 233. Respondent stated the University of Stuttgart similarly denied his final examination

through which Respondent would have obtained his Ph.D. in Chemistry under a law allowing an academic degree to be withdrawn "if there is a lack of academic dignity." Tr. at 233.

Finally, as a result of his prosecution and conviction, flight from Germany, and failure to find a safe haven in Spain or the United Kingdom, Respondent was divorced by his wife who took his two children with her back to Germany. Tr. at 242-44.

On June 3, 2003, the IJ entered a decision denying the Service's motion to pretermit, finding no evidence that the Respondent sought to achieve the persecution of others, "even assuming that the activities which led to respondent's conviction(s) were motivated by a desire to achieve persecutory ends, there is no indication in the record that he achieved his goal." I.J. at 19.

The IJ further concluded that Germany has a "legitimate right to criminally sanction those like respondent who engage in certain 'revisionist' activity . . . that respondent has been subjected to legitimate prosecution; and, that he has no well-founded fear of persecution in the future." *Id.* at 21. The IJ also determined "the record shows respondent is not above falsehood." *Id.* at 41. As evidence, scouring a mountainous record, the IJ cited a letter to Respondent's godmother in which Respondent obliquely denied use of the pseudonym Ernst Gauss and stated he avoided contact with the revisionist figure Remer, while in fact he did write under the name Ernst Gauss and did have contact with Remer, to whom he did not refer by name in his I-589. *Id.* at 42. Combined with the recognition that the German court heard 19 days of testimony in Respondent's original proceeding, the IJ therefore concluded that "respondent has presented the Court with an asylum application and supporting testimony which is to a significant degree false." The IJ found Respondent to have knowingly filed a frivolous application for asylum,

denied all requests for relief, and ordered Respondent deported from the United States. *Id.* at 43-44; *see* Copy of Order, attached hereto as Exhibit H.

STANDARD OF REVIEW

The scope of review by the Board of Immigration Appeals is *de novo* on all questions of law, discretion and judgment, and all other issues in appeals from decisions of immigration judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). Only facts determined by the IJ, including findings as to the credibility of testimony, are reviewed as to whether or not they are clearly erroneous. *See id.* § 1003.1(d)(3)(i).

ARGUMENT

I. THE IJ MADE A FINDING THAT RESPONDENT KNOWINGLY PURSUED A FRIVOLOUS APPICATION FOR ASYLUM WITHOUT GIVING RESPONDENT SUFFICIENT OPPORTUNITY TO ACCOUNT FOR ANY DISCREPANCIES OR IMPLAUSIBLE ASPECTS OF HIS CLAIM.

Without any notice or warning that he was about to impose the most severe immigration sanction available, the IJ below determined that Scheerer had knowingly pursued a frivolous application for asylum. *See* Decision at 42-43. Undersigned counsel was given no indication at anytime during the hearing before the IJ, or otherwise, that Scheerer's application was anything but well taken. Indeed, the IJ never signaled his intent to impose a finding of frivolousness, nor did the IJ give Scheerer any opportunity to explain the discrepancies or implausibilities highlighted by the IJ in his decision. As such, this finding of frivolousness is unsupportable and must be reversed. *See Farah v. Ashcroft*, 348 F.3d 1153, 1158 (9th Cir. 2003) (overturning conclusion that application was knowingly frivolous where respondent was not given proper

opportunity to explain all discrepancies in record in violation of 8 C.F.R. § 208.20) (citing cases).[1]

As the Ninth Circuit in *Farah* discussed, there are precious few reported cases where courts have upheld the bar imposed by a finding of frivolousness pursuant to 8 U.S.C. § 1158(d)(6). *See Farah*, 348 F.3d at 1154. In *Farah*, the IJ below had failed to follow the requirements of 8 C.F.R. § 208.20, and the Ninth Circuit focused on the fact that the IJ had not afforded *Farah* "an adequate opportunity to address those additional discrepancies ***before*** the ruling on frivolousness was made." 348 F.3d at 1158 (emphasis added). In the two cases the *Farah* court cited as having upheld the frivolousness bar, both respondents failed to take advantage of "ample opportunity to clarify" any contradictory testimony or discrepancies. *See Efe v. Ashcroft*, 293 F.3d 899, 908 (5th Cir. 2002); *Barreto-Claro v. Attorney General*, 275 F.3d 1334, 1338-39 (11th Cir. 2001) (agreeing that finding of frivolousness "shall only be made if the IJ or Board is satisfied that [respondent] had sufficient opportunity to account for any discrepancies or implausible aspects of his claim for asylum.").

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[1] 8 C.F.R. § 208.20 says:

> For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

Here the IJ below totally ignored the applicable regulation recounted in full *supra* at note 1. The IJ did not indicate which, if any, of the material elements of Scheerer's application had been deliberately fabricated. Nor does the IJ indicate in any way his satisfaction that Scheerer "has had sufficient opportunity to account for any discrepancies or implausible aspects of his claim." 8 C.F.R. § 208.20. And finally, the IJ did not indicate, when, if ever, Scheerer had the opportunity above to clear up discrepancies, given the requirement that the opportunity had to be given, "during the course of the proceedings." *Id.* Since the IJ did none of the things that he was required to under this regulation, the decision of the IJ ought to be reversed.

In addition to ignoring the regulation that controls, the IJ **did not** mention any discrepancies from the actual court record, and he **did** take notice of the extensive record and evidence that was presented. *See* Tr. at 18, 22, 25, 29, 149, 163, 208, 222, and 312. The IJ also took notice of the seriousness with which Scheerer prepared his application and conducted his argument. *See id.* at 209. With this as the bizarre backdrop for a finding of frivolousness, the only option for this Board is to reverse the IJ's finding.

II. THE IJ'S DECISION SHOULD ALSO BE REVERSED ON THE MERITS SINCE SCHEERER HAS DEMONSTRATED HIS ELIGIBILITY FOR ASYLUM.

A. Scheerer's Credibility Should Not Hinge on a Letter to a Godmother.

Before analyzing Scheerer's eligibility for asylum which this Board reviews *de novo*, just a word needs to be said about the IJ's credibility determination that "the record shows that [Scheerer] is not above falsehood." This was both gratuitous and imprecise on the part of the IJ. Upon a voluminous record and extensive testimony, the only thing that the IJ could seize upon to cast any aspersion on Scheerer's credibility was an April 30, 1994 letter from Scheerer to his godmother containing two half-truths: one was that Ernst Gauss was a person "mistakenly

identified" with Scheerer when in fact it was one of his pseudonyms; and the second was that he avoided any contact with the revisionist figure Remer, when some two years later he visited Remer in Spain.

There are so many problems with this that one hardly knows where to begin. First, why is this letter even relevant? It should be the representations on the asylum application that matter here and the IJ is at least careful to point out that Scheerer admits "Ernst Gauss" is an alias of his on his I-589. The representations on the I-589 concerning visiting Remer in Spain are plainly not false, but the IJ gratuitously calls them "deceptive" because Scheerer does not name Remer. Second, what were the nature and circumstances of this letter to a godmother? Was she dying? Was she having her house broken into by German authorities searching for documents? Was it a draft on a computer? How do we know if it was sent and received? Third, how do we know the representation about avoiding contact with Remer was not true when written? Scheerer did not go to visit Remer until more than two years after he had written this letter to his godmother. Does everything a man writes to his godmother have to be true several years after the statement was written? So much stock is put in this letter by the IJ and yet it is not a sworn statement or an immigration form subject to severe penalties for untruths. It is truly remarkable that these tiny inconsistencies are being seized upon by the IJ to render Scheerer's credibility to be worthless.

B. Scheerer Meets All the Eligibility Requirements for Asylum.

To be eligible for asylum in the United States, Scheerer must demonstrate that he has a well-founded fear of persecution in his home country, Germany, on account of his political beliefs. *See Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987). To demonstrate subjective fear of persecution, Scheerer must have a "general apprehension or awareness of danger in another country." *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

Scheerer testified, without contradiction, that he fears the German government will arrest and detain him for 14 months should he return to Germany. The evidence was also clear that Scheerer believes that when the German government releases him from custody, it will regularly and arbitrarily search his home, confiscate his property, arrest him for questioning, and deny him the opportunity to pursue his academic research. He has developed this fear based on the German government's previous conduct towards him and others in his research field.

Moreover, the German government has previously persecuted Scheerer for his political beliefs. An asylum applicant to the United States will demonstrate eligibility for asylum where he can demonstrate that his government has persecuted him in the past. *See Matter of B--*, 21 I&N Dec. 66 (BIA 1995) ("An applicant for asylum under section 208 of the Act may establish his claim by presenting evidence of past persecution in lieu of evidence of a well-founded fear of future persecution,") (citing 8 C.F.R. § 208.13(b)(1)); *see also*, *Vongsakdy v. INS*, 171 F.3d 1203, 1206-07 (9th Cir. 1998) (demonstrating past persecution satisfies requirement for asylum without having to establish well-founded fear of future persecution because law presumes well-founded fear absent rebuttal).

The Board of Immigration Appeals and the Courts have concluded that the following conduct can, on a case-by-case basis, constitute persecution: *arbitrary home incursion* -- *Singh v. Ilchert*, 69 F.3d 375 (1995) (arbitrary government raids of home can constitute persecution); *arbitrary arrest* -- *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (N.D. Cal. 1982) (arbitrary arrest grouped with other government untoward harassment can constitute persecution); *economic deprivation* -- *Mikhael v. INS*, 115 F.3d 299, 303 n.2 (5th Cir. 1997) ("The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other

essentials of life"); *Kovac v. INS*, 407 F.2d 102, 105 (9th Cir. 1969) (finding persecution where Yugoslavian government prevented applicant form working as highly skilled chef, forcing him instead to work as unskilled cook); *Berdo v. INS*, 432 F.2d 824, 827 (6th Cir. 1970) (finding that petitioner presented sufficient evidence that he had been subjected to deliberate imposition of substantial economic disadvantage, where he was first demoted to menial job, then threatened with denial of available education and training to secure highly skilled jobs); *Mesieh v. INS*, 73 F.3d 579, 584-85 (5th Cir. 1996) (loss of job due to religious beliefs).

This court should view the German government's conduct in its totality. *See Liev v. INS*, 127 F.3d 638, 647 (7th Cir. 1997) (endorsing "totality of the circumstances" test in measuring persecution); *Singh v. INS*, 94 F.3d 1353, 1358-59 (9th Cir.1996) (whether discrimination or harassment is sufficiently offensive to be considered persecution is decided on case-by-case basis by examining totality of the circumstances).

Most significantly for the case at bar, detention or prolonged confinement is *per se* persecution. *See Matter of Acosta*, 19 I&N Dec. 439, 445 (BIA 1987) (prolonged "confinement" is persecution); *Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir. 1961) ("persecution means confinement"); *Matter of Kale*, Adm. Dec. A9555532 (BIA 1958) (unpublished decision) (cited in *Sovich v. Esperdy*, 319 F.2d 21, 28 (2d Cir. 1963) ("Physical persecution contemplates incarceration.")).

Scheerer's unrefuted testimony was that should he return to Germany, the German government will execute a warrant for his arrest and will, thereafter, detain him for an extended time period. Tr. at 238-39. The documentary evidence showing fear of future persecution and detention was also evidenced by the Stuttgart decision sentencing Scheerer to 14 months in prison. *See* Exhibit E.

In determining whether a government's prosecution of its laws and resulting sentence equates to "persecution" this Board should examine a number of factors to determine whether government prosecution will amount to persecution. If any single one of these factors applies, the prosecution for such crime entitles the foreign national to asylum. *See Chang v. INS*, 119 F.3d 1055, 1062 (3d Cir. 1997) (asylum in United States will lie if foreign national can demonstrate that either: 1) the law is political in character;[2] or 2) the prosecution's motivation in bringing the prosecution was political; or 3) if the punishment meted out was extreme or disproportionate to the crime); s*ee also*, *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

Scheerer presented evidence to show that the German government's prosecution of him rises to the level of persecution because it fails not just one, but each of these three tests from *Chang*. Specifically, § 130 of the German Penal law, under which Scheerer was prosecuted, was enacted to discourage German right-wing parties and thus, by its very nature is political. *See* Amelung Report at 6-7, Exhibit D. Also, the German government prosecuted Scheerer because it wanted to discredit his scientific research in order to discredit its imputed political content. *See id.* at 5-6, 25; Stuttgart Decision at 12, Exhibit G. Finally, Scheerer's trial was permeated with unfairness, and his punishment was extreme and disproportionate. Tr. at 83-84; Amelung Report at 39-40, Exhibit D.

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[2] *See INS v. Aguirre-Aguirre*, ___ U.S. ___, 119 S. Ct. 1439 (1999) ("In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.") (citing *Matter of McMullen*, 19 I&N Dec. 90, 97-98 (BIA 1984); *Behzadpour v. United States*, 946 F.2d 1351, 1353 (8th Cir. 1991) ("To prove her criminal prosecution is political persecution, Behzadpour must show the crime is political . . ."); *Yang v. Carroll*, 852 F. Supp. 460, 468-69 (E.D. Va. 1994) ("petitioner may show that his criminal prosecution amounted to persecution by demonstrating (1) that his crime was political in nature.")).

Courts have found that should a law prohibit peaceful political expression it is *per se* political in character. *See Perkovic v. INS*, 33 F.3d 615, 622 (6th Cir. 1994) (finding that outlaw and punishment of "peaceful expression of dissenting political opinion . . . of which the government does not approve" to be per se political prosecution.)[3]

Judicial process is persecution where the foreign government's motive is to dissuade political expression. *See Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997) ("In determining whether a political offender can be considered a refugee, regard should be had . . . [to] the nature of the prosecution, and its motives . . .") (citing United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status at 86).[4]

Where a foreign government does not afford the foreign national a fair trial, the prosecution is *per se* political and invalid. *See Behzadpour v. United States*, 946 F.2d 1351, 1353 (8th Cir. 1991) ("To prove her criminal prosecution is political persecution, [the applicant]

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[3] "Although international law allows sovereign countries to protect themselves from criminals and revolutionaries, it does not permit the prohibition and punishment of peaceful political expression and activity . . . ." *Perkovic v. INS*, 33 F.3d 615, 622 (6th Cir. 1994) (citing Universal Declaration of Human Rights, U.N.G.A. Res. 217A(III), U.N. Doc. A/810 (1948) & Helsinki Final Act, Conf. on Security and Cooperation in Europe, 14 I.L.M. 1292 (1975) ("The United Nations Protocol on the Status of Refugees specifically speaks to the protection of aliens from punishment for such activities, and the provisions of the Protocol (a binding treaty to which the United States is a party) are deemed to have been incorporated into U.S. law.")); *see also Ubau-Marenco v. INS*, 67 F.3d 750, 758 (9th Cir. 1995) (finding persecution where applicant is prosecuted for his "outspokenness against the Communist system" under a law that was "designed and used to 'punish[ ] those who would block the creation of a new society.'") (internal citations omitted).

[4] *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996) ("In evaluating motive in a case in which prosecution for an offense may be a pretext for punishing an individual for his political opinion, the Board would examine a number of factors including . . . the nature of the prosecution and its motives."); *Behzadpour v. United States*, 946 F.2d 1351 (8th Cir. 1991) (to prove her criminal prosecution is political persecution, [the applicant] must show the government had an improper motive for pursuing her conviction); *Mabugat v. INS*, 937 F.2d 426 (9th Cir. 1991) (applicant must demonstrate "some improper government motive for pursuing the matter."); *Yang v. Carroll*, 852 F. Supp. 460, 468-69 (E.D. Va. 1994) ("petitioner may show that his criminal prosecution amounted to persecution by demonstrating . . . that the . . . government had an improper motive for pursuing his conviction.").

must show . . . she did not receive a fair trial.); *see also Yang v. Carroll*, 852 F. Supp. 460, 468-69 (E.D. Va. 1994) ("petitioner may show that his criminal prosecution amounted to persecution by demonstrating . . . that he did not receive a fair trial before being punished.").

Scheerer has demonstrated that he did not receive a fair trial. The German Constitutional Court can reject evidence, if the evidence being produced is considered "self-evident" pursuant to § 244, ¶ 3 of the German Code of Criminal Procedures. This means that any evidence, such as the Expert Report written by Scheerer for which he was prosecuted, is inadmissible because such material refutes or at least makes innocuous the official view on the history of the Holocaust. This made it impossible for Scheerer to present any exonerating evidence on his behalf that could potentially support his revisionist views or beliefs. In other words, even scientific truth is not a defense to the crime for which Scheerer was tried and convicted.

A foreign national's fear of persecution will be well-founded (objectively reasonable) where the foreign government seeks to overcome a belief through persecution or punishment, the foreign government is aware that the foreign national possesses this belief, and the foreign government is both capable and has the inclination to punish the foreign national. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *see also Ljucovic v. INS*, 76 F.3d 379 (6th Cir. 1996.); *Momalife v. INS*, 983 F.2d 1073, 1992 WL 389224 at *5 n.4 (7th Cir. 1992); *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998); *Barillas-Ibarra v. INS*, 145 F.3d 1336 (9th Cir. 1998); *Rahman v. INS*, 133 F.3d 932 (10th Cir. 1998).

In this case, Scheerer presented expert testimony that was uncontradicted showing that aim of § 130 of the German Penal Code is to punish those who hold the political belief that the Holocaust was not as it has been portrayed, Scheerer's 19-day trial and ordeal makes plain that the German government is aware of Scheerer's research and his beliefs in the accuracy of his

scholarship, and finally, there was extensive testimony by Scheerer and both his experts that Germany is both capable and inclined to punish Scheerer.

Having satisfied all the eligibility requirements for asylum in the United States it was unjust for the IJ to ignore the overwhelming and uncontradicted evidence of political persecution faced by Scheerer at the hands of a German government so scarred by events of the past that it cannot even bring itself to allow anyone to conduct free academic, scientific or historical research into those events. Indeed, the only way for the German state to protect itself, it seems, is to criminalize certain political speech, and to impute political beliefs to those academics who seek to publish their findings concerning the Holocaust as well. Even if the Board is not willing to question the German government's authority to prosecute revisionists, Scheerer has demonstrated that his prosecution rose to a level of persecution in its extreme and disproportionate application to him. Accordingly, asylum is appropriate in this case and the decision of the IJ should be reversed.

III. SCHEERER IS ALSO ELIGIBLE FOR WITHHOLDING OF REMOVAL.

The IJ below should have also found Scheerer eligible for withholding of removal under § 241(b)(3) of the INA since he showed without contradiction that it is more likely than not that his freedom will be threatened in Germany on account of his imputed political opinion. This is not even a really close call. Indeed, there was unrefuted evidence that Scheerer will face a 14-month prison term if he is removed to the U.K. and then extradited to Germany. *See* Tr. at 87, 238-39. There was further evidence that Scheerer will face even more jail time on account of other publications that he has made since leaving Germany. *See id.* at 238-39. Why is Scheerer subject to these prosecutions or persecutions in the first place? The reason is that he has been

identified by the German government, as a result of his scientific research and subsequent publishing activities, as a revisionist and this group, however fragmented or defined, has come to be associated in Germany with a "radical right" political movement. Regardless of whether Scheerer has ever had any exposure to any of the people involved in such political movements his writings have identified him and branded him as part of something political with or without his involvement. His political opinion, in other words, has been imputed to him. *See Briones v. INS*, 175 F.3d 727, 728-29 (9th Cir. 1999) (en banc) (holding informant in fierce ideological struggle subject to imputed political opinion).

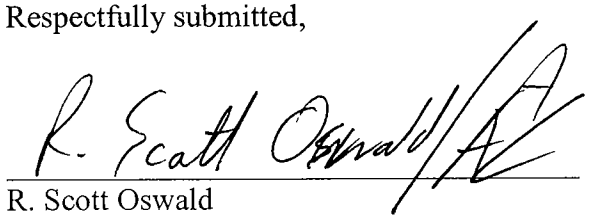
What could be more plain than that Scheerer's liberty will be taken for his exercising pure speech and on account of political beliefs being imputed to him? If an alien has a well-founded fear of persecution based on a political opinion that is imputed to the alien by the persecutor, then a valid basis for relief would exist. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (leaving open possibility that persecution based on a political opinion falsely attributed to victim could provide basis for relief). Here, the German government is falsely attributing to Scheerer a political opinion that would advocate anti-Semitism or even violence simply because Scheerer's academic research leads him to question whether and to what extent the mass gassings that have been alleged during the Holocaust actually took place as a provable, historical, fact. Scheerer testified, and again this was uncontroverted, that he has never advocated any sort of violence, and nor does he espouse anti-Semitism or similar political beliefs. He does not deny that genocide occurred during the Holocaust, and that a great many Jews perished at the hands of the National Socialist (Nazi) Party during World War II. His research and questions are simply whether the scope, location and manner of the mass gassings that have commonly been accepted to have taken place at Auschwitz, did in fact take place there. These are fair questions that ought

to be explored for the sake of history, and no one should be jailed or persecuted simply for asking them or for trying to get the history done right. Accordingly, Scheerer's application for withholding of removal should be granted and the IJ's decision reversed.

CONCLUSION

WHEREFORE, and for all the foregoing reasons, Respondent Germar Rudolf Scheerer, respectfully requests that the decision of the Immigration Judge be reversed.

Respectfully submitted,



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