U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Atlanta, Georgia

File A 78 660 016 June 3, 2003

In the Matter of

GERMAR SCHEERER,) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: No valid entry document.

APPLICATIONS: Termination; asylum/withholding of removal (statutory and treaty).

FOR RESPONDENT: FOR DHS:

R. Scott Oswald, Esquire John Doolittle, Esquire

DECISION AND ORDER

This matter is before the Court as a result of a charging document (Exhibit 1) in which respondent is charged with being removable on the above stated ground. In earlier proceedings, speaking through his counsel of record and by written response, respondent has admitted the truth of the facts alleged in the charging document, with some exception, and contested the charge of removability. More specifically, respondent has admitted the facts alleged in paragraphs 1, 2, and 4. He's also admitted the first portion of the allegations found

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in paragraph 3. He has denied that he was the subject of a conditional parole, good for 90 days, when he presented himself on or about August 18, 2000 at the port of entry in New York. He contends instead that he was admitted as a visitor and is therefore subject to removal only under an appropriate charged lodged under Section 237 of the INA. The Service in its charging document has instead charged him as an arriving alien who was conditionally paroled into the country, and therefore is subject to removal under a charge growing out of Section 212 of the INA.

The record contains several documents relating to the processing of respondent upon his arrival at a port of entry in this country (Exhibits 1A, 1B, 1C, 1D). Respondent has presented a photocopy of an I-94 (Exhibit 1C), which he received on August 9, 2000 at Newark. It is valid until November 18, 2000. There is no indication as to classification. Respondent's passport (Exhibit 1D) indicates an entry May 25, 2000, good to August 20, 2000. It is further indicated plainly that respondent was paroled. His status is indicated to be "CP." (i.e. conditional parole). The passport further indicates (page 6) the entry stamp at Newark on August 9. This stamp carries no classification and no date of expiration. On the following page (page 7) is found a later entry at the port of New York on August 18, 2000, which does note the status as "CP." A printout from the INS database

regarding port of entry matters indicates that respondent was subject of a conditional parole on August 9, 2000, at Newark and that this conditional parole was valid to November 8, 2000. A concise summary of respondent's port of entry history is found off the report of the Asylum officer who interviewed respondent on December 4, 2000, in connection with his application for asylum (Exhibit 1B). Respondent was interviewed under oath and asserted that his most recent entry into the U.S. was on October 16, 2000, at San Ysidro, California. It was his testimony to the officer that he gained entry by showing his passport and the Form I-94 (Exhibit 1C), which he had received at Newark on August 9, 2000. The officer goes on to note that the visa waiver pilot program, under which someone with a valid German passport could enter without visa, had expired prior to August 2000, and that the "conditional parole" technique was utilized to temporarily deal with individuals arriving from that country without visas. In the absence of a valid visa parole would be the only option available by means of which respondent could have acquired entry into this country at that time. Consequently whatever respondent may have understood to be his status, the record satisfies the Court that he has properly been termed in the charging document an arriving alien. As a result the burden is upon him to show "clearly and beyond a doubt" that he is entitled to be admitted

and that he is not inadmissible as charged. 8 C.F.R. Section 240.8(b). Respondent has not met this burden and the documents satisfy the Court that removability on the charge stated has been established by evidence which is clear and convincing as well.

Respondent seeks relief from removal through asylum and/or withholding of removal (under both the INA and the Convention Against Torture). To that end he has prepared and submitted to the INS a Form I-589 (Exhibit 2), which was subsequently referred to this Court for disposition. He has supplied a number of supporting documents. There are four items specifically relating to third party witnesses (Exhibit 3) and 111 other catalogued and tabbed items (Exhibit 4, pages 1 through 1,472) of other and various descriptions. It is to be noted that item 92 in this compilation is the Country Report of the U.S. Department of State regarding respondent's home country of Germany, which report was issued February of 2001. The record also contains as a separate exhibit the remaining portion of the report of the interviewing Asylum officer along with his interview notes (Exhibit 5), as well as an article from the Vanderbilt Journal of Transnational Law (Exhibit 6), published in 1994 and addressing certain aspects of law in Germany as of that date.

Respondent bears the evidentiary burdens of proof and

persuasion regarding his application for asylum and/or withholding of removal. He must establish the facts underlying his claims for such relief by a preponderance of credible, probative evidence. He must also show that the facts so established satisfy the statutory standards of eligibility for these forms of relief.

To be eligible for asylum respondent must meet the definition of a "refugee," which requires him to show past persecution or a well-founded fear of future persecution in Germany on account of race, religion, nationality, membership in a particular social group, or political opinion.

Fear encompasses both subjective and objective elements. The subjective element relates to respondent's state of mind and is satisfied if the fear expressed is deemed genuine. Even genuine fear, however, must meet the test of objective reasonableness. That is, it must have a basis in reality or reasonable possibility. To meet this requirement respondent must establish specific, objective facts which support a finding of past persecution, risk of future persecution, or both. Fear of persecution is well-founded only if a reasonable person placed in the same circumstances as those in which respondent finds himself would likewise fear persecution.

To be eligible for withholding of removal under Section

241(b)(3) of the INA, respondent must show that it is more likely than not his life or freedom will be threatened in Germany on account of race, religion, nationality, membership in a particular social group, or political opinion. To be eligible for withholding of removal under the Convention Against Torture he must show that it is more likely than not that, if now returned to Germany, he will be subjected there to "torture" as that term is defined in the implementing regulation. 8 C.F.R. Section 208.18(a)(1, 2). It is not necessary that he show that the anticipated torture will be inflicted upon him for any one or more of the specific grounds set out in the asylum and withholding statutes.

The record in this case reveals that respondent is a 37 year old divorced male, native and citizen of Germany who departed his homeland in the spring of 1996 because he was at that time subject to a 14 month jail sentence following his conviction for several criminal offenses by a German court. Rather than present himself or be arrested and serve his sentence, he went first to Spain where he remained for several months. He then traveled to the United Kingdom, where from approximately July 1996 until November 1999, he lived for the greater part of the period under a pseudonym. In late 1999, fearing that he would be extradited back to Germany, he left the

United Kingdom and came here. Following his initial arrival in this country he thereafter made several exits and reentries, the latter series of which is chronicled above. He now seeks safe haven here due to his expressed fear that if required now to return to Germany, he will be at risk of persecution in the form of the jail sentence which he faces as well as several further prosecutions, which he anticipates will be brought against him should he again fall subject to the jurisdiction of German courts.

More specifically, it is respondent's testimony that he is by academic training a chemist. He describes himself as being short only his final exam(s) to qualify for his Ph.D..

Some years ago, while pursuing his studies respondent read an article by an American engineer (Leuchter), which called into question the assertion that Jews had been systematically killed with cyanide gas at Auschwitz. This, respondent says, piqued his academic curiosity and he undertook some personal research using the sizeable technical library at his university (Stuttgart). The results were made available to some interested parties, one of whom was a lawyer representing the client charged under the law restricting promulgation of "revisionist" views regarding the Holocaust.

As respondent describes it "revisionists" are convinced

that the historical account of the Holocaust as it is commonly understood is flawed, is not supported by the true facts, and is detrimental to Germany's position on the world stage. That position would be enhanced if the exaggerations and inaccuracies which presently undergird common understanding of the subject were corrected. "Revisionists" seek to advance this remedial cause but face the obstruction of a government which has criminalized their efforts.

At the behest of this defense attorney, respondent went to Auschwitz, inspected the premises, took appropriate samples, and otherwise obtained what he needed to formulate a more definitive report. It was his finding that, while the delousing chambers had clear, chemical signs of cyanide use, the chambers in which the alleged mass killings were supposed to have occurred, manifest no such signs. From this respondent concluded that the mass gassings could not have happened as was commonly believed. His findings and conclusions were articulated in his "Expert Report" (Exhibit 4, pages 266-473). According to respondent this report is entirely scientific and devoid of anything inciteful or otherwise actionable.

Respondent made the Expert Report available to several defense attorneys at their request for use in pending criminal cases. Without respondent's knowledge or authorization it came

into the hands of General Otto Remer (who had already been convicted and sentenced -- but not yet jailed). Remer decided to publish it himself. Acting without respondent's knowledge or consent Remer added inflammatory materials (prologue and epilogue) and published the resulting product. Respondent's Expert Report thus became the hygienic meat between two slices of contaminated bread.

Respondent reports that Remer's publication, in which he was not complicit, resulted in great difficulties for him (respondent). Pressure from the chemical profession brought about his suspension from the Max Plank Institute where he worked. This was in about September or October 1993.

More significantly, in the same time frame, September 1993, respondent was arrested and his home was searched. He was booked and released. In early 1994 charges were filed, another search was made of his home, and a friend's home where respondent had stored some materials was also searched. Because of the criminal case pendency, respondent was not allowed to take his doctoral finals. He was also suspended by the university.

The criminal case proceeded through trial and respondent was convicted. He was sentenced to 14 months jail time (no probation). Respondent appealed. In September 1996 the conviction was upheld by the highest court in Germany to which

such a case might be appealed. Therefore, in August 1996 respondent was ordered to report and serve his sentence (Exhibit 4, page 217).

Also as a result of the finality of the conviction, respondent was terminated by the Max Plank Institute and dismissed by the University of Stuttgart, though he had only his final exam(s) to complete in order to qualify for his Ph.D.. He tried to fight the employment termination in the Industrial Court but was unsuccessful. He chose not to fight the academic dismissal because he knew that German constitutional law countenances the withholding of a degree, or even the withdrawal of a degree already granted, where an individual has used his academic credentials to further commission of a crime. See, Exhibit 4, page 1305; pages 1249-1261.

While respondent was awaiting a decision on his appeal he found himself subject to further search and seizure efforts by the government. These were related to potential prosecutions for yet other alleged offenses. Thus in late March 1996, respondent fled Germany to Spain to avoid, one, serving the 14 month sentence; two, the anticipated second prosecution; and, three, a likely third prosecution.

Respondent expected to find haven in Spain. However, after a few weeks there he learned that Spain intended to adopt

laws similar to that under which he had been convicted. Fearing he would then become subject to extradition, in late June he fled again, this time to the United Kingdom (U.K.). In about July 1997 he learned that the house of his parents had been searched in connection with an Internet publication of his. Hence, he relocated within the U.K. and adopted an alias (Exhibit 4, page 1464).

In August 1999, a London newspaper began a repertorial series noting his presence in the country and urging his extradition. Respondent consulted a solicitor and learned that extradition under British law was not only possible, but likely. He therefore fled yet again and made his way here as related above.

Respondent's defense attorney, Dr. Gunther Amelung, appeared as a witness and provided a written statement (Exhibit 4, tab 4). See also, Exhibit 4, pages 1334-1428, pages 1313-1314. It is his testimony that he has been counsel(both retained and appointed) in about 20 cases involving so called section 130 prosecutions, i.e. those of the nature which resulted in respondent's convictions. Of these three were writers (e.g., respondent) and the others were charged with either oral violations or distributing the writings of others.

He views the German legal system as a good one in which

highly qualified attorneys represent their client's interests. This is borne out by the discussion of that system found in the Country Report of the U.S. State Department (Exhibit 4, item 92). Following months of preparation respondent's trial consumed 19 days. It is Amelung's view that the court accepted the prosecution's misconception of respondent as having a political motive for his Expert Report. He feels the court wrongly attributed to respondent responsibility for not only that report, but also for the prologue and epilogue. Erroneously rejected was respondent's testimony that those two additions were appended without his knowledge or authority. The panel, according to Amelung, deemed respondent to be a liar. Furthermore, the court refused to allow respondent to present any proof of the scientific accuracy of his report.

Amelung also views the sentence imposed to be improper. He cites the Deckert case as the basis for his concern. Deckert had been convicted of a section 130 offense and sentenced to a suspended one year term. This sentence was roundly and widely criticized. The prosecution appealed it; it was overturned. On resentencing Deckert received a two year term which was not suspended. Amelung believes all subsequent such cases, including respondent's, were treated differently in light of the uproar over Deckert. In his view the court in sentencing respondent was

adversely influenced by the Deckert scandal and overly harsh in imposing sentence on him. He agrees, however, that respondent is not the only "revisionist" to be sentenced to jail and that the 14 month sentence imposed is well within the statutory maximum of five years.

Finally, Amelung confirmed that respondent pursued his appellate rights to the fullest. He sought and obtained review up to and at the highest German court for criminal appeals, a forum in which constitutionally-based challenges can be entertained and decided. With appellate failure came finality of the conviction(s) and a directive that respondent report for service of his sentence, beginning August 26, 1996 (Exhibit 4, page 217). His failure to comply, Amelung notes, would routinely result in issuance of a bench warrant for his arrest.

Respondent's other witness was Dr. Klaus Nordbruch. He provided evidence in both oral and written form. See Exhibit 3, tab 2; Exhibit 4, pages 611-615, pages 1108-1166. In his testimony he presents himself as a scholar who, though not himself a "revisionist," has knowledge of the subject due to his interest in free speech rights in Germany.

He classifies revisionism as being neither a political movement nor a political philosophy. Rather, revisionists are researchers/scholars who question the accuracy of certain

commonly accepted historical accounts of Nazi atrocities, and who want to see history revised accordingly.

The government, on the other hand, sees the revisionists' position as extremist and seeks to censor and suppress it. He notes that revisionists' work can be "indexed" and thus neither advertised for sale nor exposed to juveniles. If sufficiently provocative it can be totally banned. Consequently, Nordbruch views Germany as having free speech in constitutional theory but not in practice. It is his opinion that through this suspension of free speech, the German government has accumulated some 15,000 "political prisoners." This is more, he says, than were victimized by the old East German regime.

For his part respondent asserts that his work is all scholarly, devoid of incitement, and should be protected under German law, not prosecuted. He is self-described as a "revisionist," but disavows being a "Holocaust denier." Rather, he believes that there was a Nazi plan to eliminate the Jews, that there was persecution of the Jews, and that somewhere between 300,000 and 1,000,000 Jews died at the hands of the Nazis. Thus, he denies not the fact of the Holocaust but its asserted magnitude and the means of its implementation (e.g., the use of mass gassing).

He believes that if he is returned to Germany he will not only be required to serve the 14 month sentence already imposed, he will also face several more prosecutions. These include not only those predicated on his works published prior to his exit from Germany, but also yet more predicated on what he has done while outside that country. Respondent notes that he has continued to produce actionable materials: A quarterly journal which he edits, publishes, and to which he contributes; books; and in the content of the three largest revisionist websites in the world, for each of which he serves as "webmaster."

Respondent's personal view as advanced in his testimony seems to be that German law is wrong-headed, not that he was treated unfairly under the terms of an otherwise proper law. For example, regarding the searches made of his premises, he states his understanding that where there is suspicion of a crime such a search is legally authorized. He makes no claim that the searches he endured were contrary to that proposition or otherwise tainted. Rather, his dissatisfaction rests upon the proposition that he had done nothing in the first instance which ought to be recognized as a crime, and therefore formed the predicate for such searches.

Similarly, he declares that the German constitution

provides for free speech, except for that which is prohibited by the penal code. Thus, if one's speech impinges on the rights of others, then one's right to free speech can be seen as secondary to the rights of those others. With this proposition respondent voices no opposition. Rather, his concern is based on the proposition that he is a scholar whose research should be protected and view as impinging on no one's right. (If there has been impingement it is due not to his activities, but solely due to the misuse of his scholarly product(s) by others.)

Respondent's counsel is more expansive in his analysis of the issues. He clearly contends that respondent has suffered past persecution by means of a prosecution which was persecutory in both its underlying concept and its execution. As a victim of past persecution, respondent therefore enjoys the presumption of a well-founded fear for the future. The basis asserted for this past persecution is twofold:

First, counsel argues that respondent's writings constitute "pure political speech" which is not only protected here but ought to be protected as well in Germany. That it was prosecuted there rather than protected, in counsel's calculus, constitutes per se persecution rather than legitimate prosecution.

Second, it is contended that the prosecution was

flawed, not only substantively but also procedurally. Counsel relies here upon the fact that it took place in the aftermath of the Deckert case. From this counsel draws the conclusion that the court panel was politically biased and motivated to see that its members did not replicate the public relations error of the Deckert court. Counsel also relies upon the exclusion from evidence of anything the purpose of which was to prove the accuracy of respondent's "Expert Report." Finally, counsel contends that the sentence imposed on respondent was excessive and disproportionate, thus rendering manifest the political nature of the proceedings. Counsel also notes as past persecution respondent's loss of his job, his Ph.D. degree, and as a result, his inability to practice as a chemist. Also advanced is the proposition that respondent has a well-founded fear due to the outstanding arrest warrant as well as the prospect of further prosecutions.

Counsel for the Government disputes this analysis and asserts that the German legal system, like the legal system here, has limits on free speech. Respondent overstepped those limits and was, as a result, held to account by a highly developed and sophisticated legal system. He received due process, was convicted, and sentenced to a term well below the statutorily established maximum. Government counsel urges that this Court

should not second guess the German court, cannot go behind the conviction (as respondent's claim of innocence would require), and should view respondent as a fugitive from prosecution, not a refugee from persecution.

The first issue which must be addressed is the Government's motion to pretermit. Though made early on in the proceedings, it was taken under advisement pending development of the evidence. This motion is predicated on the proposition that respondent should be barred as one who has "ordered, incited, assisted, or otherwise participated in the persecution of any person" on account of an enumerated ground. See, INA Section 101(a)(42)(B). Counsel argues that respondent's conviction(s) are adequate to bring him within the terms of the bar.

In determining whether the particular crimes for which respondent was convicted are such as to bring him within the barred category, the Court must function without the guidance of any directly applicable case precedent. Neither the BIA nor any federal court seems to have addressed the question. There is a line of cases dealing with denaturalization and/or the Displaced Persons Act of which Fedorenko v. U.S., 449 U.S. 490 (1981) is seminal. The BIA has dealt with the asylum bar in the context of terrorism [Matter of McMullen, 19 I&N Dec. 90 (BIA 1984)] and civil war [Matter of Rodriguez-Majano, 19 I&N Dec. 811 (BIA

1988)]. All have been reviewed and considered, but none provides an adequate basis for disposition of the instant issue.

Rather, the Court turns to the plain language of the statute and concludes that inherent in all permutations of the bar, there is the concept of actual, present, or past persecution. For example, one cannot "assist" that which does not exist; one cannot have assisted that which did not exist. There must be a temporal coincidence of the persecution and of the activities said to fall within the terms of the bar. Thus, writing anti-Semitic articles for a German newspaper in the years immediately preceding and during World War Two qualitatively differs from the same type of activity presently. See, U.S. v. Sokolov, 814 F.3d 864 (2nd Cir. 1987).

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. Similarly, the record will not sustain the proposition that there presently exists (or did exist at the time of his activities) "a climate in which such persecution is acceptable" and that he helped create that climate. Id, at 874. That inflammatory activity is criminally actionable under German law is indicative of the government's effort to prevent the emergence of any such climate.

Thus, even postulating such a malevolent goal on respondent's part, he was at worst engaged in an "attempt" as the Court can find in the statutory language no reference, direct or implicit, to "attempt," or "conspiracy," or "solicitation," the Court must conclude that respondent's activities as reflected in his conviction(s) do not fall within the terms of the bar. This analysis is consistent with the proposition adopted in another context by the Board in Matter of Fedorenko, 19 I&N Dec. 57, 69 (BIA 1984)(holding that the objective effect of an alien's actions, not his motivations and intent, controls in determining whether he "assisted" in persecution). See also, Rodriguez v. Majano, 19 I&N Dec. 811 (must look to objective effect of the individual's acts, not simply the intent behind those act). The motion to pretermit therefore must be denied and the relief application considered on its merits.

As to the merits, the threshold issue is past persecution and whether it has or has not been established in the evidentiary record. Respondent's grounds for past persecution are outlined above. Most bear directly on the propriety of his conviction(s). Loss of his Ph.D. and of employment indirectly have the same foundation since both were precipitated by the successful criminal prosecution brought against him. If past persecution is shown, then respondent benefits from the

presumption of a well-founded fear for the future. If it is not shown then he must establish a well-founded fear independently in order to qualify for asylum. In this case, however, the bases for his future concerns are reiterations of the bases advanced as to the past. All turn upon the legitimacy of the limitations on "revisionist" free speech incorporated in the German penal code, and in particular, their applicability past, present, and future to respondent.

Thus, that which is dispositive in this case is, at its essence, whether Germany has a legitimate right to criminally sanction those like respondent who engage in certain "revisionist" activity, or whether, in so doing, Germany oversteps the bounds of legitimate prosecution and engages in persecution. For reasons stated below, this Court concludes that for purposes of immigration law Germany does have such a right; that respondent has been subjected to legitimate prosecution; and, that he has no well-founded fear of persecution in the future.

First for consideration is the claim that respondent has been persecuted through loss of his job and/or his Ph.D.. With regard to both, respondent had legal remedies available under German law. He challenged the employment termination but lost. He chose not to pursue a remedy against the university

over exclusion from his finals, not because of any absence of a remedy but rather because he calculated that he would lose there too, given established law on the subject. The prevailing law binding on this court is likewise unfavorable to respondent. "The internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice." Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985).

Respondent's conscious choices and actions indicate that he is, in any event, vastly more devoted to his "revisionist" endeavors and role than he is to pursuing chemistry as his life's work. Were this not so he would have chosen a more prudent path, one designed to protect rather than compromise his academic and professional opportunities. Instead, as he admitted to his mother, he knew the risks and was prepared to sacrifice his professional future. Exhibit 4, page 118. It is also abundantly clear from the record that respondent is an exceedingly versatile and talented individual. To foreclose for him one field of endeavor, such as chemistry, hardly renders him economically inert.

Respondent's claim rests more heavily on the proposition that his trial, conviction(s), and sentence were fatally flawed. Here he cites: One, a court biased in its handling of his case due to the "Deckert scandal;" Two, the

exclusion from evidence of that which might prove the truth of his report; and, three, a sentence which was extraordinary and/or excessive.

Regarding Deckert, two observations:

One, respondent was arrested September 1993, almost a year before the emergence of the Deckert controversy in August 1994. Thus, while respondent's trial commenced three months post-Deckert, it can hardly be said that the prosecution itself was in any way precipitated by Deckert.

Two, the judges presiding in the Deckert trial did receive criticism for their lenient sentence. Some politicians called for impeachment (something not unheard of in this country). Furthermore, the politicians modified the law in a paradigmatic response to public concern. But it must also be noted that the Judge who "voluntarily" retired did so under criticism for his personal, out-of-court communication, which constituted "vouching" for Deckert, thus giving at least the appearance of an inappropriate bias for Deckert. See Exhibit 4, pages 1288, 1292.

The Deckert affair may or may not have been a spectre hanging over the collectives heads of the judicial panel hearing respondent's case. This Court declines to accept the invitation of respondent's counsel to simply assume that it was. This is an

argument that should have been made, and presumably was made, during the thorough appellate review afforded respondent by the German legal system. If so, it was made unsuccessfully. As advanced here the argument is simply: "Post hoc, ergo propter hoc." That, standing alone, is flawed logic which this Court declines to accept.

As to the exclusion of certain evidence, the applicable rule, section 244(3) allows for exclusion of proffered evidence where the matter upon which it bears is "self-evident." See, Exhibit 4, page 1271. This rule has been upheld by the German constitutional court (Exhibit 4, page 1358). The trial court viewed mass murder of the Jews as self-evident historical fact. It therefore excluded that which respondent wished to offer to show the contrary (Exhibit 4, page 120). This is the net equivalent of an irrebuttable presumption. Under German law it is, in effect, irrebuttably presumed that the Holocaust occurred in a way consistent with orthodox historical accounts. There is nothing inherently unfair about such presumptions. They exist in our system as well. For example, a DUI defendant will simply not be permitted to adduce evidence designed to show that, even though his blood alcohol level was above the statutory presumptive level, he, nevertheless, was not in actuality impaired as a driver. Similarly, one charged with possession of

a short-barreled shotgun will be barred from trying to prove a benign motive for that possession. The offense is one of strict liability and motive is neither an element nor a defense. This Court concludes that the existence of section 244(3) in German law and its application in respondent's case did not render his trial fundamentally unfair.

Respondent's counsel describes the 14 month non-probationary sentence as disproportionate and reflecting a "no mercy" attitude on the part of the court. However, the statutory maximum sentence is five years (Exhibit 4, pages 128-129). Thus, respondent's sentence of 14 months represents but 23.3 percent of that which the court might legally have imposed. The quantum of mercy embodied in this sentence is beyond determination, but there is no protected right to a merciful sentence, only to one within the legally authorized boundaries.

Others have been sentenced more harshly. Deckert received on resentencing 24 months without probation (Exhibit 3, tab 4, page 22, section 4). Remer received a sentence on October 22, 1992, of 20 months; he appealed and, on November 16, 1993, lost (Exhibit 3, tab 4, page 44, section I). Before serving any of this sentence he fled to Spain (1994) where he died in 1997 (Exhibit 4, page 1031). No rigorous study of German sentencing practice is found in this record. Two examples are contained in

that record and they do not support the asserted disproportionality of respondent's sentence.

In imposing a 14 month sentence the court offered a thorough explanation for its decision (Exhibit 4, pages 122, 123). Reasonable people might differ regarding the nature of a sentence appropriate for respondent's crimes, but it simply cannot reasonably be said that the German court imposed its sentence without justification. The totality of the record does not reveal any substantial basis for finding the 14 month sentence to be disproportionate, and certainly either "especially unconscionable" or "merely a pretext." See, Abedini v. INS, 971 F.2d 188 (9th Cir. 1992).

Attention must finally and mainly be afforded respondent's principal argument, vis, that the prosecution against him (and more of which he faces if returned to Germany) is not simply prosecution, but persecution. He seeks to have this Court go behind his conviction and, in effect, provide him with a de novo determination of his guilt or innocence. This is a request which this Court cannot and will not grant.

This Court must look to judicial records to determine whether respondent has been convicted of a crime. It is not permitted to retry the issue of respondent's guilt or innocence. Matter of Roberts, 20 I&N Dec. 294 (BIA 1991) citing Matter of

Contreres, 18 I&N Dec. 30 (BIA 1981); See also, Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). While the circumstances of a crime may be examined to determine if a favorable exercise of discretion is warranted, it is impermissible to reassess an alien's ultimate guilt or innocence. Id at 301 citing Matter of Edwards, 20 I&N Dec. 191 (BIA 1990)(citing Matter of M-, 3 I&N Dec. 804, 805 (BIA 1949)); See also Trench v. INS 783 F.2d 181 (10th Cir.) cert. denied 479 U.S. 961 (1986).

Similarly, this Court cannot entertain a collateral attack on a judgment of conviction unless that judgment is void on its face (such as one entered by a court clearly without jurisdiction over the subject matter); this Court cannot go behind the record of conviction to determine respondent's guilt or innocence. Matter of Rodriguez-Carrillo, 22 I&N Dec. 1031, 1034 (BIA 1999); Matter of Madrigal, 21 I&N Dec. 323 (BIA 1996); Matter of Fortis, 14 I&N Dec. 576 (BIA 1977); Matter of Sirhan, 13 I&N Dec. 592, 595 (BIA 1970). The same rule applies to adjudications of foreign courts. Once guilt of an offense has been found and a conviction entered by a foreign court with criminal jurisdiction and it has not been overturned on appeal, "it is not our place to retry that issue." Matter of McNaughton, 16 I&N Dec. 569, 571 (BIA 1978). See also, Chrabamontea v. INS,

626 F.2d 233 (8th Cir.), cert. denied 434 U.S. 853 (1977). Cited in Madrigal supra at 327.

The established law distinguishing between prosecution and persecution is not helpful to respondent. A fundamental proposition incorporated in this law is that punishment for violation of a generally applicable criminal law is not persecution and "does not implicate any grounds for asylum." El Balguitti v. INS, 57 F.3d 1135, 1136, n.14 (8th Cir. 1993).

Two other illustrative cases are Chanco v. INS, 82 F.3d 298 (9th Cir. 1996) and Fisher v. INS, 79 F.3d 955 (9th Cir. 1996). Chanco was a Philopine military officer involved in a coup d'etat effort. He claimed he faced persecution, not prosecution, if returned to his homeland. The Circuit Court concluded that, even where the punishable act is committed out of political motives "if the anticipated punishment is in conformity with the general law of the country concerned, fear of such punishment will not in itself make the applicant a refugee." Id at 301.

Fisher claimed she would be persecuted "for religious and/or political reasons" by prosecution for violating Iranian dress and conduct rules applicable to women. The court rejected this claim and found that she had only "established that [she] faces a possibility of prosecution for an act deemed criminal in

Iranian society, which is made applicable to all [women] in that country." The court noted the general rule that prosecution does not amount to persecution. It also noted the two exceptions to this rule: Disproportionately severe punishment and pretextural prosecution. Id at 962.

Respondent makes no claim that he was a victim of invidious selective prosecution. If anything he asserts that the German government prosecutes all those deemed in violation where a prosecutable case can be made. His claim is that he was wrongly targeted, not invidiously, but because he was factually innocent. In the absence of selective enforcement and/or disproportionately severe punishment, the general rule applies to this respondent just as it did to Chanco and to Fisher.

Counsel urges that respondent should not be required to renounce "fundamental beliefs." Putting aside the issue of whether the use, vel non, of mass gassing at Auschwitz qualifies as a "fundamental belief" the fact is that the German law does not require renunciation. Respondent can believe as he chooses. What is proscribed is public advocacy of certain beliefs. He is not asked to renounce any belief, just to abstain from advocating them to others. Defendant's own evidence indicates there is no absolute ban. For example, Dr. Nordbruch distinguished between that which is banned and this which is "indexed." The latter

cannot be made available to juveniles and/or advertised, but is otherwise permitted. A news account (Exhibit 4, page 1054) reports a case in which the lower court found no violation because the accused had sent letters containing challenged information to only a limited number of recipients. Therefore he was not viewed as propagating a denial of the Holocaust. Bavaria's highest court reversed and upheld the charges, noting that: The defendant's letters denying the use of gas at Auschwitz had been sent to members of parliament; the purpose was to propagate his views (and presumably influence public policy); the number of recipients was large, recipients were informed the letters could be passed on to others. This defendant was held to answer, but the standards used by the court clearly implicate a propagation threshold below which otherwise actionable communication is permitted.

Respondent's counsel chiefly argues that his client's right to engage in "pure political speech" without being prosecuted for it must be protected unless that speech falls under some exception recognized as beyond protection by our Constitution. Counsel emphasizes that respondent's speech involved no imminent danger and that no violence was alleged, thus it would enjoy protection here.

It is appropriate at this point to observe that the

crime statutory provision under which respondent was convicted, section 130, is not simply one of censorship. In its language it primarily focuses on "safeguarding public peace." See Exhibit 6, page 9, section 1. Section 131, under which respondent was also convicted, has a similar purpose (Exhibit 6, page 9, section 2). Also worthy of note is that Germany is not alone in employing such restrictions. According to an Esquire magazine article published February 2001, as of that date similar proscriptions of speech existed "not just in Germany, but in Holland, Belgium, France, Spain, Switzerland, Austria, Poland and Israel...." (Exhibit 4, page 1051). Human Rights Watch commentary cites the "different and conflicting standards in this area" of the law and recognizes the historical context for Germany's restrictions. While the organization feels those restrictions should be loosened, it does not attribute to them any invidious, persecutory character (Exhibit 4, page 572).

Certainly the right of free speech is not absolute in this country and restrictions on it do not necessarily involve violence or imminent danger. One cannot yell "fire!" in a crowded theater; one cannot incite to riot. Pornography and/or obscenity are restricted and/or banned, particularly where minors are involved. Where classified information is involved, revelation of it is subject to prosecution. This can be in the

realm of national security or where personal privacy rights are involved. In the immigration context there are matters the revelation of which can bring sanction. Also actionable are criminal libel, criminal contempt (by means of speech), and perjury or false statement, as, e.g., on a police report. There is no generic requirement that such actionable speech be accompanied by any actual adverse impact, result. The threat or mere potential for same may be enough to justify restriction. For example, where classified information is revealed there is no need to prove actual harm to national security. Similarly, perjury is actionable even where it has not resulted in a miscarriage of justice.

Counsel is correct that respondent's particular activities do not fit within the inventory of those which has been established as actionable under our system. However, just because German law establishes standards different from our own does not require that the motives of the German government in seeking to uphold those standards be deemed, ipso facto, tainted and improper.

That foreign countries need not meet our standards is a principle well-embodied in asylum law. For example, compelling one to face death in an environment of armed combat is at least as severe an intrusion on personal freedom as is imposition on

the limits on speech in contention here. (In our Declaration of Independence reference to life precedes reference to liberty). Yet, the draft laws of foreign governments need not conform to U.S. standards. Foroglou v. U.S., 170 F.3d 68 (1st Cir. 1999) holding that "the asylum statute does not inflict on foreign governments the obligation to construct their own draft laws to conform to this nation's own highly complex equal protection jurisprudence." Id at 72.

In Saleh v. INS, 962 F.2d 234, 239 (2nd Cir. 1992) Saleh faced a death sentence at the hands of a Sharia court. He claimed religious persecution because that court would not have jurisdiction if either he or his victim were other than Yemeni Muslim. The court agreed that "the Yemeni dispensation is foreign to American laws and morays under the regime of the First Amendment." Id at 239. Nevertheless, the court concluded that asylum law "does not call upon this court to substitute domestic standards for those enforced under Yemeni non-discriminatorily in accordance with the Muslim religion." Id. This defendant faces not death but 14 months of quite humane incarceration. In Bustanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) the claim made was that Bustanipour faced persecution as a drug trafficker because his country, Iran, imposed the death penalty, one "frequently administered after summary proceedings that would be

regarded in this country as a travesty of due process of law." The court rejected this claim and found respondent to be facing prosecution, not persecution. While the circumstances in these cases differ (drug trafficking, for example, is a quite different offense from that at issue here), both cases clearly stand for the proposition that other countries do not engage in persecution just because they pursue jurisprudential rules different from our own and detrimentally so as far as the individual defendant is concerned.

The above cases are not binding here in the 11th Circuit. BIA decisions are, however, and the adopt the same general principles. For example, in Matter of Chang, Int. Dec. 3107 (BIA 1989), Chang made a claim analogous to that now made by respondent, namely, that his right to have children enjoyed absolute protection under the U.S. Constitution and that abridgement of that right by China was persecutory. The BIA rejected this claim and held that "the fact that a citizen of another country may not enjoy the same constitutional protections as a citizen of the United States does not mean that he is therefore persecuted on account" of a protected ground. Since this decision the Congress has enacted specific statutory provisions which deal with Chang's circumstances. But the BIA's decision has itself never been disturbed and the principles upon

which it was decided remain operative.

A similar pronouncement of these principles is found in Matter of Linnas, 19 I&N Dec. 302 (BIA 1985). Linnas had been sentenced to death in the old Soviet Union "in what appears to have been a sham trial." The BIA held that our "Constitution does not extend beyond our borders to guarantee the respondent fairness in judicial proceedings in the Soviet Union. Moreover under our immigration laws there is no requirement that a foreign conviction must conform to our Constitutional guarantees. Thus, due process is not violated by the respondent's deportation to the U.S.S.R.." Id at 310 (citations omitted). Affirmed, Linnas v. INS, 790 F.2d 1024, 1032 (2nd Cir.) (holding deportee has no constitutional right to due process in native country), cert. denied, 479 U.S. 995 (1986).

In support of his "pure speech" proposition, respondent's counsel relies upon Perrovic v. INS, 33 F.3d 615 (6th Cir. 1994). This case is binding only in the 6th Circuit. It is also distinguishable on its facts. Perrovic engaged in clearly political acts, which acts were not simply actionable under established, generally applicable law, they were anti-government in nature. He was detained but neither charged nor tried. While detained he was subjected to physical abuse (at least once to the point that he was "unable to walk"). Id at

617. Also, his life was threatened by government authorities. No such abusive tactics are involved here. Rather the German authorities proceeded entirely in accord with well-established practices which constitute due process within the German system. Counsel agrees that he can cite no authority issuing from either the BIA or the 11th Circuit in support of his proposition. There is such authority, but it does not support respondent's theory.

In Matter of Surzycki, 13 I&N Dec. 261 (BIA 1969), Surzycki, a Pole, postulated a then-existing anti-intellectual climate in his country, one in which Polish authorities discouraged and took a dim view of scientists and other educated intellectuals who tried to speak freely in their chosen fields. He anticipated and feared a punitive governmental response if, after being returned to Poland, he attempted to speak freely. In rejecting Surzycki's claim, the BIA found "no indication" that Congress established the then-existing form of relief (an analog to what is now asylum) "with a view to guaranteeing an alien freedom of speech" in his homeland. Id at 262. The Board also found that where one is "not afforded [freedom of speech] by his government" one is not being persecuted. Id. In reaching this decision the Board noted: "There are many totalitarian governments in the world today which do not brook dissent of any nature. We do not hold that an alien who feels compelled to

espouse in his native country beliefs which are looked upon with disfavor by his government is thereby being persecuted if the government acts against him." Id. This decision was rendered prior to emergence of what is now known as asylum. However, the definition of "persecution" as developed prior to the establishment of the present asylum statute is applicable under the present law. Matter of Acosta, 19 I&N Dec. 211, 223 (BIA 1985).

The 11th Circuit Court of Appeals has also spoken on the subject in the case of Najar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001). Najar functioned as editor of various journals advancing his political beliefs. He claimed a well-founded fear of persecution due to governmental suppression of academic freedom and political advocacy. The court cited the constitutional establishment of freedom of speech in Najar's homeland, the United Arab Emirates (UAE), but noted its limited nature in practice, such as "generally recognized bans on criticism of the government" and the prohibition on "formation of political parties." Id at 1288. However, the court found, "these restrictions are insufficient to amount to persecution." Id. In so doing, reliance was placed upon the general principle that "political conditions "which affect the populace as a whole or in large part are generally insufficient to establish

[persecution]."" citing Gonzales v. Reno, 212 F.3d 1338, 1355 (11th Cir. 2000), cert. denied, Gonzales v. Reno, 530 U.S. 1270 (2000). The court goes on to note, "because any governmental bar on political advocacy, association, or free speech is applicable to the general population of the UAE, these social constraints do not amount to persecution on grounds of political opinion." Najar supra at 1288.

Thus, both the BIA and the 11th Circuit provide binding guidance in cases which share sufficient similarity to the instant case that, without hesitation, this Court finds that in dealing with the respondent, the German legal system: Prosecuted (and seeks to punish) him for his conduct, not just his personal opinion(s); demonstrated no invidious selectivity in either his prosecution or his sentencing; utilized procedures strictly in conformity with well-developed and long-standing standards of due process under German law, including full appellate rights; and, did not engage in arbitrary arrest, detention, or abuse. See, Matter of S-P-, 21 I&N Dec. 486 (BIA 1996).

Thus, this Court rejects respondent's claims for relief as legally insufficient. He asserts, however, not just that he has been victimized by legal action against him brought under invidious German laws, but also that, even if those laws be deemed legitimate, he was an innocent person wrongly convicted.

Neither our criminal justice system nor any other achieves perfection. An accused can certainly be wrongly convicted and that can occur without the malice or incompetence of any participant(s) in the process. Human constructs fall prey to human error(s). However, as stated above, the remedy for the wrongfully convicted lies in the pursuit of established appellate remedies. The remedy is not to be found in U.S. immigration law. This court is not an appellate adjunct to the German criminal justice system and neither review nor retrial of respondent's case will occur here.

Notwithstanding the legal insufficiency of respondent's relief claims and the absence of any right to de novo consideration of his convictions, it remains necessary for this Court to determine whether he is the innocent victim he claims to be. With this claim of innocence he puts himself in the same position as a legitimate photographer whose "artistic" photographs are sandwiched in with pornographic photos and/or text in an effort to provide for the totality of the material a veneer of "social redeeming value." Where the photographer's work is thusly used without his knowledge or consent, he is himself a victim rather than a perpetrator. However, where the evidence shows that the photographer was covertly complicit and knowingly allowed his work to be used in such a "figleaf"

capacity, he is an accomplice/principal, notwithstanding the fact that, viewed in isolation, his personal contribution to the whole does not itself rise to the actionable, pornographic standard. Upon the question of whether respondent is a victim as he claims or is instead an accomplice/principal hangs this Court's determination of his ultimate credibility and the good faith or frivolousness of his application for relief.

Respondent has presented to this Court precisely the same defensive explanation he provided to the German court. His testimony before that court is summarized (Exhibit 4, pages 78-81) and thoroughly analyzed (Id, pages 81-84). In deciding the case the panel found his good-ham-in-the-bad-sandwich defense to be but "a journalistic trick" (Id, page 7) and his claim of merely providing legal defense information to a third party to be a "fake" (Id, page 52). They found his denials of involvement with the tainted Remer publication and/or with Remer himself to be "deceitful" and advanced by the use of faked documents (Id, page 8). They determined that respondent engaged in "deceptive maneuvers" designed "exclusively" to provide "ostensible evidence" of his resistance to Remer's use of the Expert Report, should there be any investigatory follow up to its publication (Id, page 116). They further determined that his goal was the appearance of objectivity from which would flow legally

guaranteed freedom of scholarly research and immunity from censorship (Id, page 10). For example, contrary to his claim, the defense attorney's request that respondent prepare the Expert Report was found to be, in fact, itself solicited by respondent as part of his effort to insulate himself (Id, pages 56-58). Thus, though he assisted in production of the actionable polemics, he abjured attribution (Id, page 10). Respondent is, the court concluded, a "fanatical, politically motivated criminal" (Id, page 123) and not credible (Id, pages 81, 84, 89, 95, 99, 102). In short, as Dr. Amelung testified, defendant was deemed a "liar."

The record shows that respondent is not above falsehood. For example, in a letter to his own godmother, dated April 30, 1994, he denied using the name Ernst Gauss as an alias (Exhibit 4, page 92). He also assured her that he avoided any contact with Remer "like the devil avoids Holy Water." (Id, page 93). In his I-589 he admits that Ernst Gauss is, in fact, one of his pen names (Exhibit 2, part C, item 7). Regarding Remer when respondent was interviewed by a British journalist (Exhibit 4, pages 1456-1458) he admitted that while in Spain he "stayed with Remer who was there in exile." (Id, at 1457). Also, long after his trial he admitted that his testimony there was "not entirely true" in that he did engage in some limited collaboration with

the Remer group. (Exhibit 4, page 1031).

It is to be noted that in the I-589 respondent reveals only that while in Spain, he "just stayed with friends." (Exhibit 2, part C, question 7). He does not identify that friend as Remer. Further reference in the I-589 to one who can only be Remer is similarly deceptive. He is described simply as "another German," one who was "exempt from deportation because he was 83 years old and severely sick (he died in 1997 in Spain)." Id.

The German trial court's decision provides a detailed, analytical basis for its rejection of respondent's testimony. This analysis appears sound and worthy of considerable deference. This Court heard but one side, respondent's. The German court heard both sides, and at length (19 days). The findings there coupled with this Court's own assessment of the record leads to the conclusion that respondent has presented this Court with an asylum application and supporting testimony which is to a significant degree false. Insofar as respondent persists here in his claim of innocent victim status, he persists in the perpetration of prevarication and continues to show himself worthy of the label attributed to him by the German court, according to Dr. Amelung. It is, therefore, the finding of this Court that respondent knowingly pursued before this Court a frivolous application for asylum. Respondent is therefore

subject to the resultant bar established by law as a consequence. Section 208(c)(6), INA.

Thus, respondent has presented no cognizable claim or past persecution or of a well-founded fear of future persecution. It follows that he has also failed to meet the higher standard necessary to demonstrate eligibility for withholding of removal under the INA. As for relief under the Convention Against Torture, while respondent's antagonist is the German government, there is absolutely nothing in this record to indicate that, if respondent is returned to Germany, he will be subjected there to "torture" as that term is regulatorily defined by that government. 8 C.F.R. Section 208.18(a)(1, 2). Hence there is no relief available under the Convention.

Because respondent is an arriving alien who was not physically present in the U.S. for one year or more prior to service upon him of the I-862 charging document herein, he is as a matter of law ineligible for voluntary departure. Section 240(B)(b)(1)(A), INA; 8 C.F.R. Section 240.26(c)(1)(i). Furthermore his false testimony before this Court renders him statutorily ineligible to establish good moral character. Section 101(f)(6), INA. He therefore cannot show such character for the preceeding five years and is for that additional reason ineligible for voluntary departure. Section 240(B)(b)(1)(B),

INA; 8 C.F.R. Section 240.26(c)(1)(ii). Thus the only option available to this Court is an order for removal. Because respondent is an arriving alien removal must be to his point of embarkation.

Accordingly, after review of the entire record in this cause, it is upon due consideration thereof

Order

That the motion to pretermit made by the Government be, and the same is, hereby denied; and it is further

Ordered that respondent's application for asylum be, and the same is, hereby denied; and it further

Ordered that respondent's application for withholding or removal (under both the INA and/or the Convention Against Torture) be, and the same is, hereby denied; and it is furthered ordered that respondent be removed and deported from the United States to his point of embarkation on the charge contained in the I-862 charging document.

Done and ordered this 3rd day of June, 2003, at Atlanta, Georgia.

G. MACKENZIE RAST
U.S. Immigration Judge

CERTIFICATE PAGE

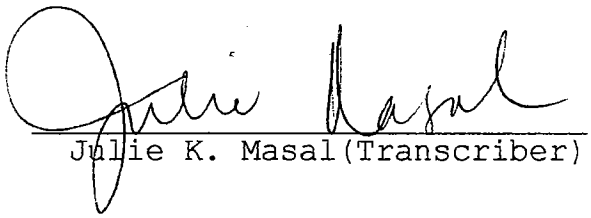
I hereby certify that the attached proceeding before G. MACKENZIE RAST, in the matter of:

GERMAR SCHEERER

A 78 660 016

Atlanta, Georgia

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.



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November 27, 2003
(Completion Date)