



Civil No. 00-3221



TATYANA VLADIMIROVNA MIRONOVA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

***PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS***

BRIEF FOR PETITIONER

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an immigration case in which Petitioners, comprising of the father (Gynadi Mironov), mother (Tatyana Mironova), and their two minor children (Anna Mironova and Anton Mironov), petitions this honorable Court for review of the adverse decision of The Board of Immigration Appeals (hereinafter “BIA” or “Board”) denying their meritorious applications for political asylum and/or withholding of deportation from the United States. Petitioners aver that the BIA’s adverse decision is not supported by substantial evidence and is therefore not entitled to deference.

The adult Petitioners are 35-year-old and 32-year-old natives and citizens of the Ukraine. The minor respondents are 14-year-old and 11-year-old natives of the Ukraine. The male Petitioner, Gynadi Mironov, entered the United States on or about July 19, 1995 as a nonimmigrant visitor with authorization to remain in the United States until January 18, 1996. The adult female Petitioner and the two minor children entered the United States on or about November 16, 1995 as nonimmigrant visitors with authorization to remain in the United States until May 16, 1996. The Petitioners failed to depart the United States at the termination of their respective authorized periods of stay in the United States and instead, in March 1996 filed an Application For Asylum (Form I-589) with the Immigration and Naturalization Service. That application was denied by the Service, and on

September 11, 1996, they were served with their Orders to Show Cause (Forms I-122). On January 7, 1998, they appeared in immigration court in Bloomington, Minnesota, conceded deportability as charged, and filed a new Form I-589 asylum application with the Immigration Court. At the conclusion of the proceedings, the immigration judge found that the Petitioners had failed to carry their burden of demonstrating either past persecution or a well-founded fear of future persecution in the Ukraine. The Petitioners appealed the decision to the Board of Immigration Appeals and by its decision dated August 18, 2000, the Board stamped a badge of approval on the immigration judge's adverse decision; although that decision was not supported by substantial evidence and any reviewing authority cannot on this record deny the requested relief.

Although the Petitioners submitted a plethora of documentary evidence to support their claims for relief and their testimony at the hearing were specific, detailed, and internally consistent, the immigration judge and the Board of Immigration Appeals somehow extrapolated inconsistencies between their first and second applications for asylum (Form I-589). Although we maintain that the two applications are not inconsistent, we nevertheless note that the first application was prepared shortly after the parties entered the United States with the aid of lay friends to translate their words into English. They could not speak English and did not have the aid of counsel to more clearly articulate their claims. Admittedly, the

first application was “rough” but it contained essentially the same information as the second application. The second application was more concise and better articulated because the parties then had the aid of counsel who reviewed the first application, interviewed the Petitioners, and prepared their asylum application in the context of the Asylum Laws and Regulations of the United States. This is precisely the purpose of the right to counsel. Calling their better articulated second asylum application inconsistent with the first merely because it was better prepared and more in line with the regulatory basis for asylum in the United States is tantamount to a denial of right to counsel provided for by the United States Constitution.

Furthermore, the immigration judge woefully failed to make an explicit credibility determination, but the Board of Immigration Appeals painstakingly found one within the oral decision of the immigration judge and proceeded to supply feeble reasons for its pre-ordained adverse determination. The fact remains that the immigration judge did not call the testimony of the adult Petitioners incredible by any stretch of the imagination and in the face of all the credible testimonial and documentary evidence submitted by the parties, including the credible affidavit of the female adult Petitioner’s mother, Ms. Ludmila Alexandrovna Tsibulskaya, the immigration judge still found that the Mironov family did not establish past persecution, nor would they have a well-founded fear

of future persecution if compelled to return to their native Ukraine. We respectfully submit to this honorable court that when the evidence of record is properly and fairly considered in the aggregate based on past and present country conditions in the Ukraine, that the Mironov family is eligible for asylum under the “reasonable person” standard set forth in *Matter of Mogharrabi*.

Oral argument before this court is crucial in the case and is strenuously requested. Not only will it materially assist the determination of this petition, it will also afford petitioner’s counsel an opportunity to effectively illuminate for the Eighth Circuit panel the Board’s abdication of its duty to review the record of proceedings thoroughly and to make an adjudication consistent with the asylum laws and regulations of the United States.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This court has subject matter and appellate jurisdiction to review the Board's order pursuant to § 106(a) of the Act, 8 U.S.C. § 1105a(a), which provides for the exclusive procedure for judicial review of all final orders of deportation. The Board's order is properly appealable as a final order of deportation within the purview of § 106(a) of the Act, 8 U.S.C. § 1105a(a).¹

¹ The 1996 Act repeals the existing INA 106 for removal orders issued under a newly enacted removal process, and establishes an entirely new statutory scheme governing judicial review. These new review procedures are set forth in new INA § 242. Section 306(a) of the 1996 Act enacts a new INA § 242 entitled "Judicial Review of Orders of Removal." Section 306(b) of the 1996 Act repeals the existing INA § 106. The former INA § 242 is amended and moved to new INA § 241. In general, the judicial review provisions of the 1996 Act go into effect on April 1, 1997. *See INS v. Yang*, 117 S.Ct. 350-352 N.1.(1996). As a general rule, new INA § 242 does not apply to pending cases or to individuals against whom the INS commences proceedings before April 1, 1997. A separate section of the 1996 Act, however, entitled "Transitional Changes in Judicial Review," imposes new procedures for review of final deportation and exclusion orders that become administratively final any time on or after October 31, 1996. This transitional rule amends former INA § 106 and subjects deportation and exclusion orders to review under those amended procedures. The specific changes in INA § 106 appear only in § 309(c)(4) of the 1996 Act. They are not codified as amendments to INA § 106 or incorporated into the new INA. However, deportation orders that become final after April 1, 1997 continue to be governed by the transitional rule as long as the proceedings were commenced before April 1, 1997. Deportation and exclusion cases commenced before April 1, 1997, where a final order is entered on or after October 31, 1996 including after April 1, 1997, are governed by the transitional rule in § 309(c)(4) of the 1996 Act.

The Mironov family petitions the Court of Appeals for the Eighth Circuit to review a final order of the Board of Immigration Appeals. The Board affirmed the decision of the Immigration Judge denying asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act ("Act"). 8 U.S.C. § 1158 and 8 U.S.C. § 1253(h).²

The Board had jurisdiction to review the January 7, 1998 decision of the Immigration Judge under C.F.R. § 3.1(b)(2). *See also* § 242 of the Act, 8 U.S.C. § 1252; 8 C.F.R. Part 242.

This petition for review of the Board's August 18, 2000 order was filed on September 18, 2000. The petition was thus timely filed under § 106(a)(1) of the Act, 8 U.S.C. § 1105a(a)(1), which now requires that a Petition for Review be filed no later than thirty days from the date of the final deportation order.³

² The Administrative Record of this case has been filed with the Court by the Respondent in lieu of a Joint Appendix by the parties. The Abbreviation "A.R." followed by a number or numbers refers to the Certified Administration Record on file with this court.

³ Section 106(a)(1) of the Act was recently amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Section 306(a)(2); amended INA § 242(b)(1) to require that the petition for review of a final order of deportation must be filed no later than 30 days after the date of the final order. The previous rule under the INA required petitions for review to the circuit court of appeals to be filed within ninety days of issuance of the BIA's decision (thirty days in the case of an aggravated felon) or sixty days if an administrative order was issued following in absentia proceedings. The most important asylum changes are contained in § 604 of the 1996 Act. The asylum changes mandated by § 604 apply to applications filed on or after April 1, 1997 .

Petitioner challenges the Board's denial of asylum and withholding of deportation as not in accordance with law.

STATEMENT OF ISSUES

1. Whether the Board of Immigration Appeals' decision is supported by substantial evidence?

- a. Did the Board fail to apply the reasonable person test in a reasonable way?
- b. Did it fail to consider extensive documentary evidence in the record?
- c. Did it fail to abide by its own regulations?

Garcia-Ramos v. INS, 775 F.2d 1370 (9th Cir. 1984);
Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1985).

2. Whether Petitioners suffered past persecution and therefore have a well-founded fear of future persecution on account of one of the five protected grounds?

Desire v. Ilchert, 840 F.2d 723 (9th Cir. 1988);
Bernal-Garcia v. INS, 8520 F.2d 144 (5th Cir. 1988).

3. Is the finding of lack of credibility supported by the record?

Okoroha v. INS, 715 F.2d 380 (8th Cir. 1983);
Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994).

STATEMENT OF THE CASE

This is an appeal from the decision of the Board of Immigration Appeals (BIA) upholding an immigration judge's denial of Petitioner's request for asylum under § 208 of the Immigration and Nationality Act, 8 U.S.C. §1253(h).

Deportation proceedings were commenced on September 11, 1996, by the filing with the Immigration Court of the Orders to Show Cause wherein Petitioners were charged with deportability pursuant to Section 241(a)(1)(B) of the Immigration and Nationality Act. This charge was based upon allegations that they remained in the United States beyond the period of time authorized by the Immigration and Naturalization Service. On January 7, 1998 an immigration judge found the Petitioners deportable and denied their application for asylum and withholding of deportation. Petitioners appealed the adverse decision of the immigration judge to the Board of Immigration Appeals. By decision dated August 18, 2000, the Board of Immigration Appeals upheld the decision of the Immigration Judge and dismissed Petitioner's appeal. Petitioners are seeking review of the BIA's denial of their applications for asylum and withholding of deportation under § 208 and § 243(h) of the Act, 8 U.S.C. § 1158(a) and 1253(h).

STATEMENT OF FACTS⁴

Petitioners in this case are a family unit comprising of a father (Gynadi Mironov), mother (Tatyana Mironova), and two minor children (Anna Mironova and Anton Mironov). Mr. Mironov, his wife and two children are seeking asylum as a result of religious persecution in their native Ukraine. (A.R. 311–319 and 370– 78) The Mironov family established and was active with the Seventh-Day Adventist Church and School in their native Ukraine. They have been practicing this religion since the 1980's and in 1993, Mr. Mironov was severely beaten and stabbed, which he strongly feels was not unconnected with his religious belief and their establishment of a church run school. (*Id.*) The father, Gynadi Mironov, is a thirty-five year old citizen and native of Ukraine who first entered the United States as a visitor for pleasure on or about July 19, 1995, and was authorized to remain in the United States until January 18, 1996. His wife, Tatyana Mironova, is a thirty-three year old native and citizen of the Ukraine as well as their two minor children, and the three entered the United States together on or about November 16, 1995, as visitors for pleasure authorized to remain in the United States until May 16, 1996. (A.R. 94 – 95 and A.R. 379-397)

Deportation proceedings were commenced on September 11, 1996, by filing with the Immigration Court by the INS of the Order to Show Cause in each of these

⁴ The factual statement herein mirrors the oral Decision of the Immigration

cases, charging the Petitioners with deportability based on their having remained in the United States longer than authorized by the United States Immigration and Naturalization Service. At their final hearing day, on January 7, 1998, the parties appeared with their counsel and admitted the factual allegations as set forth in the respective charging documents, as well as the respective charges contained therein. They declined to designate a country for deportation, and the court designated their native Ukraine. And based on their admissions the court found that deportability was established in each case by evidence that is clear, convincing and unequivocal. (A.R. at 95). The parties interposed the deportation defense of Asylum and Withholding of Deportation which was a renewed case carried over from the INS Asylum Office from where it was referred to the Immigration Judge for consideration. (A.R. 311 – 432)

The first witness to testify was the mother, Tatyana Mironova, she asserted that the family has a well-founded fear of persecution and that the family was persecuted on numerous occasions in the past in their native Ukraine, predicated mainly on their religious beliefs and their practice of the religion known as the Seventh-Day Adventist Church. She testified that she married her husband on July 5, 1986, in the city of Kiev. That they have two children born of that marriage, the first Anna Mironova, born February 16, 1987, and Anton Mironov, born January 29, Judge and are mostly as detailed in that document. (A.R. 94-118).

1988. (A.R. at 97) She testified that she entered the United States on November 16, 1995, with their two children following to join her husband who had previously entered the United States on July 19, 1995. she stated that the family came to the United States to escape persecution and that they were unable to travel together for financial reasons. (A.R. 97–98). She testified that her husband was attacked and injured severely on two occasions, that the last attack occurred in 1993, which placed him in the hospital after which he had to walk around on crutches and that he escaped to the United States when he was able to walk without crutches in 1995. She also testified that her mother is alive and that her father is deceased. That her mother is currently residing in Kiev, Ukraine at this time;. She stated that her mother had visited the United States on two occasions, the first in April 1996 and again in June 1997. Tatyana testified that her mother came the last time in July 1997, to testify as a witness in this proceedings, but that the hearing was unfortunately postponed. She confirmed that her mother’s visit to the United States was arranged by the Seventh Day Adventist church in Minneapolis. (*Id.*) (A.R. 260 – 261)

Regarding their religious affiliation, Ms. Tatyana Mironova, testified that both her and her mother are members of the Seventh-Day Adventist Church which she had joined at the age of 16 in 1983. Tatyana’s mother had joined the Church in 1980. She stated that she is a member of the Seventh-Day Adventist Church because she believes that it is the religion that is closest to God. That the principle tenets of the

religion included belief in the second coming of Christ, and its celebration or observation of Saturday as the Sabbath day. That since her arrival in the United States, she and her family have attended Seventh-Day Adventist Church services in Minneapolis. (A.R. 98-99). That since 1983, she participated in church meetings at their home, which meetings were forbidden by the governmental authorities. This led to church members being frequently arrested by the police from these meetings. (*Id.*) She testified that members of her family were arrested on numerous occasions because of their church affiliations. These arrests occurred as early as 1982. (*Id.*) (A.R. 256 – 259)

The first incident that Tatyana recounted was an arrest of herself, her mother and her sister, after they had gone to the American Consulate in Moscow, in 1982. They were picked up by individuals in a car, and were subjected to verbal abuse. She testified that her mother and the rest of the family were subjected to constant KGB harassment since 1980 when her mother attempted to renounce her Soviet Citizenship. That her and her sister were taken to the KGB building and were subjected to interrogations and detention that lasted approximately four hours, in 1982. (*Id.*) And that after her mother was arrested regarding the 1982 appearance at the American Consulate, she was hospitalized at a psychiatric hospital in the Soviet Union. And this was an involuntary hospitalization designed to punish and intimidate her since she has never suffered or been diagnosed of any mental or

emotional problems. She stated that she wrote several letters to the Kremlin and that other people intervened by filing complaints with authorities which ultimately led to the release of her mother from the psychiatric hospital. (A.R. 99-100).

From 1987 to 1990 the family, suffered a number of periodic detentions for religious reasons. She testified that during this time, membership in any religious organization other than the Orthodox Church was prohibited. She also noted incidents under the Soviet government where searches of their family home for religious literature took place. She stated that other church members were also subjected to arrests because the police watched for their gatherings. Tatyana Mironova also testified that she was compelled to attend Public Schools. She indicated that she was suspended from school on a number of occasions for what she believed were religious reasons. She identified incidents from 1982 to 1984, when she was unable to complete portions of her schooling because she did not wish to take tests on Saturday, the Sabbath day of the Seventh-Day Adventist Church. (A.R. at 101) She indicated that in 1989, her mother and her sister had applied for refugee status to the United States with their claim for refugee status predicated on religious problems. (*Id.*) That in 1993, her mother established a Seventh-Day Adventist Church School in the city of Kiev, Ukraine. (A.R. at 102). She testified that the school was closed on order of the Ukrainian President Kravchuk, in approximately September 1995. (*Id.*) Her mother was held in jail for approximately three days after

this protest. She testified that her mother struggled immensely to reopen the school, but that her attempts were to no avail and that the school remains closed at this time having finally seized operation in September 1997. (*Id.*)

She stated that her mother is presently employed by the Seventh-Day Adventist Church at this time and does Bible teaching in the Ukraine. (A.R. at 103). She also cited to her sister's arrest on several occasions, including during the 1995 protest for the closing of the school. She confirmed that the assaults on her husband was a significant factor in their decision to come to the United States in search of religious freedom and safety. (*Id.*) She also confirmed as did her mother in her affidavit that there have been inquiries of her mother in the Ukraine, regarding the whereabouts of Mr. Mironov and the family. (See Affidavit of Ludmila Alexandrovna Tsibulskaya contained in the record of proceeding). (A.R. 256-259 and A.R. 51-52). On cross examination it was established that respondent's sister, Natalia is currently living in Minneapolis having arrived in the United States on or about July 1996, as a tourist. She has similarly applied for asylum, based on her Seventh-Day Adventist Church membership. (A.R. at 103).

In response to questions from the court, Tatyana Mironova confirmed her detention of one day by the police in 1982, and her three-day detention regarding the school protest in 1995. She also stated that there were other incidents in which she was called to the police station from time to time, and during which the house was

searched for religious literature. She stated that in January 1993, she was also detained by the police in regards to her husband's beating. She identified other incidents in which she has been taken to the police station when the authorities learned that a number of people have been meeting in her home for religious reasons. This was the one day detention in 1994. (A.R. 104-105).

After the testimony of Tatyana Mironova, her husband Gynadi Mironov, testified substantively and consistent with his wife's testimony. (A.R. at 105). He stated that he came to the United States in July 1995, because of oppression to himself and his family. He referred to the first incident that occurred on May 29, 1988, when he was beaten and stabbed. (*Id.*) He confirmed that based on the comments to him, his persecutors were aware of his religious affiliation since they also made certain degrading and insulting religious remarks to him and threatened his family. (*Id.*) (A.R. at 319) These individuals ultimately beat him mercilessly and stabbed him causing serious injuries that landed him in the hospital where he underwent surgery and remained confined for a month. He asserted that he became a member of the Seventh-Day Adventist Church in 1986, when he married his wife. He stated that he engaged in home church meetings after that and continues to practice the religion continuously since 1986. (A.R. at 106). He also testified to an incident that occurred on January 18, 1993. On that day he was driving his vehicle in a suburb of Kiev, when his car was approached by another vehicle containing three

large men. They signaled him to stop his vehicle and pulled him over. He was removed from his car, pushed off the road, advised that he had been warned that he would be subjected to mistreatment and other derogatory religious references were made to him. He stated that the individuals assaulted him, with fists and kicked him, which caused him to suffer concussion, tooth injuries, and other serious physical problems. (A.R. at 107-108). He reported the incident to the police and was questioned by police while he was in the hospital. He was hospitalized for a period of approximately one month and due to the injuries suffered on his pelvis, he had to walk around on crutches. (*Id.*) And during the time he was recuperating from the incident he stated that he was subjected to further acts of mistreatment, including two men who assaulted him and broke his crutches and then ran away. (*Id.*)

He also testified to a number of what he described as short or small arrests, including one for the distribution of religious literature. When asked by the Court the reasons why he obtained the visa to come to the United States, he said that he advised the consulate that it was for tourist purposes although his real intent in coming here was to escape persecution and to come to Minnesota, which is the location of certain Seventh-Day Adventist Church Officials. (*Id.*) Genadiy has a sister, Ms. Helena Suchova, who is presently in the United States, having arrived approximately six months after respondent. His parents are retired individuals and reside in the Ukraine. He confirmed that he did not move from his residence in the Ukraine after

either the 1988 or 1993 beatings. (A.R. at 108-109). He stated that this was because of extreme difficulties in trying to move from one place to another in the Ukraine. Genadiy also confirmed that he feared groups that were controlled by the government and denied that there have been any changes of significance in the Ukraine since the fall of the Communist Government, on the issue of the religious freedom. Neither he nor his wife claimed to have held any positions of prominence or leadership in the Church. But they engaged in a crusade to convert others to their religion, including the distribution of Literature. (*Id.*)

In the face of all this credible testimony the Immigration Judge still found that the Mironova family did not establish past persecution nor do they have a well-founded fear of future persecution. The BIA affirmed the IJ's decision in a "boilerplate" decision that is not supported by the record. The BIA, like the Immigration Judge, obviously evaluated the various incidents and aspects of their claim in isolation, without any consideration whatsoever of the interplay between the various aspects of the claim and the total level of persecution which the Petitioners faced in Ukraine as a result of their religious beliefs. We respectfully submit to this Honorable Court that when the evidence of record is properly considered in the aggregate based on past and present country conditions in the Ukraine that the Mironova family is eligible for asylum under the "reasonable person" standard set forth in *Matter of Mogharrabi*.

SUMMARY OF ARGUMENTS

The BIA essentially adopted the opinion of the Immigration Judge in a five-page opinion which is almost entirely boilerplate. The few sentences which are not boilerplate reveal an utter failure to consider facts which were amply documented in the record. In short, the erroneous observations of the Immigration Judge pervaded the Board's review of the case.

But there is an even more fundamental reason why careful judicial review is warranted here. Judicial review is central to our system of government and the principle of checks and balances. *Marbury v. Madison*, 5 U.S. 137 (1803). As an alien, the Petitioner is nevertheless a person within the meaning of the Fifth Amendment and is entitled to due process of law. *Yamatava v. Fisher*, 189 U.S. 86 (1903); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977). See also *Jean v. Nelson*, 472 U.S. 846, 857 (1985) (statute and regulations protect aliens' constitutional rights). When Congress delegates specific duties to the executive branch, such as the conduct of proceedings on asylum applications, the executive officer is "an officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others." *Marbury*, 5 U.S. at 164. See also *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and *Galvan v. Press*, 347 U.S. 522, 531 (1954). The Petitioner does not argue that she has the right to asylum, but rather that she has the right to due process of law. This means

a right to have all of the evidence taken into consideration and evaluated in light of the proper standard. The Petitioner is guaranteed that due process right not only in the Constitution but in the statute and regulations. INA § 242(b), 8 U.S.C. § 1252(b); 8 C.F.R. § 242 (in general) and § 242.17(c) (in particular); see also 8 C.F.R. § 208. As an alien, the Petitioner does not have access to either the legislative or executive branches of government for redress. She needs the judiciary. Specifically, she needs this Circuit to perform judicial review because she did not get it below. She deserves more than a few sentences of erroneous analysis buried in a few pages of boilerplate.

The Board of Immigration Appeals' adverse decision in this matter is not supported by substantial evidence and must therefore be reversed in order to avoid manifest injustice. A complete review of the adverse decision of the Board of Immigration Appeals in conjunction with the record of proceedings reveal that this decision is not supported by the record. In the face of the immigration judge's failure to make a credibility determination, the Board said:

“we find that the immigration judge, although not expressly stated such, found the respondents' testimony incredible, and we find it necessary to address the immigration judge's decision as if he had explicitly stated that he found the respondents' testimony incredible.”

This statement from the Board was extrapolated from the immigration judge's remarks that:

“the Court will be denying the application for asylum because the Court believes that the weight of the respondents’ testimony is seriously undercut by the inconsistencies with the original asylum application.”

Both the Board and the Court were wrong because there are no significant inconsistencies between the two applications. What the Board and the immigration court called inconsistencies were fully explained in the hearing, and the stance of these two previous adjudicators (IJ and BIA) is tantamount to depriving the Petitioners of their right to counsel guaranteed by the United States Constitution.

The first asylum application was “rough” as it was prepared at the time that the family initially arrived in the United States and could not speak English. It was prepared by a lay person that could not articulate their claim to comport with applicable asylum laws and regulations of the United States. When the first application was reviewed by counsel and redrafted with appropriate emphasis on relevant aspects of their claim to meet their burden of proof, the immigration court and the BIA unfairly decided to call this an inconsistency. This is not the type of lenient consideration of asylum claims that the United States Congress had in mind when they enacted the United States Asylum Laws and Regulations. It appears the BIA and the immigration judge applied the “beyond a reasonable doubt standard” as opposed to “a preponderance of the evidence standard” applicable in immigration proceedings.

At the hearing, the adult Petitioners testified extensively in support of their claims and submitted pictorial evidence to document that the adult male petitioner was attacked and severely beaten on two occasions. While he fortunately survived the attacks and stab wounds, he endured a long recuperation and has never fully recovered. (A.R. at 322 and 335). He has been determined to be disabled for life as a result to this attack. After the attacks, he decided to keep a low profile but this did not insulate the Mironov family from further persecution. Significantly, the Board noted that the Mironov family's testimony during the hearing was consistent with the second application. (A.R. at 5). It is not insignificant that the parties testified consistent with the second application, which was better articulated with the aid of counsel to which they are entitled under the Sixth Amendment of the United States Constitution. As aforementioned, the so-called inconsistencies were, for the most part, addressed and explained on cross-examination and by counsel during the proceedings and common sense alone, without more, explains it away.

It does not take a nuclear scientist to realize that the two applications will differ in succinctness because the first was prepared at the time the family could not understand English, and by a lay person, and the second by experienced immigration counsel. This is merely a question of better articulation of the arguments as opposed to substantive inconsistencies. Above all, the parties testified consistent with the second application as supported by the record of

proceedings and the extensive documentary evidence submitted by the parties. But the immigration judge and the BIA failed to pay any heed to the evidence and on appeal, the Board of Immigration Appeals gave great weight to the alleged finding below of lack of credibility and gave the claim very short shrift. The Board held that even if the Mironov family were credible in their testimony, they haven't met their burden of proof because they have not shown that they are likely to be persecuted if they were compelled to return to the Ukraine. The Board wrote "The record reflects that, since the overthrow of the Communist regime in 1991, Evangelicals are no longer denied religious freedom and they worship in the Ukraine without interference." The Board cited to the Bureau of Democracy Human Rights and Labor, U.S. Department of State, *Ukraine – Profile of Asylum Claims and Country Conditions* at p. 8 [June 1997]. This is the same publication that this Court and at least one other U.S. Federal Court found to lack objectivity and to be mostly unreliable. *Okoroha v. INS*, 715 F.2d 380, 383 (8th Cir. 1983); *Zamora v. INS*, 534 F.2d 1055, 1061 (9th Cir. 1976). But the Immigration Court and the Board elevated the State Department Advisory Opinion in this instance to the level of "Gospel."

The BIA, like the immigration judge, ignored substantial evidence in the record. As will be argued below, the Mironov family suffered persecution in the past in the Ukraine on account of their religious beliefs and the consequent

attachment of imputed political opinion to evangelists in most of the former Soviet Union, including Ukraine. (A.R. at 270).

As aforementioned, the BIA's decision in this case is very disquieting. In its adverse decision, the BIA on page 3 (A.R. at 4) states as follows:

A number of the most significant inconsistencies noted by the immigration judge concerned conflicting testimonial evidence presented by the respondents upon comparison with their written asylum applications. For example, the respondents indicated in their original application for asylum that they were seeking asylum because they wanted "to save their children from the consequences of the Chernobyl accident." *See* Exhibit 2. In regard to the adult female respondent's mother, the respondents indicated that the adult female respondent's mother "was uselessly trying to fight for the human rights in the country of lying socialism". *Id.* The respondents also stated in their original asylum application that the male respondent was subject to coercion by Muffia [sic] groups uncontrolled by the government. *Id.* They recount two incidents in which the male respondent was assaulted by unknown assailants. *Id.* Notably, although the respondents state that they were members of the Seventh Day Adventist Church in the Ukraine, they make no claim that they were persecuted in the Ukraine on that basis.

A side-by-side review of the two asylum applications does not reveal substantive inconsistencies and shows that the Board pre-judged the case without carefully reading the record and then proceeded to supply feeble reasons to justify their pre-ordained adverse decision.

What the Board and the judge ignored is the serious stress associated from having to be uprooted from your culture and all that you know and be thrust into a new culture with a different language and confusing laws. In this context, holding

someone to such a high standard as the Board and the immigration judge obviously held these Petitioners is unfair, and offends traditional notions of fairplay and substantial justice inherent in this our system of democracy, founded on a bastion of human rights, fairness, and even-handedness. I submit that the Board's determination in this case is not consistent with the fairness and lenient consideration warranted in asylum cases, which is consistent with US Congressional intent in enacting this section of the United States Immigration and Nationality Act, as amended.

On page 4 of its erroneous adverse Decision (A.R. at p.5), the Board wrote:

“The respondents’ testimony somewhat reflects the claims found in the second asylum application. As aforementioned, these incidents and any mention of persecution on account of religious affiliation are noticeably and inexplicably absent from the respondents’ original application.”

Again, a side-by-side review of the two asylum applications shows that the Board's contention in this regard is incorrect. The Board further states on the same page that:

“In the instant case, the respondents have failed to provide any explanation for these discrepancies other than their claim that the inconsistencies contained in the record are minor. *Id.* However, we find these discrepancies go to the heart of the respondents’ asylum claim.”

The Board found alleged inconsistencies between the two asylum applications which it called “significant,” found them to be “meaningful

evidentiary gaps,” and proceeded to deny the asylum application for failure of proof. Both the immigration judge and the Board unfairly sifted out portions of the petitioners’ response to the questions on the Form I-589 that did not pertain to reasons for which asylum could be granted in the United States. For instance, in Part C, question 1 of the Asylum Application, which asks why are you seeking asylum?, the petitioners indicated in addition to what the Board and the immigration judge sifted out, that:

“We believe in God, our kids went to Christian school, but it was closed by the Decree of Ukrainian president. I, mother of my kids, want to save my children from the fate that I had. I was deprived of my childhood at twelve (12) due to reprisal of my mother by KGB. My mother was uselessly trying to fight for the human rights in the country of lying socialism. (Have documents.) The reprisals have been continuing for one year now. (Have documents.) Like a Christian family, we are afraid of our future of our children because God’s people were persecuted all the time we had been through in our life. Anytime our life could be in danger and we could be physically destroyed . . .”

And in response to the Question No. 2 which asks, “What do you think would happen to you if you returned to the country from which you are claiming persecution?” the petitioners indicated that:

“In case, if we will go back to our country, we will expose of the persecution of us and our children. In the last couple of years, we had threats from the government. Our children will be laughed at and physical influence. Because the Christian school is already closed if they are going to go to public school, they will meet a lot of problems. If we do go back home, our kids will grow up spiritually broken and physically unfit . . .”

This is certainly the Mironov family trying to explain with their limited language abilities that they fear persecution based on their religious faith as opposed to what the Board of Immigration Appeals and the immigration judge extrapolated from these answers. As aforementioned,. these answers are not clearly articulated and with the aid of counsel, they were fleshed out in the second application. The two applications are not inconsistent with one another. And, significantly, in the answer to question no. 4, the Mironov family circled “yes” to the question of whether they had been mistreated and indicated that they were persecuted based on religion and political opinion. In answering this question, although they indicated that the adult male petitioner was subject to coercion by “Muffia groups” uncontrolled by the government and that he was in 1988 stabbed in the stomach and in 1993 suffered a broken pelvis for which he was out of commission for one year, she did indicate that:

“My mother, Tsybulskaya L.A., had been under oppression of KGB because she did not agree with internal politics of the lying socialism. I, myself, have been intimidated since I was 12 by governmental officials who were rascals and scoundrels, who left our family without all means of existence. They excluded me from school a couple of times and persecuted, though I did graduate from school with a 5.0 diploma and finished first in math Olympiad in Kiev . . . but I could not find a job because I have been a daughter of an honest human being who does not sell hers persuasions. . . .”

And in the answer to question 5 about the arrest, detention and interrogation of family members, they indicated that:

“My mother was arrested and interrogated many times. I was twelve years old the first time. I was arrested, it was with my mother and sister, in Moscow by American Embassy. Later it continued time after time. Last time I was arrested it was when I disagreed to close the Christian school. The policemen of our city were aggressive and many times brought us to the police office . . .”

A review of the second Form I-589 (A.R. 311 – 319) when fairly considered does not show any of the so-called inconsistencies found by the immigration judge and the Board of Immigration Appeals. It is merely a matter of succinctly stating what was already said in the first application and articulating it properly by counsel to aid the petitioners to meet their burden of proof. In the second asylum application, Counsel merely “fleshed out” the claims of the petitioners that are consistent with the requirements for grant of asylum in the United States. All the dates mentioned for the attacks and the incidents in the two applications are consistent, and the check marks as to the reasons for persecution on question no. 4 are consistent. The account of events in the two applications are essentially the same other than the language used. Clearly the parties could not put their thoughts in proper words in the first asylum application because they just arrived in the United States, could not speak English, did not understand the laws, and therefore, could not properly articulate their claims as was done by counsel in the second application. It is really disquieting that the Board and the immigration judge went to great lengths to find this to be inconsistencies.

I point out to this court the Affidavit of Ludmila Alexandrovna Tsibulskaya (A.R. 256–259) which confirms the past persecution suffered by the family in Ukraine. She had traveled to the United States to testify on their day in court, but the court rescheduled the asylum hearing. She had enlisted the help of the Seventh Day Adventist Church in Minnesota to obtain a visa at the U.S. Embassy. (A.R. 260–261) Even though the Department of State report (A.R. 263–280) does mention that with the overthrow of the Communist Regime in 1991, that Evangelicals are no longer denied religious freedom officially in Ukraine, it nevertheless did also indicate that there have been some cases of interference from local authorities, who have delayed registration of religious organizations. The same report states that under the Russian Empire, Evangelical Christians were regarded by the state-established Russian Orthodox Church as a threat, and were subjected to unofficial harassment on religious grounds. And that under the Communist, Evangelical Christians were repressed in the same way as were believers of other faiths. If they were open about their religion, they were usually denied higher education and professional opportunities. In addition, the beliefs of many of the Evangelical groups included a prohibition against bearing arms. In some cases, this was interpreted by the believers as forbidding military service entirely. This often led to prison, incarceration in psychiatric hospitals or to alternative service in unhealthy places and occupations. (A.R. at 270). These

mirror the exact complaints laid out by the Petitioners in both their original and subsequent asylum applications. It is unrealistic to expect that by decreeing religious freedom into law that it will change the minds of people immediately. Changes of this kind are not quick to come and normally takes a long period of time.

Therefore, the contention that Evangelicals are no longer denied religious freedom and that they now worship without interference is untenable and unbelievable in a country that has persecuted such religion for centuries. The adult male petitioner was stabbed numerous times in 1988 by a group of young people who called him “religious bastard” and “subbotnik.” (A.R. at 319) And in 1993, after following his car for a while, he was beaten mercilessly by unknown assailants who yelled at him, “admit us to our church.” (A.R. at 319) And he sustained considerable injury which is very evident in his body, as documented in the record of proceedings. (A.R. at 322) The person that took over their apartment in the Ukraine, Ms. Tatyana Pavlovna Gorodetskaya, indicated in a sworn statement that the police department came to the apartment many times and broke in without a warrant looking for the adult male petitioner. (A.R. at 51) This is consistent with the Affidavit of the adult female petitioner’s mother which confirms that after petitioners applied for asylum in the United States, she was questioned by the security police as to why her daughter, husband and family had

not returned and informed her that criminal proceedings could be brought against them if they returned to the Ukraine. (A.R. at 258).

ARGUMENT

I. THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT ENTITLED TO DEFERENCE.

A. Burden of Proof

The Attorney General has the discretion to grant asylum to “refugees.” 8 U.S.C. § 1101(a) (42) (A); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 428 n.5 (1987); *Miranda v. INS*, 139 F.3d 624, 626 (8th Cir. 1998); *Lopez-Zeron v. INS*, 8 F.3d 636, 638 (8th Cir. 1993); *Yacoub v. INS*, 999 F.2d 1296, 1297 (8th Cir. 1991). A refugee is an alien who was persecuted¹⁰ or has a well-founded fear of persecution⁵

¹⁰ Persecution has been defined as “ ’the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.’” *Ubau-Marenco v. INS*, 67 F.3d 750, 754 (9th Cir. 1995) (citations omitted). “Brief detention,” the Court has also noted, “does not necessarily establish persecution.” *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1994) (citing *Mendez-Efrain v. INS*, 813 F.2d 279, 283 (9th Cir. 1987) (alien detained and questioned for four days)). Detention with physical attacks may establish persecution. *Id.* (citing *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988)).

⁵ Refugee status may be based on past or future persecution. *See, e.g., Kazlauskas v. INS*, 46 F.3d 902, 905 (9th Cir. 1995) (citations omitted). Under the regulations, if an asylum applicant demonstrated past persecution, he will be presumed to have a well-founded fear of future persecution. This presumption can be rebutted by change in country conditions that eliminate this well-founded fear. 8 C.F.R. § 208.13(b) (1) (i). If the applicant is found not to have a well-founded fear of persecution, his application for asylum shall be denied. Only if the applicant can demonstrate compelling reasons for refusing to return to his country, based on the severity of past persecution, may asylum be granted without a

on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a) (42) (A), 208 (a); 8 U.S.C. §§ 1101 (a) (42) (A), 1158(a).

In order to establish statutory eligibility for asylum, the alien must show that his or her fear is both subjectively genuine and objectively reasonable. *Cardozo-Fonseca*, 480 U.S. at 430-31; *Hamhezi v. INS*, 64 F.3d 1240, 1242 (8th Cir. 1995); *Hajiani-Niroumand v. INS*, 26 F.3d 832, 837 (8th Cir. 1994); *Safaie v. INS*, 25 F.3d 636, 639 (8th Cir. 1994); *Lopez-Zeron*, 8 F.3d at 638, *Ghasemimehr v. INS*, 7 F.3d 1389, 1390 (8th Cir. 1993); *Behzadpour*, 946 F.2d at 1352. “To prove a well-founded fear of persecution, an asylum applicant must show that his or her fear is genuine (the subjective component), and that a reasonable person in the same circumstances would fear persecution if returned to the applicant’s native country (the objective component).” *Lopez-Zeron*, 8 F.3d at 638 (citation omitted). Specifically, “[t]he objective component is satisfied with credible, direct and specific evidence of facts that show a reasonable person in the alien’s position would fear persecution if returned to the alien’s native country.” *Ghasemimehr*, 7 F.3d at 1390 (citing *Behzadpour*, 946 F.2d at 1352). *See also Yacoub*, 999 F.3d at

showing of a well-founded fear. 8 C.F.R. § 208.13(b) (1) (ii). *See also Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993) (citing *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989)) (stating that the Board may grant asylum for humanitarian reasons where the persecution was particularly atrocious).

1297 (citing *Alsheweikh v. INS*, 990 F.2d 1025, 1026-27 (8th Cir. 1993)); *Matter of Y-B-*, Interim Decision 3337 (BIA 1998) (citing *Matter of E-P-*, Interim Decision 3311 (BIA 1997)); *Matter of Dass*, 20 I. & N. Dec. 120 (BIA 1989)).

Testimony lacks credibility if it is too general and speculative in nature. *Ghasemimehr*, 7 F.3d at 1391. The testimony must be “believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the alien’s fear.” *Id.* If the testimony is merely speculative, the Board is entitled to reject it. *Behzadpour*, 946 F.2d at 1353.

B. Standard of Review

Factual determinations as to an alien’s eligibility for asylum or withholding of deportation are reviewed under the “substantial evidence” standard. *Elias-Zacarias*, 502 U.S. at 481; *Hajiani-Niroumand*, 26 F.3d at 838 (citing *Behzadpour*, 946 F.2d at 1353); , 946 F.2d at 1353); *Yacoub*, 999 F.2d at 1297; *Alsheweikh*, 990 F.2d at 1027. “This Court must uphold the Board’s finding that an alien is not a refugee if it is supported by substantial evidence.” *Lopez-Zeron*, 8 F.3d at 638 (citation omitted). The Supreme Court has explained the application of the “substantial evidence” standard of review in the immigration context: “to obtain judicial reversal of the [Board’s] determination, [the alien] must show that the evidence he presented was so *compelling* that no reasonable factfinder could fail to find the requisite fear of persecution.” *Elias-Zacarias*, 502 U.S. at 483-84

(emphasis added). This Court has embraced the *Elias-Zacarias* analysis and applies this principle to uphold denials of asylum if “a reasonable factfinder *could* find [the alien] lacked a well-founded fear of political persecution.” *Ghasemimehr*, 7 F.3d at 1390 (emphasis added). This Court’s review is limited to the Board’s decision. See *Rodriguez-Riveria v. INS*, 848 F.2d 998, 1002 (9th Cir. 1988); *Okoroha v. INS*, 715 F.2d 380, 383 (8th Cir. 1983).

Circuit Courts review findings of fact by the BIA “under a deferential substantial evidence standard”. *Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990) citing *Novoa-Umania v. INS*, 896 F.2d 1 (1st Cir. 1990). Whereas questions of law and statutory interpretation are reviewed *de novo* (*Bajwa v. INS*, 727 F.Supp 53 (D.Mass. 1989)). In asylum cases, the threshold question of statutory eligibility is reviewed under the substantial evidence standard and the ultimate decision of whether to grant asylum is reviewed under the abuse of discretion standard. *Ipina v. INS*, 868 F.2d 511 (1st Cir. 1989). Where the question is a mixed question of law and fact in deportation proceedings, some courts have found *de novo* review appropriate. *Singh v. Ilchert*, 801 F.Supp 313 at 318 (N.D. Cal. 1992) citing *Tarvand v. INS*, 937 F.2d 973, 975 (4th Cir. 1991).

In *Alvarez-Flores*, *supra*, the First Circuit explained that “although ‘questions of statutory interpretation [are reviewed] *de novo*,’ the court is obliged . . . to defer to the BIA’s interpretation of the applicable statute if that

interpretation is reasonable." *Alvarez-Flores, supra*, at 3 citing *Perlera-Escobar v EOIR*, 894 F.2d 1292, 1296 (11th Cir. 1990).

The BIA's interpretation of the asylum standard is not reasonable in this case. It is not reasonable because the BIA does not really apply the standard which it established for itself in *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). *Matter of Mogharrabi* established the reasonable person standard for asylum cases saying that well-founded fear exists if a reasonable person in like circumstances would fear persecution. The BIA consistently cites *Mogharrabi* as the applicable standard and indeed cited it in the Petitioners' case. (A.R. at 3). However, then, when it applies this standard to the facts, of individual cases such as the Petitioners', it is in fact using a beyond-a-reasonable-doubt standard of proof, rather than a reasonable person standard.

It is inherent in asylum cases that applicants will not be able to prove for a certainty that they will be persecuted or that the persecution will certainly be on account of one of the five statutory reasons. The Supreme Court has recognized this in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and explained that this is why an applicant is not required to show a clear probability of persecution, rather it is sufficient to show that persecution is reasonably likely to occur. The BIA has also recognized this in *Matter of Mogharrabi* in which the Board further explained that an asylum applicant need not always present corroborating evidence of his

claim because such evidence is very difficult to obtain. *Mogharrabi*, 19 I&N Dec. at 445. The same problems of proof exist where an asylum applicant seeks to prove that his or her fear of persecution is on account of one of the five protected reasons. It is all but impossible to prove for a certainty the exact reason for which one might be persecuted.

Deference to agency interpretation must be limited by the principle of judicial review. After all, when *Cardoza-Fonseca* was argued before the Supreme Court, the INS urged the Court to defer to the BIA's interpretation of the well-founded fear standard as identical to the old clear probability standard; the INS argued that the agency's interpretation was entitled to substantial deference." *Cardoza-Fonseca*, *supra* at 445. The INS relied upon the principle of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). *Id.* at n.9. However, the Supreme Court rejected this argument holding that the issue was one of pure statutory construction which called for judicial review rather than deference.

In this case too, we have reached the permissible limits of deference and ask this Court to look behind the mere recitation of a reasonable person test, to determine whether that test was really applied in a reasonable way. Now that the Supreme Court has resolved the issue of statutory construction, the courts must

continue to stay involved and review BIA decisions to be sure that the construction mandated by *Cardoza-Fonseca* is honored.

The Supreme Court even noted in *Cardoza-Fonseca* that deference is not warranted where the Board's interpretation conflicts with previous interpretations. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *citing Watt v. Alaska*, 451 U.S. 259, 273 (1981) (additional citation omitted). *Cardoza-Fonseca*, *supra* at 446 n.30.

In *Davila-Bardales v. INS*, 27 F.3d 1, (1st Cir. June 23, 1994) the circuit court reaffirmed this principle. That case involved the admissibility of statements by an unaccompanied minor in a deportation case. The Board of Immigration Appeals (BIA) had in a conclusory fashion upheld the admission of statements by Davila-Bardales despite its previous enunciation of the principle that such statements were inherently suspect. The First Circuit struck down the BIA's conclusory departure from its own standard. It said:

... the law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. *See Congreso de Uniones Industriales de Puerto Rico v. NLRB*, 966 F.2d 36, 39 (1st Cir. 1992); [also citing *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir. 1989)].

Davila-Bardales, at 8. Here the BIA did not confront the issue squarely or explain why the Mironov family did not have a well-founded fear of persecution. It did not

explain why a reasonable person in like circumstances would not fear persecution. It cited but did not follow the standard which it established for itself in *Matter of Mogharrabi, supra*.

Even before the Board decided *Mogharrabi*, it considered and approved the asylum case of a religious layworker from El Salvador. (*See In re: Paniagua-Vides*, A24 166 230 (unreported BIA decision, Jan. 8, 1985). In that case, the facts were quite similar to this case. The applicant's husband had participated in a Christian study group which gave catechism lessons to children, helped refugees, gave children food and milk and studied the Bible. He and the applicant's sister had disappeared. Two of her husband's uncles, also members of the religious group, had been killed by the death squads. She joined the Christian study group after her husband's death but fled when she heard that all members of the group were on a list (a hit list) and soldiers came looking for her at home.

What the Board did in that case that it did not do here is it took a detailed look at all the evidence. It cited, in particular, documentary evidence regarding the persecution of church activists in El Salvador as well as expert testimony about why members of such groups would be considered subversive and subject to persecution in El Salvador. Slip Opinion at 3-4. The Board found that *Paniagua-Vides* had a well-founded fear of persecution on account of her political opinion. Specifically it stated:

"Although there is arguably some overlap in the bases for the Respondent's fear of persecution, it is our view that the Respondent has a well-founded fear of persecution in El Salvador based on her political opinion, as expressed by her active participation in a Christian study group, several of whose members have either been killed or disappeared."

Slip Opinion at 6. This is precisely the kind of careful evaluation of the evidence which is lacking in this case. Moreover it shows inconsistency on the Board's part. Even though *Paniagua-Vides* predates *Mogharrabi*, 19 I&N Dec. 439, and the current regulations, 8 C.F.R. § 208.13, it contains the type of reasoned consideration of the evidence which current standards require.

The Board created a common-sense reasonable person test in *Mogharrabi* and now refuses to apply it in a common sense way. This violation of its own standard is not entitled to deference. The Seventh Circuit Court of Appeals considered and criticized the Board's application of the well-founded fear standard in *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992). That case involved a permanent resident with a drug conviction who had converted to Christianity in prison. He based his asylum claim on his fear that he would be persecuted in Iran on account of his conversion from Islam to Christianity. Despite the fact that apostasy is punishable in Iran by death, the Board found that Bastanipour did not have a well-founded fear of persecution. The Seventh Circuit reversed and remanded the case for the Board to consider not whether Bastanipour had in fact converted, but whether an Iranian religious judge would consider that he had

converted because that is what matters as far as danger to the alien is concerned.

The Seventh Circuit discussed the standard of proof:

Nor must the applicant for asylum prove that he will be persecuted- - -only that a reasonable person in his shoes would fear persecution. At argument we asked the government's lawyer whether he would fear persecution by Iran if he were in Bastanipour's religious and political shoes and he conceded that he would- - -and even conceded that he was a reasonable man! We accept both concessions. . .

Id. at 1133.

In *Ananeh-Firempong v. INS*, 766 F.2d 621(1st Cir. 1985), the court reviewed the Board's discretionary decision on a motion to reopen to apply for a non-discretionary remedy (withholding of deportation.) Although *Ananeh-Firempong* was reviewed under the abuse of discretion standard (due to the underlying motion to reopen), the First Circuit bristled at the suggestion that extraordinary deference was due to the decision of the BIA:

. . . But, if, the *INS* mean; that the cases it cites reach beyond ordinary principles of administrative law to require a special judicial mood of extraordinary caution in all immigration cases, we do not agree. To be more specific, we do not believe that the cases it cites require so extreme and unusual a judicial attitude when courts review a purely factual determination under the standard now before us.

Ananeh-Firempong, 766 F.2d at 624.

The Ninth Circuit addressed the effect of the Supreme Court decision in *INS v. Elias—Zacarias*, 502 U.S. 478, 112 S.Ct. 812 (1992). In *Gheblawi v. INS*, 28F.3d 83 (9th Cir., June 6, 1994), the Ninth Circuit found that *Elias-Zacarias* did

not change the standard of review Set forth in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). The Ninth Circuit cited Justice Frankfur's test set forth in *Universal Camera Corp.*, *supra*, as follows:

Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Gheblawi, slip opinion at 6180-81, quoting from *Universal Camera*, 340 U.S. at 490.

In *Gheblawi v. INS*, *supra*, the court found that extreme deference should not be shown to a decision of an administrative body such as the Board of Immigration Appeals. Extreme deference is shown to decisions of parties such as prison officials and internal workings of Congress. This once again, echoes *Marbury v. Madison*, *supra*, and reaffirms the role of the judiciary. The court concludes that the finding by the Supreme Court in *INS v. Elias-Zacarias*, 112 S.Ct. at 817, that the BIA may only be reversed if the evidence the petitioner presented was "so compelling that no reasonable fact finder could fail to find the

requisite fear of persecution,” did not change the standard of review as enunciated by *Universal Camera Corp. v. NLRB, supra*.

II. THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE IT APPLIED AN INCORRECT STANDARD, IGNORED EXTENSIVE DOCUMENTARY EVIDENCE AND FAILED TO FOLLOW ITS OWN REGULATIONS.

In this case, the BIA cited to its analysis in *Matter of A-S-21* I&N Dec. 1106 (BIA 1998) and stated that “in this case, we find that the Immigration Judge’s adverse credibility finding is sufficiently supported by our analysis in *Matter of A-S-*, *supra*. (A.R. at 4). The Board’s reasoning herein is flatly contradicted by abundant evidence in the record.

A. The decision of the BIA is not supported by substantial evidence because it applied an incorrect standard for relief for political asylum applicants.

There is absolutely no requirement that an applicant show past harm in order to qualify for asylum. Mogharrabi himself was never harmed in his native country, Iran. *See Matter of Mogharrabi*, 19 I&N Dec. 439. The test clearly written in the plain language of the statute and reiterated by the Supreme Court in *Cardoza-Fonseca, supra* and the BIA in *Matter of Mogharrabi, supra* is well-founded fear of persecution. This means fear of future harm.

Past persecution (as opposed to well founded fear of future persecution) is an alternative means of proving asylum eligibility. An applicant must either show

past persecution or a well-founded fear of future persecution, not both. INA § 101(a)(42), 8 U.S.C. §1101(a)(42). That alternative means for proving eligibility is set forth in the regulations at 8 C.F.R. § 208.13(b) and was discussed by the First Circuit in *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993).

The Second Circuit in *Sotalo-Aguije v. Slattery*, 17 F.3d 33 (2d Cir. 1994) addressed this issue. The court specifically found that under the plain meaning of the statute there is no requirement that Mr. Sotalo actually had to have experienced persecution through physical harm or confrontation: "The essential element is that the threat be such that a reasonable person would find it credible based on what that person has experienced and witnessed." *Id.* at 37. The BIA in the instant case applied an incorrect standard of review in that both the Immigration Judge's decision and the Board's decision discredit the Mironov family's claim for persecution because they did not convincingly establish past persecution on account of the five enumerated grounds nor a well founded fear of future persecution on those grounds. This is clearly an incorrect standard and as such the decision is not supported by substantial evidence.

Yet, the adult male petitioner was brutalized to the brink of death on two occasions and that wasn't even mentioned by the Board. And the adult female petitioner and her mother suffered repeated arrests. The fact that relatives are harmed tends to show that an applicant's fear is well founded but it is not a

requirement of asylum eligibility. *See Hernandez-Ortiz v. IRS*, 777 F.2d 509 (9th Cir. 1985).

B. The Board's decision is not supported by substantial evidence because it ignores substantial documentary evidence in the record of persecution of religious evangelists in Ukraine.

Petitioners applied for — and were denied — two distinct forms of relief: (1) asylum and (2) withholding of deportation to Ukraine.⁶ INA § 208(a) and 243(h). To establish eligibility for asylum, an applicant must demonstrate that he or she is a "refugee," i.e. an alien who is unwilling or unable to return to his or her country either because of past persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group or political opinion." INA § 101(a)(42), 208(a).

The standard of proof for asylum is more liberal than the "more likely than not" standard for withholding of deportation. *INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1222 (1987); *Bolanos-Hernandez v. INS*, 767 F.2d at 1282-83. To establish a well-founded fear of persecution, an applicant must show that (1) she is genuinely afraid to return to his or her home country and (2) there is a reasonable possibility that he or she will be persecuted upon return. *Cardoza-Fonseca*, 107

⁶ An application for Asylum is deemed by regulation to also constitute an application for withholding of deportation. 8 C.F.R. 208.3(b).

S.Ct. at 1217. Even a 10 percent possibility of persecution may constitute a well-founded fear. *Id.* at 1213.

Where an alien has suffered persecution in the past, however, she qualifies as a refugee, even absent a well-founded fear of future persecution. *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Matter of Chen*, Int. Dec. 3104 (BIA 1989). Moreover, victims of past persecution are "presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted were he to return." 8 C.F.R. § 208(b)(1)(i).

The applicant's credible testimony "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13(a). *See also, Matter of Mogharrabi*, 19 I&N 439 (BIA 1987); *Matter of Villalta*, Int. Dec. 3126, slip op. at 8-9 (BIA 1990); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981).⁷

⁷ This principle is often expressed as the "benefit of the doubt," which applies as well to the evaluation of the applicant's testimony and related evidence.

It is a general principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared

C. The IJ Erred In Failing To Make Specific Findings On The Respondent's Credibility And The Board Should Not Have Made The Erroneous Finding That The IJ Found Petitioners Testimony Incredible.

In determining whether the applicant has proven his claim, the trier of fact must assess the applicant's credibility and, if he or she finds the applicant's testimony to be incredible, the trier of fact must provide specific and appropriate reasons. *See, Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986); *Garcia—Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985).

In *Hartooni v. INS*, 21 F.3d 336, (9th Cir. 1994), the reviewing court remanded the case back to the BIA because the immigration judge failed to make specific findings on the petitioner's credibility, and the BIA simply accepted the immigration judge's nonexistent credibility finding. In that case the IJ denied the asylum claim on 'the grounds that:

[t]he cumulative effect of the respondent's testimony and application leads me to conclude that the **respondent has not established a credible claim to persecution**. (Emphasis added).

between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all means at his disposal to produce the necessary evidence in support of the application. *Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.* (emphasis added).

UN Handbook, *supra* note 29 at para 196; *see also* paras. 203, 204, and 219.

The court noted that the IJ did not expressly state that he disbelieved the petitioner's testimony nor did he specify that any of her claims were questionable. The court found that the IJ's holding failed to explain the basis of his decision. In rejecting the BIA's decision, the court stated, "We are not permitted to credit such an inaccurate, conclusory, and boilerplate decision." *Id* at 343.

The instant case is similar to *Hartooni*. Here, the IJ denied Ms. Mironova's asylum claim after finding:

“...the Court will be denying the application for asylum [because] the Court believes that the weight of the Respondents’ testimony is seriously undercut by the inconsistencies with the original asylum application”

At no time did the IJ state that he disbelieved Ms. Mironova and Mr. Mironov or that their testimony⁸ lacked specificity and detail, or that their demeanor impacted their veracity.⁹

Moreover, the facts upon which the IJ and BIA based their decisions, are inaccurate because there were no significant inconsistencies in the record.

⁸ See, e.g., *Matter of Fefe*, Int. Dec. No. 3121 at 4 (BIA 1989) (applicant must testify in order for the court to ascertain whether there are significant differences between the written and oral statements in the asylum application).

⁹ Assessment of credibility may involve several factors, including demeanor, specificity and detail of the testimony, consistency in the testimony, and other factors. See, *Generally Basic Law Manual: Asylum Summary and Overview Concerning Asylum Law*, Asylum Branch, Office of General Counsel, I.N.S., March 1991 (hereinafter I.N.S. Law Manual).

Because of the pivotal importance the assessment of an applicant's credibility plays in the evaluation of an asylum claim, and because of the critical consequences to an applicant of an adverse determination, the BIA's conclusion regarding credibility should be disregarded.

It is well recognized that an individual may have difficulty in proving his application for asylum. It is recognized that people fleeing persecution often do not have affidavits from their persecutors signifying they will be persecuted on their return. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984). The INS has recognized this principle in its own regulations noting that often all an individual applicant has is his or her own testimony; and if that testimony is coherent and credible in light of country conditions it should be credited. 8 C.F.R. § 208.13(a). In the instant case the Immigration Judge discounted the testimony of Mr. and Mrs. Mironov because he found alleged inconsistencies between their two asylum applications; yet the Judge failed to consider the testimony in light of country conditions as required by the regulations. *Id.* He failed to consider the country conditions at all as did the BIA. When one views the conditions in Ukraine, the testimony of the Petitioners is in fact cogent and credible.

The finding that a witness is not credible is ordinarily subject to the substantial evidence standard of review. See, for example, *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141-1142 (9th Cir. 1988). "While [this court's] role is not to

make an independent finding of credibility, [it] must review [the] evidence to determine whether the Board's rejection of it was reasonably supported." *McMullen v. INS*, 658 F.2d 1312, 1318 (9th Cir. 1981) (citation omitted). *See Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990) (Board's credibility finding must have adequate record support). Here, the record reveals that the negative credibility finding does not have adequate record support; it is not supported by substantial evidence.

A court must offer specific reasons for disregarding un rebutted testimony. *See, e.g., Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986). These reasons must be something more than simply improper inferences drawn from the evidence. *See, DelValle v. INS*, 776 F.2d 1407, 1413 (9th Cir. 1985) (holding that "BIA's conclusion that the security forces released [an asylum applicant] because they were satisfied that he was not part of the opposition [and therefore did not face future persecution was] not based on substantial evidence, but on conjecture" and therefore was "an improper inference").

While this so-called inconsistency between the two asylum applications may have loomed large in the mind of the Immigration Judge, one suspects that it did so because the Immigration Judge ignored the testimony of the Petitioners and the remainder of the record documenting conditions in Ukraine. The asylum application must be considered as whole; it cannot be viewed in a vacuum.

Numerous courts have overturned negative credibility findings based on minor inconsistencies particularly when these inconsistencies do not detract from the weight of the testimony. In *Plateros-Cortez v. INS*, 804 F.2d 1127, 1129 (9th Cir. 1986), the BIA found the petitioner's testimony not to be detailed and consistent. In that case, the inconsistencies the BIA noted were petitioner's uncertainty about the date he left El Salvador and the date he was deported from the United States. Further, the petitioner testified that the National Guard had killed his employer and his employer's son in their car while the asylum application stated they were killed at home. The court rejected the BIA's emphasis on these discrepancies and stated, "(b)oth of these inconsistencies have little or no relevance to the merits of Platero-Cortez's claim. They do not refute his testimony that he was detained, threatened, tortured and twice had his name placed on death lists." *Id.* at 1131. In *Zavala Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984), the court also held that minor inconsistencies did not detract from credibility. Similarly, courts have overturned negative credibility findings where the petitioner had testified that the persecutor had an oral or written list of names of petitioner's political group. *See Canjura Flores v. INS*, 784 F.2d 885 (9th Cir. 1985). *See also Damaize Job v. INS*, 787 F.2d 1332 (9th Cir. 1986); *Martinez-Sanchez v. INS*, 794 F.2d 1396 (9th Cir. 1986).

In the instant matter, the Petitioners provided specific detail concerning the attacks on the adult male petitioner and the numerous arrests and detentions of the adult female petitioner and her mother. These assertions were corroborated independently by letters and sworn statements concerning the attacks and the medical treatment Mr. Mironov received from the hospitals or physicians. (AR. at 322) The inconsistencies found by the IJ and BIA are not inconsistencies which reflect upon the credibility of the Petitioner. It is exactly the type of inconsistency that courts have rejected as a basis for finding incredibility.

The Board cites to several cases to support giving great weight to the Immigration Judge's alleged credibility finding. However, these cases are not controlling here because they refer to credibility findings based upon demeanor. Here the Judge's negative credibility finding is not based upon demeanor, rather it is based upon perceived inconsistencies and implausibilities, most of which are not really inconsistent or implausible in the context of Ukraine.

D. The Petitioners' Testimony And Documentary Evidence Establish "Past Persecution' On Account Of Religion And Imputed Political Opinion.

1. The evidence demonstrates that the Mironov family suffered persecution in the past such that their life or freedom was threatened.

The IJ must make specific findings as to credibility, otherwise the reviewing court will assume that the Petitioners' testimony is credible. *Damaize-Job*, 787

F.2d at 1338. The IJ in this case did not make specific findings as to credibility so that their testimony must be deemed to credible. Therefore, Petitioner met her burden of proof through her credible testimony, and also the extensive background documents regarding current human rights conditions in her home country, and documentary evidence relating specifically to her claim that she presented.

Past persecution and present persecution are two distinct forms of relief with distinct burdens of proof. Past persecution requires a showing of actual persecution in the past, while present persecution requires a showing of a well—founded fear of future persecution. INA Section 208.13(b). Under the past persecution standard, the current fear may come into play if country conditions have changed to such an extent that there is little likelihood of present persecution. *Matter of Chen, supra*.

When taken together the treatment that the Mironov family received at the hands of the government or individuals and/or officials the government could not control cumulatively constitutes "persecution."¹⁰ Threats to life or freedom" are

¹⁰ Paragraph 53 of the United Nation's Handbook On Procedures and Criteria For Determining Refugee Status states:

"[An applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in various forms).. In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds."

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always persecution. *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984).¹¹ Torture and other cruel or inhumane treatment are "threats to life or freedom" that are always persecution.¹² Petitioners suffered psychological torture and inhumane treatment in being threatened, arrested, interrogated etc... She was witnessing what happened to her mother and husband. This alone rises to the level of persecution. However, when viewed in context with all of the other abuse suffered by her, there

DETERMINING REFUGEE STATUS (1979) [herein after U.N. HANDBOOK]. See also *Samimi v. INS*, 714 F.2d 992 (9th Cir. 1983)(where the actions taken against applicant did not individually rise to the level of persecution, the Court viewed them cumulatively and held that they comprised the required prima facie showing for reopening of deportation proceedings).

¹¹ In *INS v. Stevic*, the U.S. Supreme Court said:

The term "persecution" includes more than just restrictions on life and liberty.., the statutory term "persecution" in the "well-founded fear of persecution" standard encompasses more than the statutory term "threat to life or freedom" and thus more than the nonstatutory term "persecution " used in the judicially established clear probability of persecution standard.

Similarly, paragraph 51 of the U.N. Handbook states:

There is no universally accepted definition of persecution," and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred, [however], that a threat to life or freedom on account of race religion, nationality, political opinion or membership in a social group is always persecution. (emphasis added.)

U.N. HANDBOOK, *supra* note 40, at 14.

¹² I.N.S. Law Manual at 20-21.

is no doubt that the treatment Ms. Mironova and her family received at the hands of the government and other assailants was "harm" cognizable as persecution.

In order to establish eligibility for asylum on the basis of past persecution, a respondent must demonstrate that the mistreatment she suffered was "on account of" political opinion or one of the other four grounds enumerated in INA §101 (42). *Desir v. Ilchert*, 840 F.2d at 729; *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987); *Matter of Chen*, *supra*. She is not required to demonstrate that her persecutors were motivated only by her political opinion, rather she must prove that her political opinion was one of the reasons for her past persecution. *See Desir v. Ilchert*, 840 F.2d at 724-25. The cumulative evidence, therefore, clearly demonstrates that the Mironova family suffered harm and mistreatment on account of their religious beliefs and imputed political opinion. (A.R. at 270).

As a victim of past persecution, Ms. Mironova and her family are statutorily eligible for asylum. *Desir v. Ilchert*, 840 F.2d at 729; *Blanco-Comarribas*, 830 F.2d at 1043; *Matter of Chen*, *supra*. Moreover, once an applicant has shown past persecution, there is a presumption of a well-founded fear of persecution in the future. 8 C.F.R. §208.13(b)(1)(i); *Matter of Chen*, *supra*. Having made such a showing the burden then shifts to the Immigration Service to prove by a preponderance of the evidence that since the time the persecution occurred conditions in the applicant's country have changed to such an extent that there is

little likelihood of present persecution. 8 C.F.R. §208.13(b)(1)(i); *Matter of Chen*, *supra*.

The Service did not offer any evidence about changed country conditions. Nor did they rebut the presumption of past persecution. Instead the Judge and BIA rested on the State Department report on Ukraine

Two things are clear, however. One, administrative notice,¹³ while generally allowed, is not an unfettered privilege. And, two, the Service has not met its burden of proving that there is little likelihood that further persecution will occur if the family returned to Ukraine. (A.R. at 51 and 256-259).

Administrative notice is not a substitute for evidence, and it cannot be allowed to outweigh fairness to individual litigants. Unregulated notice, even of legislative facts, cannot run afoul of due process. *Castillo-Villapra v. INS*, 972 F.2d 1017, 1027 (9th Cir. 1992). The demands of due process ultimately depend on the circumstances. For example, as the Court said in *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1097 (10th Cir. 1994), "[i]t is not necessary to warn that administrative notice will be taken of the fact that water runs downhill. . ." Likewise, it may be proper to take notice of objective facts like the results of an

¹³ Judicial notice, and its close parallel, administrative notice, permit a court or agency to take notice of an adjudicative fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b).

election, the political affiliation of elected or appointed officials and the inauguration of a new president. *Id.* On the other hand, whether there are other groups or forces beyond the control of the government is an issue over which reasonable persons may disagree, particularly in countries where conditions are volatile. *Id.*

In this case Ms. Mironova's fear is not of the new government but of forces outside the control of the new government. Threats of persecution may also come from groups, which the government is unwilling or unable to control.¹⁴ The INS Law Manual also concludes that, although ordinarily the persecutor is the government, "the persecutor may be a non-governmental entity which the government is unable to control or a governmental organization the government is unwilling to control. . ." (emphasis in original).¹⁵

Even if the Service meets its burden of demonstrating little likelihood of present persecution, the applicant may still be granted political asylum if, when all of the discretionary factors are considered, asylum should be granted for humanitarian purposes. *Matter of Chen, supra.*

¹⁴ *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (Following *McMullen v. INS*, 658 F.2d 1312, 1315, n.2 (9th Cir. 1981) see also U.N. Handbook, *supra* note 29, at para. 65.

¹⁵ INS Law Manual at 25.

The Board's discretion to deny political asylum "is far from limitless." *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). Where the Board has not "identified an alternative source of refuge, it can deny asylum only on the basis of genuine compelling factors — factors important enough to warrant returning a bona fide refugee to a country where he may face a threat of imminent danger to his life or liberty." *Id.* at 519. The Board must weigh all favorable and unfavorable factors, *Mattis v. INS*, 756 F.2d 748 (9th Cir. 1985), for where s/he fails to do so, the proper remedy is a reversal or a remand. *De La Cruz v. INS*, 713 F.2d at 545 (9th Cir. 1983).

The decision of the Immigration Judge, in deportation proceedings, must "contain a discussion of the evidence pertinent to any application made by the respondent . . . and the reasons for granting or denying the request." 8 C.F.R. § 242.18(a). While the Immigration Judge has discretion in political asylum and suspension of deportation cases, "discretion can be properly exercised only if the circumstances are actually considered. When important aspects of the individual claim are distorted or disregarded, denial of relief is arbitrary . . . The Board abuses its discretion if it is unduly influenced by factors that are not germane to the eligibility requirements set out in the act." *Santana-Figueroa v. INS*, 644 F.2d 1354 at 1356 and fn 5 (9th Cir. 1981) (quoting *Chung v. INS*, 602 F.2d 608, 612 (3d Cir. 1979) (remanded to BIA for proper consideration). *See also Ravancho v.*

INS, 658 F.2d 169, 176 (3rd Cir. 1981); *De La Luz v. INS*, 713 F.2d 545 (9th Cir. 1983).

In the instant case, the Board of Immigration Appeals disregarded and distorted significant aspects of the evidence supporting Petitioner's claim. The Immigration Judge disregarded significant aspects of the documentary evidence supporting Petitioner's claim. Petitioner submitted documentary evidence consisting of articles and excerpts from human rights reports confirming the persecution of religious workers, clergy and community activists.

The documentary evidence submitted by the Petitioner in support of his asylum claim is extremely pertinent, in that it objectively demonstrates the persecution of similarly situated religious persons in Ukraine.

It is well established that where the Immigration Judge or Board fails to refer to relevant evidence supporting a petitioner's claims under asylum and withholding of deportation this constitutes grounds for reversal or remand. *See Sotto v. INS*, 748 F.2d 832 (3rd Cir. 1984). In *Sotto*, the court reversed where the Immigration Judge and the BIA failed to refer to an affidavit constituting material evidence in support of Sotto's claims for asylum and withholding of deportation. In reversing, the court stated:

If the administrative record fails to reveal that [material] evidence has been fairly considered, the proper course is to remand the case to the INS so that the Service may evaluate such evidence and consider its effect on the application as a whole . . . We recognize that there is a possibility that the

immigration judge or the Board may choose to discredit the affidavit for reasons that are within their expertise. However, if they do not articulate such reasons, we are unable to discharge our statutory obligation of review.

Id. at 837.

Similarly, in *Fernandez-Rogue v. Smith*, 599 F.Supp. 1103 (U.S.D.C., N.D. Georgia, 1984), the court found that the Immigration Judge and the Board of Immigration Appeals had “abused [their] discretion because, in deciding that plaintiffs had failed to show *prima facie* a well-founded fear of persecution, the BIA [and the Immigration Judge] disregarded or mischaracterized evidence tending to establish a well-founded fear of persecution.” *Id.* at 1108. The evidence disregarded in *Fernandez-Rogue* was expert testimony on the likelihood of petitioners' suffering persecution if returned to Cuba.

In the instant case, both the Immigration Judge and the Board failed to fairly consider the Petitioner's evidence.¹⁶ In another context, the First Circuit previously reversed the BIA for failure to consider meaningful evidence. *Luna v. INS*, 709

¹⁶ The Immigration Judge's disregard of the documentary evidence submitted by the Petitioner is particularly egregious in light of the fact that flight from persecution and difficulties in obtaining proof render the task of documenting a claim of persecution inherently difficult. *Matter of Dunbar*, 13 I&N 310 (BIA 1973); *McMullen v. INS*, 658 F.2d 1312, 1219 (9th Cir. 1981). See also *The Handbook on Procedures and Criteria for Determining Refugee Status* (hereinafter "Handbook"), §§ 195-191, (1979). (Excerpts of Handbook attached as Appendix III).

F.2d 126 (1st Cir. 1983) (regarding a motion to reopen to apply for suspension of deportation). This case also warrants reversal.

E. The Board's decision is not supported by substantial evidence because it failed to follow its own regulations.

Moreover, both the Board and the Immigration Judge totally ignored the regulation which defines well founded fear of persecution and allows an individual applicant to establish asylum eligibility by showing a pattern and practice of persecution of similarly situated groups. 8 C.F.R. § 208.13(b) (2).

This regulation provides:

(i) In evaluating whether the applicant has sustained his burden of proving that he has a well-founded fear of persecution, the Asylum Officer or Immigration Judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if:

(A) He establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) He establishes his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable.¹⁷

Yet despite the Mironov family repeated statements that their fear of persecution is on account of religious activities and beliefs, neither the Immigration Judge nor the BIA made reference to this regulation. Nor did either the Immigration Judge or

¹⁷ This regulation, published as a final rule in Fed. Reg. Vol. 55 *No.* 145 (June 27, 1990) became effective October 1, 1990 and therefore governed both proceedings before the Immigration Judge and ~IA in this case.

BIA make a single reference to the documentary evidence of persecution in Ukraine and in particular persecution of evangelists.

Given the Immigration Judge's unexplained disregard for and mischaracterization of substantial material evidence supporting Petitioner's claims, and the Judge's failure to adequately evaluate these claims beyond a mere recital of the facts, his decision must be reversed as being unsupported by the evidence and constituting an abuse of discretion. Since the Board of Immigration Appeals adopted the Immigration Judge's decision, the decision of the Board of Immigration Appeals is not supported by substantial evidence and must be reversed.

III. THE PETITIONER HAS SHOWN A WELL FOUNDED FEAR OF PERSECUTION WITHIN THE TERMS OF THE LAW AND IS THEREFORE STATUTORILY ELIGIBLE FOR ASYLUM.

In order to establish eligibility for asylum, an individual must show that he meets the definition of refugee as a person with a “well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.” INA §§ 101(a)(42)(A) and 208(a), 8 U.S.C. §§ 1101(a)(42)(A) and 1158(a).

Here, the Petitioners have a well-founded fear of persecution on account of their religion and on account of the political opinion which is imputed to such people, and to the adult petitioners in particular. (A.R. at 270).

In *Gebremichael v. INS*, 10 F.3d 28, this Court looked at family relationships in evaluating the definition of refugee. In *Gebremichael* the younger brother had been tortured to learn the whereabouts of the older brother who was a political opponent of the Ethiopian government. This Court held that the younger brother met the definition of refugee and had shown past persecution on account of his membership in a particular social group – his immediate family.

The Court found that the link between family membership and persecution was manifest in the record where the security forces applied the “time-honored theory of *cherchez la famille* (‘look for the family’). The Court held that no reasonable factfinder could fail to find that the petitioner had been singled out for mistreatment because of his relationship to his brother. *Gebremichael* at 36.

The test is whether a reasonable person in like circumstances would fear future persecution. *Mogharrabi, supra*. Well founded fear has a subjective and objective component. Clearly the harm that the Mironov family have already suffered make their subjective fear reasonable. The documentary evidence from human rights organizations provide the objective component to show that their subjective fear is reasonable under the circumstances.

The asylum applicant must show a nexus between the harm feared and the five statutory grounds. It is this nexus that the Supreme Court had found lacking in *Elias-Zacarias, supra*. It is this nexus that the BIA had found lacking

Gebremichael, supra; the BIA held that admittedly the younger brother was tortured but it wasn't on account of one of the statutory reasons. *Gebremichael*, 10 F.3d at 32-33. In *Gebremichael* this Court inferred the nexus from the facts, here that nexus was explicitly provided by the persecutors. Here the nexus is very strong because of the years of mistreatment suffered by the family and the words uttered to the adult male petitioner when he was beaten and stabbed on two occasions. Rarely is the nexus so strong.

The *United Nations Handbook Relating to the Criteria for Refugee Status* (the *Handbook*) explains that the five statutory grounds overlap and reinforce one another. This *Handbook* is particularly persuasive because it contains the United Nation's interpretation of the international definition of refugee which was incorporated into U.S. law with the Refugee Act of 1980. The Handbook states: "it is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them," but it is important that the factfinder consider all five grounds or any combination of them. *Id.* at § 66-67.

Finally, the Mironov family fears persecution by the government or groups which the government is unable or unwilling to control. The law is well established that persecution by groups the government is unable or unwilling to control constitutes persecution within the meaning of the Act. *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971) (re: old INA § 243(h), prior to Refugee Act of 1980);

Matter of McMullen, 17 I&N Dec. 542 (BIA 1980) rev'd on other grounds *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981) and *Matter of Tan*, 12 I&N Dec. 564 (BIA 1967).

Thus, the Petitioners have a well founded fear of persecution on account of his political opinion and membership in a religious social group. They fear persecution by the government or groups which the Ukrainian government is unwilling to control. They are therefore statutorily eligible for asylum.

CONCLUSION

For the reasons explained above, the Board's decision should be reversed. The Board utterly failed to consider extensive documentary evidence in the record regarding religious persecution in Ukraine. It adopted the decision of the Immigration Judge, and in doing so adopted the Judge's faulty assumptions about the alleged inconsistencies between the two asylum applications. The net result was that the Petitioners were denied a full and fair evaluation of their claim as required by statute, regulations and caselaw. Thus this case cries out for reversal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Herbert A. Igbanugo, hereby certify that a Copy of this Brief and all attached exhibits were sent by U.S. Overnight Mail to:

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