



**STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Alla Bogdan (A 75 306 208)
Yevgeniya Bogdan (A 75 306 207)
Roman Bogdan (A 75 306 206)
(Appellant)

APPELLANT'S BRIEF
FOR REVIEW OF THE
DECISION OF THE
BOARD OF
IMMIGRATION APPEALS

v.

Court File No. 00-3695

Attorney General
(Appellee)

Submitted by: February 20, 2001 pursuant to extension
granted February 05, 2001.

APPEAL FROM THE DECISION OF THE BOARD OF IMMIGRATION
APPEALS OF OCTOBER 10, 2000.

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SUMMARY OF THE CASE.

This Petitioner asks for relief from deportation and requests that the determination of the Board of Immigration Appeals dated October 10, 2000 upholding the order of the Immigration Judge of December 08, 1998 denying a claim for asylum and withholding of removal be overturned. The Petitioner Alla Bogdan and her two children were subject to hostile abuse both psychological and physical for a period of four years from 1992 to 1996. (Admin. R. at 240-254). The Ukrainian mafia plagued the Petitioner during this period of time regarding the payment of a debt supposedly owed by her disappeared husband. (Admin. R. at 240-254). They used both psychological and physical abuse to achieve their aims of terror. The Petitioner lived in great fear during this time and the police did little to help.

The Petitioner also claims a well founded fear of persecution based upon religious persecution suffered at her workplace and by her daughter at her school.

The Petitioner claims application of Article 3 of the United Nations Convention Against Torture.

The Petitioner hereby waives her right to oral argument in a declaration pursuant to FRAP (eighth) 28A(f)(1).

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II. JURISDICTIONAL STATEMENT

The Eighth Circuit Court of Appeals has jurisdiction over this case pursuant to its jurisdiction over Decisions made by an Immigration Judge based within the geographic jurisdiction of the United States Eighth Circuit Court of Appeals. INA 242(b)(2). In this case, the Petitioner is bringing a claim based upon the Decision of the Immigration Judge of December 08, 1998 in Bloomington, Minnesota. (Addendum p. 3,4(R190,191)).

The United States Court of Appeals has jurisdiction over cases under agency jurisdiction in which a final order of deportation has issued. INA 242(d). In this case the Board of Immigration Appeals issued a decision of October 10, 2000 (Addendum p.1,2(R2,3)) in support of the Decision of the Immigration Judge (December 08, 1998) which denied a claim for asylum and withholding of removal and ordered voluntary departure in lieu of deportation. This decision constituted a final order of deportation as defined in 8 CFR 241.1(a) (dismissal of an appeal by the Board of Immigration Appeals). This appeal was timely filed according to INA 242(b)(1) which requires that petitions for review and motions for a stay of deportation be filed within thirty (30) days of notice of the order of the Board of Immigration Appeals. The Board of Immigration Appeals issued an order of October 10, 2000 and the

Petition for review and the Motion for a stay of deportation was filed with the Eighth Circuit Court of Appeals on November 08, 2000.

III. STATEMENT OF THE ISSUES.

A. Does persecution emanating from the Mafia, a quasi-political/criminal group constitute imputed political persecution? Does this constitute political persecution based upon the mixed motive theory?

Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988)

McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981)

Matter of TMB, Int. Dec. 3307 (BIA 1997)

Osario v. INS, 18 F.3d 1017 (2nd Cir. 1994)

B. Did the religious harassment suffered by the Petitioner the years 1992-1996 rise to the level of persecution? Does this justify her present fear both objective and subjective of a return to the country of the Ukraine? Does the Petitioner face the prospect of religious persecution upon her return to the Ukraine?

Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993)

C. Did the persecution from the Ukrainian Mafia suffered by the Petitioner during the years 1992-1996 constitute past persecution? Did the religious persecution suffered by the Petitioner at the hands of former communists at her workplace and at the police station amount to past persecution? Did the religious persecution suffered by the Petitioner's daughter Yevgeniya as a result her Christian beliefs and her attendance at the Baptist church constitute past persecution?

Matter of Chen, 20 I&N 16 (BIA 1989)

Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995)

D. Does the Petitioner face the possibility of economic persecution upon her return to the Ukraine?

Borca v. INS, 77 F.3d 210 (7th Cir. 1996).

E. Does the Petitioner have a valid claim for asylum based upon a well founded fear of persecution should she and her children return to the Ukraine?

Singh v. Ilchert, 63 F.3d 1501

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987)

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)

F. Did the persecution suffered by the Petitioner fall under the Article 3 of the United Nations Convention Against Torture?

II. 8 CFR 208.16, 17, 18

IV. STATEMENT OF THE CASE

Alla Bogdan seeks reviewal of the October 10, 2000 decision of the Board of Immigration Appeals affirming the decision of the Immigration Judge of December 09, 1998 denying her claim for asylum and withholding of removal and instituting a final order of deportation.

Petitioner, a native of the former Soviet Republic of Ukraine, entered the United States on May 23, 1996 at Chicago, IL, along with her two children, Roman V. Bogdan age (9) and Yevgeniya Bogdan age (15). An affirmative asylum application was filed on or about 02/25/97. An asylum interview was held on October 08, 1997. The asylum officer denied the application and referred the application to the immigration court. The Immigration Judge found the Petitioner removable as charged and denied the Petitioner's application for asylum and withholding of removal. (Administrative Record at 75).

The Appellant filed notice of appeal with the Board of Immigration Appeals on January 09, 1999. (Admin. R. at 172). An appellate brief was filed on June 25, 1999. (Admin. R. at 28). The appeal before the Board of Immigration

Appeals was denied on October 10, 2000 and the ruling of the Immigration Judge was upheld. (Addendum 1,2(R2,3)). The Board of Immigration Appeals merely affirmed the decision without giving substantial reasoning of their own pursuant to Matter of Grijalva, 21 I&N Dec. 27, 36-37 (BIA 1995).

The Appellant filed a petition for review and motion for a stay of removal with the Eighth Circuit Court of Appeals on November 08, 2000. A stay of deportation was granted on December 04, 2000.

V. STATEMENT OF THE FACTS

Alla Bogdan is a thirty-eight year old woman from the city of Simferopol, the Region of the Crimea in the Country of the Ukraine. She and her two children Yevgeniya age 15 and Roman age 9 lived under conditions of duress from early 1992 until their departure for the United States in May of 1996. In early 1992 Alla's husband Vladimir disappeared mysteriously. He had previous to that been involved in rather shadowy occupations and had been arrested for disorderly conduct on several occasions. (Admin. R. at 236, 237(Transcript)). He had no formal occupation and would not confide with Alla regarding his work or the people he contacted. (Admin. R. at 236, 237(Transcript)). Shortly thereafter, Alla was accosted on the street near her home by men who claimed that her husband owed them money (\$1500).

(Admin. R. at 240, 349(Transcript)). They told her that she owed them money as a result of her husband's unpaid debt and that they would charge 50% interest per month on the unpaid balance. (Admin. R. at 241(Transcript)). They also told her that if she did not pay the money things would go very bad for her. (Admin. R. at 241(Transcript)). Some months later (April 1992) she was again approached by these same four men. (Admin. R. at 242(Transcript)). They told her that "she must have thought they were joking". They then proceeded to hold her hands behind her back and hit her in the face and kick her in the kidneys. (Admin. R. at 242(Transcript)). They told her if she did not pay the money the next time they "would just beat her" (Admin. R. at 242(Transcript)). From this time forth Alla and her two children lived with fear, changing her residences many times, living with friends.

The Ukrainian mafia kept close tabs on her for the next four years. (Admin. R. 247, 248, 249(Transcript)). In the winter of 1996 she was again accosted by members of the Ukrainian Mafia, one of whom was in the original group from 1992. At this time the Mafia tried to pull her into a car while she was walking home from church with a friend. (Admin. R. at 250(Transcript)). One of the mafia came outside of the car and hit her and told her she owed money plus interest. He also told "we'll see how your God will help you now". (Admin. R. at 250(T)). These same men have continued to inquire about her

with her mother and have told her that she continues to owe them money and not only her husband's debt but also her own now due to the fact that she left the country. (R. at 249(T)).

The Petitioner had on several occasions gone to the police as a result of these harassments and assaults upon her from the Mafia. Shortly after the April 1992 assault, she went to the police where she filed a complaint. The police however told her that she could not file a complaint because she did not have witnesses. (R. at 244(T)). After the assault in the Winter of 1996 she and a friend who had witnessed the assault went to the police station. After waiting at the Police station for over two hours she was approached a person in plain clothes who asked her if she attended church. When she said yes, he then proceeded to tell her that the state could deprive her of her parental rights because she was a bad mother for attending church instead of staying home and watching her children. (R. at 251(T)). This confirmed her fears that she was being watched and that her activities were known. (R. at 251(T)).

Alla had started to attend the Baptist Church in Simferopol in the summer of 1995. (Appendix at 75(R152)). At that time she was working at Naval warehouse as a bookkeeper. Her supervisor, a communist, found out that she attended the Baptist church and began to try and intimidate her to stop her from attending church. He called her into his office and told her "if you don't want

to lose your job, stop attending church”. (R. at 252(T)). He also made her work on Sundays so it would be hard for her to attend church. (R. at 253(T)). This was very uncommon, as the work force generally worked a five day work week from Monday to Friday. (R. at 254(T)). She believed that the KGB kept records of those who attended the Baptist Church in Simferopol. (R. at 253(T)).

Alla’s daughter, Yevgeniya also had difficulties with religious persecution. She was abused physically by Tatar children (Muslims) while walking home from school. They were asking her who her God was. She was shoved to the ground and skinned her knee. Her school administrators did nothing to help her and this continued to be a problem as these Tatar children would push her and try to humiliate her. (R. at 254, 255(T)).

Alla was forced out of housing by these Tatars who aggressively demanded that she return a home she was living in that had been relinquished by the Tatars around the end of World War II.. (R. at 262,263,Appendix at 76 (R153)). Apparently this was done with the tacit approval of the Government Officials. (R. at 263(T)).

Because of the great difficulties Alla was encountering in the Ukraine she decided to try and obtain a visa to visit the United States for some time. She and her two children obtained funds from friends living in the United States and

obtained a visa for her and her two children. She arrived in the United States at Chicago, IL on May 23, 1996. (R. at 364).

VI. SUMMARY OF THE ARGUMENT

A. The Board of Immigration Appeals erred as a matter of law in failing to find evidence of imputed political persecution and mixed motive persecution and instead attributed the persecution suffered by the Petitioner and her daughter as based purely on criminal causes. (Admin. R. at 206). The Immigration Judge erred as a matter of law in construing this to be merely criminal activity. (Addendum at 17,18 (R 206, 207)). This result was presented despite the evidence that the Ukrainian Mafia and the Russian Mafia is populated by former members of the KGB and is used to control political activities in these countries through the use of extortion and murder. (Appendix at 24 (R70, (Organized Crime in the Ukraine))). and reasonably attribute this persecution to one of the five protected basis, i.e. race, nationality, religion, membership in a particular political or social group. The Immigration Judge erred as a matter of law in construing this to be merely criminal activity. (Addendum at 17,18(R 206, 207)). This result was presented despite the evidence that the Ukrainian Mafia and the Russian Mafia is populated by former members of the KGB and is used to control political activities in these

countries through the use of extortion and murder. (Appendix at 24,25 (R70, 71 (Organized Crime in the Ukraine))).

B. The Board of Immigration Appeals erred as a matter of law and failed to consider a claim for religious persecution on behalf of the Petitioner based upon various incidents of persecution between 1992 and 1996. From 1992 to 1996 the Petitioner was psychologically and physically threatened by members of the Ukrainian Mafia, unidentified persons at the Police station and her supervisor at the Naval Warehouse on both criminal/political basis and a religious basis. (R. at 240-254(T)) Her child, Yevgeniya was beaten and abused on her way home from school by Muslim children (Tatars) and the school administrators did nothing to help her. (R. at 254(T)).

C. The Board of Immigration Appeals erred as a matter of law and failed to consider a valid claim of past persecution based upon religious and political persecution suffered by the Petitioner and her daughter. The Petitioner was subject to severe persecution based upon its cumulative nature. *Shiraza-Parsa v. INS*, 14 F.3d 1424, 1428 (9th Cir. 1994). According to the

ruling of the Board of Immigration Appeals in the *Matter of Chen*, 20 I&N 16, (BIA 1989) an alien can be granted asylum on past persecution alone. Factors such as the existence of human rights abuses in the home country; the applicants genuine fear of return to his home country; the severity of persecution suffered. The Petitioner can meet the requirements with each of these criteria and thus deserves asylum on the basis of past persecution which increased in severity due to its cumulative nature.

D. The Board of Immigration Appeals erred as a matter of law and fact and failed to consider a claim for economic persecution on behalf of the Petitioner. The Petitioner was threatened with the loss of her employment as a bookkeeper and accountant while working at the Naval warehouse in Simferopol. (R. at 252(T)). This constituted persecution on the basis of the ruling in *Fatin v. INS*, 12 F.3d 1233, 1242 (3rd. Cir. 1993) and a closely held religious belief. The former Soviet Union discriminated greatly against members of the Baptist Church (Appendices at 8-12 (R11-15)).(Appendix at 88-90 (R162-164)). Based upon the present condition of the country of the Ukraine religious persecution is still prevelant. The Petitioner still has reason to fear discrimination based upon religious affiliation and specifically that of the Baptist Church should she return to the Ukraine.

E. The Board of Immigration Appeals erred as a matter of law and failed to consider a valid claim for asylum based on a well-founded fear of persecution should the Petitioner and her children return to the Ukraine.

There is a presumption of persecution if the alien has suffered persecution in the past. *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995). The asylum applicant must have both a subjective (*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and objective fear (*Matter of Mogharrabi*, 19 I&N Dec. 439, 440 (BIA 1987)) of persecution should he return to his home country. Alla has subjective fear should she return to the Ukraine. She fled initially even though her mother was seriously ill. (R. at 201, Appendix 73-78 (R150-155 (affidavit of Alla Bogdan))). Ukraine country conditions have not changed and are still dangerous due to Mafia activity and religious persecution. (Appendix at 13-19 (R 59-65) (Dirty Cops in the Former Soviet Union Run Both Sides of the Law), 20-36 (R66-82) (Organized Crime & Corruption, Ukraine), 37-43 (R87-93) (The Communist Face of the Modern Russian Mafia), 50-64 (R100-114) (Rise of the Russian Criminal State), 65,66 (R115-116) (Organized Crime Rising to the Level of the Fifth Branch), 8-12 (R11-15 (affidavit of Irina Potapenko)), 88-90 (R162-164 (affidavit of Boris Golovko))). Alla has a genuine fear of persecution should she return. (Appendix at 73-78 (R150-155 (affidavit of Alla Bogdan))).

F. The Board of Immigration Appeals failed to consider a valid application of the United Nations Convention Against Torture pursuant to 8 CFR 208.18 on behalf of the Petitioner and her two children. The Petitioner was harassed, beaten and followed by the Ukrainian Mafia for a period of over four years from 1992 to 1996. (R. at 239-252(T)). The Mafia is an element of government. Her child Yevgeniya was subject to harassment and physical punishment from a Muslim segment of the population (the Tatars) because she identified with Christianity and the Baptist church. School officials knew of the problem but did nothing to help. (R.at 254(T)). This constituted torture in accordance with the Torture Convention. Severe harm or suffering either physical or mental which is purposefully inflicted with the acquiescence of a public official or a breach of his legal responsibility to intervene. 8 CFR 208.18(7).

VII. STANDARDS OF REVIEW

A. The standard of review for asylum, issues of fact and law.

According to INA 242 the proper standard for the review of an asylum claim by the Federal Court of Appeals is that the prior ruling must be manifestly contrary to law and abuse of discretion to overrule. INA 242(b)(4)(D). In *Ramos-*

Vasquez v. INS, 57 F.3d 857, 861 (9th Cir. 1995), the court found that a discretionary denial of asylum was to be reviewed for abuse of discretion. Questions of fact underlying a denial of asylum, including whether the applicant has proved a well-founded fear of persecution are reviewed for substantial evidence. *Ghaly v. INS*, 58 F.3d 1425 (9th Cir.1995) Other standards must also apply. In *Reyes-Guerrero v. INS*, 192 F.3d. 1241,1245(9th Cir. 1999) the Court stated that the BIA's decision concerning asylum must be upheld if supported by reasonable, substantial and probative evidence). In *Kratchmarov v. Heston*, 172 F.3d. 551, 553 (8th Cir. 1999) the Court stated that evidence for asylum must be so compelling that no reasonable fact finder could fail to find requisite fear of persecution. In *Sangha v. INS*, 103 F.3d. 1482 (9th Cir. 1997) the Court declared that in order to overrule a BIA denial of asylum the court must find that the evidence not only supports the conclusion but compels it. *Sangha at* 1483. In general, questions of law are reviewed under the less deferential de novo standard of review. *Maldonado Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989).

The Court's have acknowledged the serious deprivation which occurs when an alien is deported. In *Sherman v. INS*, 350 F2d. 894, 899(1965) the court stated that a final order of deportation should be based upon reasonable, substantial and probative evidence.

B. Historical precedent: consideration of the standard of review in the context of the serious deprivation resulting from deportation.

A measure of review was set forth in *Sherman v. INS*, 350 F.2d 894 (2nd Cir. 1963). The court stated that a decision to deport an alien should be made upon facts that are almost certainly true. *Sherman v. INS*, at 899. In *Woodby v. INS*, 385 U.S. 276 (1966), the Supreme Court acknowledged the extreme hardship imposed upon visiting aliens when they are deported. The Supreme Court stated “This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.” 385 U.S. at 285. The Court stated as a consequence that, “no deportation order may be entered unless it is found based upon clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.” 385 U.S. at 286. While exile....Since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. In assessing the risk of loss involved for an asylum claimant, it should be noted that the stakes are even higher, as the alien faces the risk of psychological and physical harm of a serious nature. Although this deals with facts specifically, it signifies the

Supreme Court's interest in protecting the rights of aliens subject to deportation. The Court has declared the serious nature of the interest deprivation involved in deportation or removal.

C. Historical precedent, serious nature of deportation, statutory analysis.

In *Haw Tan v. Phelan*, 333 U.S. 6 (1948) the Court considered the significant loss that would occur upon deportation in the context of statutory analysis.

“We resolve doubts in favor of (the narrower construction of the contested deportation statute) because deportation is a drastic measure and at times the equivalent of banishment or exile.... upon Since the stakes are considerable for the individual, we will no assume that Congress meant to trench his freedom beyond that which is required by the narrowest of several possible meanings of the words used. In assessing the risk of loss involved for an asylum claimant, it should be noted that the stakes are even higher, as the alien faces the risk of psychological and physical harm of a serious nature upon return to their home country.

D. Consideration for time spent in the United States.

The interest of an alien in a potential claim of citizenship increases with the duration of time spent in this country. *In Johnson v. Eisentrager*, 339 U.S.763, 770 (1950), the court declared, “Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly”. Therefore, in the present case, the Petitioner, Alla Bogdan and her two children have established that they have a substantial claim to remain in this country based upon residence in this country for over four years and the standard to remove them under legal construct remains high.

E. The standard of review for asylum.

A person who is eligible for asylum must be within the confines of the United States and be classified as a refugee INA 208(a)(1),(2) INA 101(a)(42)(A) defines the term refugee to mean (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The Court’s have

generally utilized a four prong test for determining whether persecution is occurring: 1) the alien possesses a belief or characteristic the persecutor seeks to overcome in others by means of punishment of some sort; 2) the persecutor is already aware or could easily become aware, that the alien possesses this belief or characteristic; 3) the persecutor has the capability of punishing the alien 4) the persecutor has the inclination to punish the alien. *In Re Acosta*, 19 I&N Dec. 211 (BIA 1985).

F. The standard of persecution for withholding of removal.

8 CFR 208.16(b) states: An alien shall not be removed to a country where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular political or social group. An alien can claim withholding of removal on the basis of a clear probability of persecution in the proposed country of deportation. *INS v. Stevic*, 467 U.S. 407, 430 (1984). This is not a discretionary grant.

G. Application of the Convention Against Torture.

Article 3. of the United Nations Convention Against Torture allows that a person who would more likely than not risk torture upon return to his home country shall not be removed to that country. 8 CFR 208.17(a). The definition of torture is, “any act by which sever pain or suffering, whether physical or

mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or third person has committed or is suspected of having committed, or, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. 8 CFR 208.18(a)(1). The torture must be inflicted while in the custody or control of the offender. 8 CFR 208.18(a)(6). The torture must be specifically intended to inflict severe physical or mental pain or suffering. 8 CFR 208.18(a)(5). The torture must be conducted with the acquiescence or at the behest of a public official or a breach of his legal responsibility to intervene to prevent such activity. 8 CFR 208.18(a)(7).

VIII. ARGUMENT

A. The Board of Immigration Appeals erred as a matter of law in concluding that imputed political persecution and mixed motive persecution were not applicable to the Petitioner’s case and that the persecution was based entirely on criminal causes.

The Immigration Judge indicated and the Board of Immigration Appeals affirmed that the basis of persecution suffered by the Petitioner was not within a protected category of race, nationality, religion, or membership in a particular political or social group. (Addendum. at 1,2,18,19(R,2,3,206)). The immigration judge utilized the Matter of TMB, Int. Dec.3307 (BIA 1997) to explain that while extortion by groups resembling the government can be threatening, they do not necessarily constitute persecution under the Immigration and Nationality Act. (Addendum at 18(R 206)). The Court of Appeals has ruled on several cases regarding imputed political persecution. In general, it is not necessary that a claimant have elicited a particular political opinion as silence or political neutrality can form the basis for political persecution. *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995). Persecution need not only be based on only one element but can derive from several causes. *Osario v. INS*, 18 F.3d 1017,1018 (2nd Cir. 1994) (*Singh v. Ilchert*, 69 F.3d 375, 376 (9th Cir. 1995)). The mixed motive theory of persecution looks to whether analysis would justify a view that the persecution was based in part on one of the five protected categories. *Matter of TMB*, Int. Dec. 3307 (BIA 1997). The alien need not show conclusively why persecution occurred in the past or is likely to occur in the future. The alien must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual

or imputed protected ground. In re S-P, Int. Dec. 3287 (BIA 1996), the Court has also stated that as the severity of the threats or nature of the conduct used to facilitate extortion increases so does the likelihood of a recognized claim for persecution.

The Ukrainian Mafia is not only a criminal organization with criminal designs, but also an organization with ties to the government itself. (Appendix at 13-19,(R 59-65), 20-36 (R66-82),50-65(R 100-115). The Mafia in the former Soviet Union is largely supported by present and former members of the KGB and local police forces. (Appendix at 13-19 (R59-65) (Dirty Cops in the former Soviet Union run both sides of the law), 20-36 (R66-82)(Organized Crime and Corruption in the Ukraine: Impediments to the Development of a Free Market Economy)). There is rampant corruption of police agencies, where an estimated four out of five officers accepts some form of a kick back (Appendix at 40(R 90(The Modern Face of the Russian Mafia)). The Mafia in the former Soviet Union is actively involved in extortion on a massive scale. (Appendix at 37-43 (R 87-93 (The Communist Face of the Modern Russian Mafiya)). Extortion with threats of violence still pose the longest inroad of organized crime into the legal economy. (Appendix at 40 (R90 (The Communist Face of the Modern Russian Mafia)). In the Ukraine, private businesses are spending an annual average of \$37,000 per year on bribes,

protection money and other “extra legal” payments. (Appendix at 44 (R94 (Embarrassment looms for Ukraine))). Business willingly acknowledge that they must pay bribes for every government service. (Appendix 45 (R95 (Embarrassment looms for Ukraine))).

The Mafia represents a political entity with specific political designs and objectives and encompasses every level of government. “Organized crime” according to Senator John Kerry (D-MA) “is the new communism, the new monolithic threat”. (Appendix at 14 (R60 (Dirty Cops in the former Soviet Union run both sides of the law))). Organized crime in the former Soviet Union can be seen as a continuation of the former communist philosophy, to advance the traditional strategic objectives of Soviet Communism: Subversion of the West, enrichment of the party and the Russian military-industrial complex through Western-Foreign aid and eventual convergence with the West with terms favorable to socialism. (Appendix at 14 (R60 (Dirty Cops in the former Soviet Union run both sides of the law))). The criminal-political nexus, the alliance of the former party elite, members of the law enforcement and security apparatuses, and the gangs of organized criminals who together penetrate the licit and illicit sectors-is the most pernicious element of the crime phenomenon in the Ukraine. Appendix at 25 (R71 (Organized Crime and Corruption in Ukraine: Impediments to the Development of a Free Market Economy))).

Thus it can be said that the Ukrainian Mafia is an entity of the government based on close political and economic ties with the acting elements of government. On this basis the persecution suffered by the petitioner was related to governmental activity on the basis of a criminal-political nexus.

The court has examined political persecution in the context of quasi-governmental extortion and theft. In *Desir v. Ilchert*, 840 F.2d. 723 (9th Cir. 1988) the court considered threats and violence premised upon the use of extortion and theft as practice of a quasi-governmental security force of the government of Haiti, the Ton Ton Macoutes. The court found a basis for persecution by one who had suffered beatings, imprisonment and assaults as a result of their extortionary attempts. *Desir v. Ilchert* at 724. The court found a government by “Kleptocracy” that was characterized by thievery from the highest to the lowest level. The organization required that each of the Ton Ton Macoutes depended upon their fellow Haitians for their livelihood, this encouraged wide-scale corruption, extortion and violence. Refusal to comply with extortionate demands resulted in the attribution of anti-government sympathies and also swift reprisals, including beatings, imprisonment and death. *Desir v. Ilchert* at 727. The court found that this claimed debt by 50% per month, (R. at 241(T)) because after Alla left they told her mother that she would now owe an additional amount because she had left for the United States.

(R.at 249(T)). Because the use of extortion is widespread in the Ukraine and in the Former Soviet Union in general the present case would fit the pattern of imputed political persecution as evidenced in *Desir v. Ilchert*.

The Immigration Judge denied a claim of persecution on the basis of Mafia harassment due to the fact that this did not constitute persecution under one of the five protected basis. He construed this to be mere criminal activity.

(Addendum at 18,19 (R206, 207)). Although this can be one basis for the persecution, persecution is not limited to one possible motive as outlined above.

In *Re S-P*, Int. Dec. 3287 (BIA 1986), *Osario v. INS*, 18 F.3d 1017, 1018 (2nd Cir. 1994). In this instance the Petitioner was subjected to persecution by an organization which has ties to the government and is similar to the government.

This organization seeks to gain political and economic power by the use of terror and physical violence. (Appendix at 40 (R90 (The Communist Face of the Modern Russian Mafia) Murder has been used by the Mafia as retribution and a tool to facilitate terror. (Appendix at 57 (R107)). The Petitioner was subjected to this violence and threats of violence. (R. at 240-252(T)). The acts of the Mafia can be construed to be political in nature.

In *McMullen v. INS*, 658 F.2d 1312, (1981) the Court recognized a significant probability of persecution from association with a quasi government/criminal group, the PIRA. The court found that this PIRA had a well documented

history of persecution of defectors. *McMullen v. INS* at 1318. In the present case the Petitioner's husband was a individual with presumed association with the Mafia. (R. at 236, 237(T)) He was not employed under normal conditions and his behavior was secretive and unusual for a family man. (R. at 236, 237(T)). He was arrested on more than one occasion for acts similar to disorderly conduct. (R. at 236, 237(T)). The Petitioner claims that he was permanently in contact with some undisclosed persons that he would not reveal to her. (R. at 237(T)). This would justify a belief that he may have been involved with the Ukrainian Mafia. After he disappeared, the Petitioner started to have difficulty with them. (R. at 241(T)). On the basis of the ruling in *McMullen*, the Court would recognize the possibility of persecution against someone who has left a clandestine organization such as the Mafia. The court has recognized familial persecution as a basis for persecution which could be applicable here. In *In Ananeh-Firempong v INS*, 766 F.2d. 621 (1st Cir. 1985) the Court recognized that persecution of one family member can constitute a valid basis for a well founded fear on behalf of another family members. This concept can be extended to relate to the political persecution of a family member of someone affiliated with a clandestine organization.

The Court has stated that the motivation behind persecution need not encompass only a motive based upon a protected ground. Rather, the courts

have looked to whether a reasonable analysis would justify a view that the persecution was based in part on one of the five protected grounds. *Matter of TMB*, Int. Dec.3307 (BIA 1997), *Singh v. Ilchert*, 63 F.3d 1501, 1502 (9th Cir. 1995). This evaluation can be broken down into the mixed motive analysis: (1) Indications in the particular case show that abuse was directed toward modifying or punishing opinion, rather than conduct; (2) Treatment of others who might be confronted by government agents in similar circumstances; (3) Statements or abuse out of proportion to non political ends. *Matter of TMB*, *supra* at 12.

While the persecution that Alla faced from the Mafia was centered around the payment of a debt, it did include other elements that could conceivably amount to the attempt to modify opinion, rather than conduct. In early 1996 in her last physical encounter with the Mafia, she was told by a gangster she knew from 4 years previous “well now your looking for help from God, lets see how God can help you”. (R. at 250(T)). This indicated a knowledge of her activities greater than that to be expected from someone merely trying to collect a debt, and considering the past history of religious persecution and intervention into the practice of religion in the former Soviet Union by security elements such as the police and the KGB this would tend to indicate that this was an attempt to

conform religious opinion. This could have been an attempt to dissuade her from attending church.

At the police station following the above-mentioned incident in early 1996, the Petitioner was approached by someone with an anti-religious message. A person in plain clothes approached the Petitioner after she had been sitting for several hours without any assistance and asked her if she attended church, when she replied affirmatively, he then replied that the state deprive her of her parental rights because instead of watching her children she was attending church. (R. at 251(T)). This incident seems out of character with mere debt collection, and may indicate a collusive effort on the part of the Mafia/Police to enforce the old communist principles of persecution and suppression of religious belief, especially belief, especially in the form of Baptist or Evangelical faith. (Appendix at 88-90(R 162-164(Affidavit of Boris Golovko)).

The proximity of these two incidents and the improbability of their random occurrence could represent a collusive attempt by the Mafia/Police to dissuade the Petitioner from attending the Baptist Church. This constituted an attempt to modify opinion rather than conduct on the basis of dissuading the practice of religious observance.

B. The Board of Immigration Appeals erred as a matter of law when it failed to recognize a valid claim for religious persecution on behalf of Alla and her daughter Yevgeniya.

Alla and her daughter Yevgeniya have been subject to religious persecution. The Petitioner was subject to religious persecution at her workplace (R. at 252, 253, 258(T)) from the Mafia (R. at 250(T)) and from the Police. (R. at 251(T)). The Immigration Judge asserted and the Board of Immigration Appeals affirmed that this did not constitute past persecution (Addendum. at 18 (R207)). This was based upon the claim that the Petitioner had a limited involvement with the Baptist Church. (Addendum at 18 (R207)). The Immigration Judge also dismissed harassment suffered by the Petitioner's daughter at the hands of a Muslim element of the population known as the Tatars, stating that this was not directed at a specific entity of the Christian population, but at Christian religionists in general. (Addendum at 18 (R207)). The Petitioner herself was also subject to discriminatory action at the hands of the Tatars when she was forcibly moved out of housing she was occupying. (R. at 263(T)).

The Board of Immigration Appeals has analyzed the criteria for religious persecution in *In Re Sanchez*, 19 I&N Dec. 276 (BIA 1985). Religious persecution can be defined on the following basis: 1) The government is aware

of the alien's beliefs; 2) special individualized circumstances indicating that he or she has been or will be singled out for persecution beyond some general threat of harm affecting the entire population of the country; 3) the government has punished members of this particular religious group; 4) receipt of specific threats as a result of his or her religious beliefs. *In Re Sanchez* at 276.

Religious persecution was prevalent in the Former Soviet Union. Appendix at 8-12 (R11-15(Affidavit of Irina Potapenko)), 88-90(R162-164(Affidavit of Boris Golovko). In the past, the government has punished members of the Baptist and Evangelical sects of the Christian faith, subjecting them to public ridicule and misinformation, sometimes calling them agents of the United States, subjecting them to imprisonment (Appendix at 88-90 (R262-264 (affidavit of Boris Golovko)). This persecution continues today although officially denied. (Appendix at 70 (R132 (Ukrainian Baptists Detained as Evangelistic Meetings Kick Off, Keston News Service), 8-12 (R11-15), 88-90(R162-164)). In this case, both the Petitioner and her daughter have experienced persecution in this formerly atheistic country.

Alla was persecuted on the basis of her attendance at the Baptist Church, the most prominent instance occurring at her place of employment. In the summer of 1995 Alla started to attend the Baptist church in Simferopol. (R. at

142(T)). The Petitioner's supervisor at her place of employment (Naval warehouse) was a former communist, who discovered that she was attending the Baptist Church and proceeded to try and discourage her from doing so. (R. at 252(T)). He told the Petitioner that if she did not want to lose her job, she should stop attending church. (R. at 252(T)). The Petitioner also states that she was forced to work on Sundays so she could not attend church, while the other employees were allowed to work a Monday through Friday schedule. (R. at 253(T)). As a result of this persecution, the Petitioner stopped going to church for several months for fear of losing her job and not being able to take care of her children and then attending church sporadically after that. (R.at 253(T)).

This information justifies several prongs of the proof in *In Re Sanchez*. The government has persecuted Christians and specifically Baptists and Evangelicals in the past. The persecutors in this instance have no direct connection to the government but can be seen as an extension of the former government. Specifically, in this circumstance religious persecution at the Petitioners work place originated from former communist party members at a government run work facility. The Mafia has a governmental connection as do the police and those associated with them. The Petitioner was part of a particular social group with immutable characteristics which distinguished her from the population at large.

In *Fatin v. INS*, 12 F.3d. 1233, 1242(3rd Cir.1993), the Court considered the issue of religious persecution based on forced compliance with the Revolutionary Islamic Law imposed after the Shah was disposed in 1979. This included the wearing of the a veil, or chador. *Fatin* at 1241. The Court postulated “the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs”. *Fatin* at 1242. The Court went on to say, “such a requirement could constitute torture or persecution only if directed against a person who actually possessed the religious beliefs or attached religious importance to the object in question”. *Fatin* at 1242.

In the present case the Immigration Judge denied a claim for religious persecution because he said the petitioner did not have a significant commitment to the Baptist faith, based upon limited time in church attendance and a lack of recognized leadership positions within the church. (Addendum at 18 (R 207)). The standard evidenced in *Fatin* allows only that the belief be actually held. Therefore it can be shown that the Petitioner did in fact have a firmly held religious belief. The Petitioner claimed she turned to God because of the difficulties encountered in her life. (Appendix at 75 (R 152(Affidavit of Alla Bogdan))). She has continued to attend church in this country (Appendix at

87 (R161)). Therefore it can be said that the work supervisor's actions constituted an act that was abhorrent to the Petitioner's most deeply held belief, her religious faith. Fatin at 1242.

The Petitioner's daughter, Yevgeniya has been persecuted for her religious faith. (R. at 254(T)). She was persecuted by a group known as the Tatars (Muslims). They asked her who her God was, they said God is Allah. (R. at 254(T)). On several occasions she was harassed, hit and beaten on her way home from school. (R. at 254, Appendix at 83 (R321)), She was harassed because she was a Baptist. (Appendix at 83 (R 321 (Affidavit of Vladimir Tararaka))). Her teacher at school knew about these occurrences, but did nothing to stop this persecution. (Appendix at 83,84 (R321,322 (Affidavit of Vladimir Tararaka))). The Immigration Judge did not attribute this to persecution on a protected basis, (Addendum at 18 (R 207), but rather to Christian religionists as a whole.

The definition of a particular social group is that they share a common characteristic that the members of the group cannot nor should not change. Fatin at 1240. The result in *In Re Sanchez*, 19 I&N Dec. 276 (BIA 1985) requires special individualized circumstances which indicate that the alien has or will be singled out for persecution beyond some general threat affecting the population at large. *In Re Sanchez* at 276. Yevgeniya was part of a particular

social group. She also was subject to a threat that was individualized to her based upon her vulnerability as a school child, her Christian belief and church attendance. According to affidavit this persecution was also premised upon the fact that she attended the Baptist Church. (Appendix at 83,84 (R321, 322)). Yevgeniya had both an objective and subjective fear of the persecutors. She cried after she was beaten and she did not want to go back to school. (R. at 254, Appendix at 83,84 (R321,322)). She had a reason to fear the persecutors, as her teacher would not intervene to help her. Historically, teachers in the former Soviet Union had been instructed to dissuade children from church attendance. (Appendix at 88 (R 162 (Affidavit of Boris Golovko))). This action, although not instigated by the government was conducted by a group (the Tatars) whom the government was unable or unwilling to control. *In Re Sangha*, 103 F.3d 1482, 1487 (9th Cir. 1997). There was a cumulative nature to this persecution as it occurred on several occasions. *Shiraza –Parsa v. INS*, 14 F.3d 1424, 1428 (9th Cir. 1994).

The Petitioner has been forcibly evicted from a home she was living in by the Tatars (Muslims). (R. at 263). The Ukrainian authorities did nothing to stop this problem which was oriented along religious lines. This was also religious persecution.

C. The Board of Immigration Appeals erred as a matter of law in affirming the Immigration Judge's conclusion that Petitioner had failed to establish that he has suffered past persecution. (Appendix at 18 (R207, oral decision of the immigration judge)).

Past persecution as defined in the Matter of Chen, 20 I&N 16 (BIA, 1989) can be considered on the basis of the severity of the persecution. *Matter of Chen*, at 21. The Court considers where there has been past persecution there is a presumption of future persecution that can be rebutted only by evidence of changed country conditions, Matter of H, Int. Dec.3276 (BIA 1996). The Court has considered that past persecution alone can form the basis of asylum. *Singh v. Ilchert*, 63 F.3d. 1501 (9th Cir. 1995).

In this instance the Petitioner has suffered severe persecution. That is the infliction of harm or suffering on the alien who differs in some way which the persecutor deems offensive. *Fisher v. INS*, 79 F.3d 955, 961(9th Cir., 1996). In this instance Alla was beaten by members of the Ukrainian Mafia (R. at 240-242(T)). She was hounded and followed by the Mafia for a period of over six years from 1992 to 1996. (R. at 240-242, 250-251(T)). Her family has even received inquiries about her from the Mafia since her departure to the United States. (Appendix at 78 (R155 (Affidavit of Alla Bogdan))). Alla suffered persecution on the basis of her membership in the Baptist church. She was

forced to stop attending church for a period of time and then sporadically thereafter due to threats from her supervisor at the Naval Warehouse. (R. at 252, 253, 258(T)). She was forced to work on Sundays, while other employees kept a Monday through Friday schedule. (R. at 253(T)). Her supervisor was a former communist and she was the only Baptist church member working at that government installation. (R. at 253(T)). Cumulative affects of harassment of a seriousness less than that required for persecution can lead to a viable case for persecution. *Shirazi-Parsa v. INS*, 14 F.3d 1424, 1428 (9th Cir. 1994).

Alla's daughter Yevgeniya was harassed at school by members of the Tatars who were Muslim. (R. at 254(T)). She was beaten by them and pushed to the ground while on her way home from school. (R. at 254(T)). They were harassing her about who her God was, they said God is Allah. (R. at 254(T)). They harassed her because she was a Baptist. (Appendix at 83 (R321)). She was harassed on her way home from school on more than one occasion (Admin. R. at 358, 359). When her teacher was told about this problem he refused to help and said it was not his problem. (Appendix at 83,84 (R321,322)).

In the *Matter of Chen*, 20 I&N 16 (BIA 1989) the Board of Immigration Appeals considered several factors which lead to the conclusion of past persecution. The Board considered 1) the existence of human rights abuses in China and limited religious freedom 2) the applicant's genuine fear of

persecution and the continued possibility of persecution. 3) The severity of the past persecution. The former Soviet Union has a history of human rights abuses, and many specifically regarding the suppression of religion. Extortion and organized crime is now present on a massive scale. (Appendix at 13-19 (R 59-65), 20-36 (R66-82), 50-65 (R100-115)). Persons of the Evangelical or Baptist sect of the Christian faith have been persecuted specifically by the prior Soviet Government. (R.at 278, 279, Appendix at 90 (R164)). Alla and her children have a genuine fear of persecution should they return to the Ukraine. Religious persecution is not limited to the Crimea, but is present in all regions of the Ukraine. (R. at 125, 132).

Alla has a genuine fear of return to the country of the Ukraine. Alla has stated that she was afraid to go outside after the visits by the Mafia. She also claimed she had a nervous breakdown as a result of the trauma she experienced throughout the four years of persecution by the Mafia. (R. at 245, 246(T)). She stated that she specifically requested that she obtain a visa to the U.S. because conditions were so bad in the Ukraine. (R. at 255, 256(T)).

The persecution encountered by the Petitioner and her daughter was severe. They were physically beaten (R. at 240-242, 254 (T)). They suffered repeated occurrences of a physical beating and psychological harassment, (Admin. R. at 240-255(T)), and this also increased the severity of the

persecution. *Shirazi-Parsa v. INS*, 14 F.3d 1424,1428(9th Cir. 1994). Based upon these considerations Alla deserves asylum on the basis of past persecution.

D. The court erred in failing to consider a valid claim for asylum based upon economic persecution.

The petitioner has been subject to threats of economic persecution at her workplace at the Naval Warehouse. (R. at 252, 253®). Should she return she as a practicing Christian would quite likely be subject to severe economic deprivation. Economic persecution is defined as substantial economic deprivation, but does not require that the economic deprivation be total. *Borca v. INS*, 77 F.2d 210, 216 (7th Cir. 1996). In *Borca*, the petitioner had been fired from her primary source of employment on the basis of political intimidation but did have the opportunity to obtain some other lesser forms of employment.

In the present situation the Petitioner faces a strong possibility that she could be prevented from obtaining employment in her primary area of learning and knowledge, due to her attendance at a Christian church (probably the Baptist church). In the formerly atheistic country of the Ukraine the practice of religion on anything other than a ritualistic level is the source of great opposition. The Baptist church in particular has been a targeted organization.

(Appendix at 88-90 (R162-164 (affidavit of Boris Golovko, 8-12 (R11-15affidavit of Irina Potapenko). Based upon this possibility it can be stated that there would be a strong possibility that there would be economic persecution if she were to attend the Baptist church and if she remained a single mother.

E. The Court erred in failing to justify a claim for asylum based upon a well founded founded fear of persecution should the Petitioner and her children return to the Ukraine.

The standard for granting asylum is that the applicant have a well-founded fear of future persecution. There is a presumption of future persecution if it can be found that persecution occurred in the past. *Singh v. Ilchert* at 1502. In this case the Petitioner has shown that she has both a subjective fear of persecution should she return to the Ukraine, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-431 (1987), which analyzes her subjective mental state. She desired to flee the Ukraine even though her sick mother remained there along with her Father and Brother. (Admin. R. at 201, 150-155(Affidavit of Alla Bogdan)). Alla also has a objective fear of returning to the Ukraine, *Matter of Mogharrabi*, 19 I&N Dec. at 444 (BIA 1987), that is a reasonable person in the place of the petitioner would fear persecution. The Petitioner has

demonstrated both the subjective and objective requirements for a well-founded fear of persecution.

F. The Board of Immigration Appeals erred as a matter of law in failing to find application of the Article III of the United Nations Convention against Torture in the claim of the petitioner.

The Petitioner has shown a claim for the application of Article III of the United Nations Convention Against Torture as applied through 8 CFR 208.18. The Petitioner has been subjected to severe pain or suffering both physical and mental. 8 CFR 208.18(a)(1). She was beaten and psychologically tormented by the Mafia. (R. at 239-252(T)). It can be said that the continual monitoring of her by repeated visits to her home and that of her mother constituted purposeful activity designed to inflict severe mental pain and suffering. 8 CFR 208.18(a)(5). (R. at 239–252(T)). A claim can be made that this activity was done with the acquiescence of the Government or a public official. Following the second encounter with the Mafia in April of 1992, the petitioner was told by the police that it was unlikely that the suspects could be apprehended. (R. at 31(T)). The police were very uncooperative. She was waiting over two hours after the incident of 1996 when approached by a person in plain clothes who

told her that the state could remove her children from her custody because she went to church. (R. 251(T)). The police in the Ukraine and Former Soviet Union are corrupt and many are Mafia members. (Appendix at 25 (R71 (Organized Crime and Corruption in the Ukraine: Impediments to the Development of a Free Market))). Based upon this analysis, it can be assumed that this conduct could be construed to with the awareness of a public official (police) and/or breached their legal responsibility to intervene to prevent such an occurrence. 8 CFR 208.18(a)(7).

Conclusion

The Petitioner, Alla Bogdan and her two children have undergone significant duress while in their home country of the Ukraine. They have been harassed and beaten both physically and mentally. They have no guarantee of safety should they be required to return to the Ukraine. Their home region of the Ukraine, near the city of Simferopol in the Region of the Crimea is a source of Criminal and Mafia activity. (R. at 117 (1996 Human Rights Report on the Ukraine)). If they should return, it is quite likely that their life or freedom would be threatened. Alla and her two children deserve the chance to remain in this country and become productive citizens.

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the United States Department of Justice, Office of Immigration Litigation this twentieth (20th) day of February, 2001 by placing two copies of this brief and a copy of the appendix in the U.S. mails to the following address:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT THIS BRIEF CONTAINS

AS DETERMINED BY WINDOWS 98 WORD PROCESSING SYSTEM

BARTON C. WINTER

ATTORNEY AT LAW

