



00-3695

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLA S. BOGDAN,
YEVGENIYA A. BOGDAN,
ROMAN V. BOGDAN,
(INS No. A75 306 208/207/206),

Petitioners,

v.

JOHN D. ASHCROFT, Attorney General of the United States,
Respondent.

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

BRIEF FOR RESPONDENT

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SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

Petitioners, Alla Bogdan ("Bogdan"), Yevgeniya Bogdan ("Yevgeniya") and Roman Bogdan ("Roman") [collectively "petitioners" or "the Bogdans"), natives and citizens of Ukraine, were found removable for remaining in the United States longer than permitted and were denied the requested relief of asylum and withholding of removal by the immigration judge.¹ Their appeal to the Board of Immigration Appeals was dismissed. The instant petition for review followed.

Petitioners have failed to prevail in their claims that the lead petitioner, Bogdan, suffered persecution, and that, as a result, she has a well-founded fear of future persecution. Bogdan's evidence and testimony concerning her alleged encounters with the mafia and written threats did not rise to the level of persecution contemplated by the INA. Moreover, Bogdan failed to show a causal connection between such acts and her religion and/or an imputed political opinion. In addition, Bogdan failed to present compelling evidence that the mafia would have an interest in persecuting her should she be returned to

^{1/} The claims of Yevgeniya and Roman, minor children of Bogdan who are derivative beneficiaries of any grant of relief to their mother, rest entirely upon their mother's application for asylum. Only Bogdan testified at the hearing before the immigration judge, and her children did not file a separate asylum application or otherwise participate in the case. See section 208(c) of the Act, 8 U.S.C, § 1158(c), and 8 C.F.R. § 208.21.

Ukraine.

Finally, the Court lacks jurisdiction over Bogdan's Torture Convention claim as she has not exhausted her available administrative remedies.

Because respondent believes that the issues presented in this case are thoroughly addressed in the briefs, he does not request oral argument.

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Petitioners,

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ON PETITION FOR REVIEW OF THE DECISION
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

—
STATEMENT OF JURISDICTION

In this immigration case, Petitioners Bogdan, Yevgeniya and Roman seek review of a decision of the Board of Immigration Appeals ("BIA" or "Board") affirming the immigration judge's denial of Bogdan's applications for asylum, under section 208(a), 8 U.S.C.A. § 1158(a), of the Immigration and Nationality Act ("INA" or "Act"), and withholding of removal under INA section 241(b)(3), 8 U.S.C.A. § 1231(b)(3). The Board's jurisdiction arose under 8 C.F.R. 3.1(b)(3)(2000), the implementing regulation to the INA which

grants the Board appellate jurisdiction over decisions of immigration judges in deportation cases.

Petitioners' removal proceedings commenced on December 17, 1997, with the filing of separate Notices To Appear in the immigration court. 8 C.F.R. § 3.14(a) (2000). A.R. 360-61, 362-63, 364-65.² As petitioners' removal proceedings commenced after April 1, 1997, this Court has jurisdiction over the instant petition for review pursuant to INA section 242(a)(1), 8 U.S.C. § 1252(a)(1) (West 2000). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546, § 309(a) (Sept. 30, 1996) ("IIRIRA").

The Board entered its order in this case on October 10, 2000. A.R. at 3-4. Petitioners filed their petition for review on November 8, 2000, within the 30-day filing period mandated by section 242(b)(1) of the INA, 8 U.S.C.A. § 1252(b)(1) (West 2000). Hence, the petition is timely. Venue properly lies in this Court because this is the judicial circuit in which the hearing in Bogdan's case was completed. See INA § 242(b)(2), id. § 1252(b)(2)

STATEMENT OF ISSUES

1. Whether Bogdan, the lead petitioner, presented evidence so compelling that no reasonable factfinder could fail to

^{2/} The abbreviation "A.R." refers to the Certified Administrative Record on file with the Court. Citations to petitioners' opening brief will be indicated by "Pet'rs Br." followed by a page number.

conclude that she suffered persecution in the past and that she presently has a well-founded fear of persecution (1) where the mistreatment of her by the mafia when she refused to pay back money owed them by her husband and the mistreatment of her daughter by her Tartar classmates who were Muslim, did not rise to a level of past persecution; (2) where there was no showing of a causal connection between Bogdan's mistreatment and her religion and/or an imputed political opinion; (3) where Evangelical Christian groups in Ukraine are no longer denied religious freedom; and (4) where there is no evidence of harm to her family members who remain in Ukraine. 8 U.S.C. § 1252(b)(4)(B); INS v. Elias-Zacarias, 502 U.S. 478, 484 (1992); Rucu-Roberti v. INS, 177 F.3d 669, 670 (8th Cir. 1999) (per curiam); Manivong v. INS, 164 F.3d 432, 433 (8th Cir. 1999); Nyonzele v. INS, 83 F.3d 975 (8th Cir. 1996); Lopez-Zeron v. INS, 8 F.3d 636, 638 (9th Cir. 1993); Behzadpour v. INS, 946 F.2d 1351 (8th Cir. 1991); Ghasemimehr v. INS, 7 F.3d 1389, 1390 (8th Cir. 1993); Canas-Segovia v. INS, 970 F.2d 599, 602 (9th Cir. 1992); Sections 101(a)(42)(A) and 208(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

2. Whether the Court has jurisdiction to review Bogdan's claims under the Convention Against Torture when she has not exhausted her administrative remedies. Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-822 (October 21, 1998); Aiyadurai v. INS, 683 F.2d 1195, 1198 (8th Cir. 1982); Mojsilovic v. INS, 156 F.3d 743, 748 (7th Cir. 1998).

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings, And Disposition Below

This is an immigration case in which the Bogdans, natives and citizens of Ukraine, challenge a decision of the Board. On December 17, 1997, the Immigration and Naturalization Service ("INS" or "Service") issued separate Notices To Appear against Bogdan and her two children, who entered the United States as nonimmigrant visitors for pleasure on or about May 23, 1996. A.R. 360-61, 362-63, 364-65. The Bogdans were charged with being subject to removal pursuant to INA section 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (West 2000), for remaining in the United States beyond May 21, 1997, the time they were authorized to remain as nonimmigrant visitors. Id. At a hearing on November 24, 1993, the Bogdans admitted the factual allegations contained in the notices to appear and conceded their removability as charged. A.R. 215. Bogdan indicated her intent to renew her request for asylum, withholding of deportation, and, in the alternative, voluntary departure, and a hearing on her asylum claim was scheduled for a later date. Id.³

On December 9, 1998, the immigration judge found the Bogdans to be removable as charged and ineligible for asylum and withholding of removal and granted their alternative

^{3/} Bogdan initially filed her asylum application with the INS Asylum Office. The INS denied the application and referred the case to the immigration court. A.R. 139-41, 215.

request for voluntary departure. A.R. 208-09. The Bogdans thereafter appealed the immigration judge's decision to the Board. A.R. 177-80. The Board dismissed the appeal on October 10, 2000. A.R. 1-3. This petition for review followed.

B. Statement Of Facts

In support of her application for asylum, Bogden offered her testimony, asylum application and supporting affidavit, and various background documents. A.R. 222-23, 231-70.

1. Bogdan's Asylum Application

In her asylum application and supporting affidavit, Bogdan stated that she was seeking "political and religious asylum" because of "harassment from [the] police, mafia[,] and work supervisors" due to her "church affiliation and nationality." A.R. 343.

Bogdan stated that her husband "disappeared to an unknown destination" in January 1992. A.R. 349. A month after his disappearance, four unknown men came to her home looking for her husband. Id. The men informed Bogdan that her "husband owed them \$1500" and that she "would have to pay them the \$1500 within one month." Id. The men further told her that she would be "in trouble" if she did not pay them the money. Id. Bogdan was visited by these four men on several occasions. A.R. 349-53. She surmised that they were members of a mafia group. A.R. 350.

During one of the visits by the four men, "[t]wo of the men held [her] hands, another held [her] by [her] hair, and the last one punched [her] in the face twice and kicked [her] kidneys once" when she refused their demands for money. A.R. 349-50. Bogdan was given three additional months to "find the money." A.R. 350. Bogdan later surmised that her "husband was a member of the [m]afia." Id. As a result, Bogdan "changed where [she] lived secretly." Id. The four men "came to [her] parents['] house and asked them where [she] was living." Id. During the next two years, Bogdan "changed [her] residence many times." Id.

Bogdan stated that she asked for police protection but was told that she "would have to be Ukrainian in order to receive help and protection." A.R. 350-51. According to Bogdan, "[a]t that time Russian people were under pressure from the government to change their nationalities to Ukrainian." A.R. 350. Bogdan stated that she "did not change [her] nationality and [her] problems became worse." A.R. 351. Bogdan's "son wasn't allowed to go to kindergarten [because] there was no place for Russian children." Id. She also could not "receive medical care for [her] children." Id. Bogdan "changed her nationality [to Ukrainian] to avoid these problems." Id.

Bogdan stated that prior to 1995, she "did not have religious freedom as a believer [in God]" and that she "began to go to the Baptist Church [in Crimea] in the summer of 1995." A.R. 351. Bogdan's affiliation with the Baptist Church "became known to the administration of [her] work" and her employer thus began making

"things difficult for [her]" by fixing her "[schedule so that [she] would have to work on Sundays." Id. Bogdan was also warned by her ex-Communist boss that she would be fired if she "didn't stop going to church." Id. Bogdan "stopped going to church because [she] couldn't get another job and [she] needed the money to care [for] and feed [her] children." Id.

Bogdan stated that in 1995 a lot of Tartars returned to Krimea to retrieve the homes they were forced to leave when Stalin sent them away. A.R. 352. Some aggressive Tartars visited Bogdan's home and demanded that she leave her home." Id. Bogdan then relocated to her mother's home. Id. Also during this time, Bogdan's daughter was taunted by her Tartar class-mates because she and her family were Baptists. Id. Bogdan's mom became very worried about her daughter and grandchildren. Id. She later became "sick and was paralyzed." Id.

On the way home from church one day, Bogdan stated that she and a friend were stopped by unknown men. A.R. 352. The men "let her friend go and tried to put [Bogdan] in their car." Id. Bogdan recognized one of the men as "one of the men who had [previously] asked for money." Id. Bogdan stated that this particular man hit her in her kidneys, ripped off her clothes, and tried to rape her. A.R. 353. The men then "said bad words, laughed and told [her] 'we will see how your God can help you now.'" Id. Bogdan's friend then came back with a policeman. Id. Bogdan stated that "[t]he men drove away in their car and the police didn't try to stop them." Id. Upon filing a report of the incident to the police at the police station,

Bogdan was advised by someone at the station to stop attending church. Id.

Bogdan later departed for the United States. A.R. 354. Bogdan stated that "those men still continue to come to her mother's home." Id. She further stated that her mother asked her "not to come back to the Ukraine because [her] life is still in danger there." Id.

2. Hearing Testimony

Bogdan, an ethnic Russian and Baptist, testified to the following facts in support of her application for asylum and withholding of deportation at the hearing held on December 9, 1998. Bogdan is a native and citizen of Ukraine and at the time of the hearing was 36 years old. A.R. 235-36 She was born in the city of Simferopol, the region of the Crimea in the Country of the Ukraine. A.R. 235.

Bogdan is married and has two children, Yevgeniya who was age 12 at the time of the hearing and Roman who was age 7. A.R. 233. Prior to coming to the United States, Bogdan's home was in Simferopol, Ukraine, where she lived with her husband and two children. A.R. 235. Bogdan lived in Simferopol her entire life before coming to the United States. Id. She attended school there and graduated from a college or technical school with an accounting background. Id. Bogdan and her husband Vladimir Bogdan have been apart from each other since he disappeared from Ukraine in 1992. A.R. 234. She is unaware of his whereabouts. A.R. 234-35.

Bogdan testified that she was raised as an Orthodox Christian and that both her parents were Orthodox Christians. A.R. 236.

Bogdan's husband did not have any religious connections. A.R. 236 .

Bogdan's husband did not have a permanent job in Ukraine. A.R. 236. He instead did "seasonal work." Id. When questioned as to whether or not he was a criminal, Bogdan responded,

He was not a criminal, but he did not have a permanent job, but he was permanently communicating with some people and when I would ask him, he would tell me that's none of your business.

A.R. 237. When further asked whether he was involved with criminal people in Ukraine, Bogdan answered, "Yes, I guess so, because since he disappeared I started having problems because of that." Id. Bogdan stated that her husband had been arrested a few times in Ukraine, once "for participating in some kind of a fight and the others were [for] hooliganism." Id. Bogdan's husband was let go by the police because "they didn't have any evidence." Id.

Bogdan started having problems after her husband disappeared in January 1992. A.R. 239. In February 1992, she was approached by four young people on her way home from the store. A.R. 240. The individuals asked if she was Alla Bogdan. Id. Bogdan was also asked about the whereabouts of her husband. Id. After informing them that she was not aware of her husband's whereabouts, one of the individuals stated "if you don't know then you are responsible for what he did. He owes us money and [you will] pay back." Id. Bogdan again

informed them that she did not know where her husband was and that she was not going to pay them back because she did not have any money. A.R. 240. Bogdan was given three months to find the money and was told that she was going to be charged "50% for every month." A.R. 241. The individuals also informed Bogdan that "things [would] be pretty bad for [her]" if she did not pay them back the money. Id. When asked whether the individuals introduced themselves, Bogdan responded that "[t]hey were very bold and they did not even think they should introduce themselves." Id. When further asked who did she think they were, Bogdan stated "[w]ell, judging by their behavior, I think they were probably the members of the mafia or racket." Id. When asked whether the men hurt her in any way, Bogdan answered,

They were grabbing me by the jacket. I tried to pull loose from them and they said [we are] just warning you, next time its going to even be worse.

A.R. 241.

Bogdan's next encounter with the four men occurred in April 1992 while returning home from work. A.R. 241-42. After informing the men that she was unable to find money, Bogdan was told that they were not joking and that she was going to be treated differently. A.R. 242. Bogdan was then slapped in the face by one of the men and kicked in the kidneys by another one. Id. When asked whether she required any medical treatment after the assault, Bogdan responded,

Well, no, I came home all in tears and my mother said . . . I should [probably] hide somewhere for a while and just wait and we didn't think that it was that serious and we thought it was just racketeering. And then we didn't think it would last for . . . that long.

Id. Bogdan was told that they could come back at any time and that they would beat her if she did not have the money. A.R. 242.

Bogdan later learned that her husband was a member of the mafia. A.R. 243. When asked the source of her knowledge, she responded,

Well, because . . . later on, in the Crimea, they started shooting, they started killing people trying to set things straight between different members of the mafia.

Id. When asked why she believed that the mafia was after her, Bogdan responded,

Well, because they were requiring some money, and probably he really was involved in something serious [because] they were asking [for] money.

Id.

Bogdan testified that she went to the police station in 1992 to report the mafia incidents. A.R. 244. After informing the police that she had no witnesses to the incidents, the police informed Bogdan that they could not take her report due to the absence of witnesses. Id.

When asked whether she ever had to get any medical treatment for any injuries she suffered from the mafia members, Bogdan stated that she had some dental work done in 1995. A.R. 245. When asked whether she had any medical

treatment prior to 1995, Bogdan stated "Yes, I had a nervous breakdown of stress and I saw a psychiatrist, which is in Russia a neurologist." A.R. 246. Bogdan testified that she was also hospitalized in the United States for a nervous condition when she arrived in 1996. Id.

During the 1992 incidents, Bogdan went into hiding from time to time. A.R. 248. After the 1992 incidents, she returned to her mother's apartment at the end of 1992, and continued to reside with her mother, father, brother and two children. A.R. 247-248. Bogdan resided at her mother's apartment until she came to the United States in May 1996. A.R. 248.

Bogdan worked part-time at the military warehouse in 1994. A.R. 247. When asked whether the men from the mafia ever bothered her at her job, Bogdan stated "No, they did not. But somehow I had the feeling that [I was] being watched." Id.

In the summer of 1995, Bogdan started attending services with the Baptist Church in Simferopol. A.R. 238-39. While she did not formally register as a member of the Baptist church in Simferopol, she later became a member "in an American Church" when she came to the United States. A.R. 239. When asked whether she had any problems in Simferopol after attending services in 1995 that was directly related to her church membership, she responded,

Yes, my supervisor at work, he was at home a communist and I didn't know how he learned that I became a Baptist. And

he called me to his office and said, if you don't want to lose your job, stop attending church.

A.R. 253. When asked whether she stopped going to church, she responded,

I stopped for a while but I was just reading religious books at home because this is not something mandatory, you have to attend. I had to feed my children because . . . I was on my own so I was afraid to lose my job.

Id. When asked whether she went back to church after the fall of 1995, Bogdan answered "I did, but not very often." Id. Bogdan's employer also made her work on Sundays "although they knew that on Sundays [she] attended church." Id.

Bogdan's daughter also experienced problems at school because of her Christian background. A.R. 254. Her Tartar classmates, who were Muslims, made fun of her because "she said that there was God, and they said no" Id. Bogdan's daughter informed her on one occasion that she was "beaten by [the Tartar] children." Id.

Bogdan last saw the mafia members in the "Winter of '96" on her way home from church with her girlfriend. A.R. 249. Bogdan testified that three young men got out of a car and tried to pull her in. A.R. 250. A fourth man, who initially remained in the car, was recognized by Bogdan as one of the men that had previously approached her for money. Id. The man recognized by Bogdan got out of the car and grabbed and squeezed her. Id. He then asked "how much interest do you owe us now, and when are you going to pay?" Id. With the help from her girl friend, Bogden was rescued by a police officer who was patrolling the streets. A.R. 250-51. Bogdan

then went to the police station to file a written report of the incident. A.R. 250. While they accepted her report, Bogdan did not believe that "they made any further investigation, processing of the document." A.R. 251. While at the station a man in civilian clothing approached her and asked whether or not she attended church and she responded "Yes." Id. The man then informed her that they could "deprive [her] of [her] parental rights because instead of supervising your . . . watching your children you go to church." Id. When asked whether they knew what church she attended, she responded "[t]hey knew everything about me." A.R. 251. When asked who knew everything about her, Bogdan responded,

Well, I guess they knew everything about me because this person, who had brushed me, he didn't know my name, he didn't know anything but he knew I had children. How did he learn about that?

A.R. 252.

Bogdan testified that she became a Ukrainian citizen in 1995 and that there was a stamp in her passport indicating that she was a citizen of Ukraine. A.R. 260. According to Bogdan, her son was not allowed to enroll in kindergarten until he got a Ukrainian passport.

A.R. 262. When asked whether most people in the Crimea are ethnic Russians, she responded,

Yes, Well, actually, yes, there is a high percentage of ethnic Russians but the Ukraine wants to prove that the percentage of Ukrainians is higher and they make people . . . change their citizenship.

A.R. 261.

Bogdan first thought about coming to the United States in late 1995. A.R. 255. She applied for a visa in December, 1995 which was initially denied. Id. After the visa was denied, Bogdan explained to the consular officers that she "was afraid to live over there and [that she] wanted to visit [her] friends." Id. Bogdan also told them that she was afraid of the mafia in Ukraine. A.R. 256. When asked whether she informed them that she was not coming back to Ukraine, she responded

No, I did not tell them about that. They did not . . . well, I didn't know that I could stay here. I was just coming as a visitor to stay here for a while.

Id. When asked whether she told the embassy that she was being persecuted for religious reasons, she stated "[t]hey didn't ask me about that. No, I didn't tell them." Id. When asked what she was afraid of when she left Ukraine on May 23, 1996, Bogdan again responded,

The mafia. My fears. I was afraid because of myself and my children.

Id. Bogdan acknowledged that she was fearful of the mafia because of their belief that her husband owed them money. Id.

Bogdan stated that there was about 600 members of her Russian Baptist Church by the time that she left Ukraine, that both Russians and Ukrainians were members of the church and that some of the members worked for the government. A.R. 258.

Bogdan's 27-year-old-brother lives in Ukraine with her father at the same apartment she resided in before coming to the United States. A.R. 258. While she testified that the Tartars were seeking to

reclaim property that was taken from them during the Stalin era, she acknowledged that the Tartars had no claims to her father and brother's apartment and that no one bothered their apartment. A.R. 262-63.

3. The June 1997 State Department Country Report

The Department of State provided a profile of Ukraine which is included in the record. A.R. 271-86. The profile indicated that "[e]thnic Russians are the largest minority in Ukraine, constituting about 22% of the population." A.R. 274.

Regarding the treatment of Evangelical Christian groups, including Baptists, the State Department noted in the 1997 Profile that under the Communists, "Evangelical Christians were repressed in the same way as were believers of other faiths." A.R. 278. On the current status of such groups within Ukraine, the State Department found: "With the overthrow of the Communist regime in 1991, Evangelicals are no longer denied religious freedom and they worship without interference." Id. "Religious organizations are required to register with the state," the Profile observed, "but so far the state has not interfered with the registration of minority religions" Id.

The report notes that "[m]any applicants cite mistreatment by criminal elements, often described as 'mafias,' that engage in robbery, extortion, and occasionally kidnapping." A.R. 281. The report further observes that while "[t]here may be occasions when the ethnic, religious or political affiliations are related to criminal activity (some criminal groupings appear to be drawn from one or

another ethnic group, for example), . . . [the State Department has] identified no pattern of mistreatment based on these factors." Id.

4. Decision of the Immigration Judge

On December 9, 1998, the immigration judge denied the Bogdans' asylum and withholding of deportation claims and granted them voluntary departure. After setting forth the standards for asylum and withholding of deportation, and summarizing the testimony and the exhibits submitted by Bogdan, the immigration judge found that Bogdan's testimony failed to establish past persecution or a well-founded fear of future persecution on account of one of the grounds set forth in the Act. A.R. 194-209.

The immigration judge rejected her claim that she was persecuted as a result of her religious beliefs. In so finding, the immigration judge held that,

The Court would simply note that [Bogdan] testified that the reason that she came to the United States was because of her fear of criminal elements in the Ukraine. The record is clear that her problems with these gangsters began in 1992, and related to the activities of her husband. [Bogdan's] religious affiliations did not come until three years later. For three years, prior to her attending the Baptist church, [Bogdan] was harassed by the mafia for extortionary reasons. Even after she joined the church, her final contact with the mafia in early 1996 began with the demand for money. The Court cannot find that based on this record that there really is any religious overtone[s] to [Bogdan's] problems with the mafia. The Court would simply note that this is a case of extortion.

A.R. 206.

As to the harassment received by Bogdan's daughter from her Tarter classmates, the immigration judge found that such acts "did not rise to the level of past persecution." A.R. 207. In so finding, the immigration judge noted that "the problems for [Bogdan's] daughter really do not specifically relate to any connection to the Baptist church, but rather involve some school harassment by Muslims, which apparently would have been directed to any Christian religionist." Id.

Nor did the immigration judge find that the problems experienced by Bogdan at her job rose to a level of past persecution. A.R. 207. In so finding, the immigration judge pointed out that,

[t]he court would initially note that [Bogdan's] period of time of involvement with the Baptist Church was extremely limited. The Court does not believe that the record shows that [Bogdan] was actually a registered member of the church, and she certainly did not hold any positions of authority or leadership in the church. She attended the church for a period of several months in the summer and early fall of 1995, but then essentially stopped attending church after having problems at her place of employment.

Id.

The immigration judge also rejected Bogdan's claim of a well-founded fear of persecution. In rejecting this claim, the immigration judge noted that,

[w]hile the Court does not dispute in any manner that [Bogdan] has fears of returning to the Ukraine, those fears are not related to a protected basis under the Immigration Act.

A.R. 208.

5. Decision by the Board of Immigration Appeals

The Board dismissed the Bogdans' appeal on October 10, 2000. The Board found that the immigration judge correctly determined that Bogdan had failed to show either past persecution, a well-founded fear of persecution or a clear probability of persecution on account of a qualifying ground. A.R. 1-2. The Board affirmed the immigration judge's decision for the reasons set forth in that decision. A.R. 2.

SUMMARY OF THE ARGUMENT

Any reasonable adjudicator would not be compelled to conclude that Bogdan has suffered persecution or has a well-founded fear of future persecution on account of her religion and/or on the basis of imputed political opinion (1) where the mistreatment of her by the mafia when she refused to pay back money owed them by her husband and the mistreatment of her daughter by her Tartar classmates who were Muslim, did not rise to a level of past persecution; (2) where there was no showing of a causal connection between Bogdan's mistreatment and her religion and/or an imputed political opinion; (3) where Evangelical Christian groups in Ukraine are no longer denied religious freedom; and (4) where there is no evidence of harm to her family members who remain in Ukraine.

Finally, the Court lacks jurisdiction over Bogdan's Torture Convention claim as she has not exhausted her available administrative remedies.

ARGUMENT

I. THE BOARD'S DECISION IN DENYING PETITIONERS' ASYLUM CLAIM IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Burden Of Proof

Under section 208(a) of the INA, 8 U.S.C. § 1158(a), the Attorney General is authorized to grant asylum to "refugees." INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987); Daiga v. INS, 183 F.3d 797, 798 (8th Cir. 1999); Rucu-Roberti, 177 F.3d at 669; Miranda v. INS, 139 F.3d 624, 626 (8th Cir. 1998); Lopez-Zeron v. INS, 8 F.3d at 638. A refugee is a person unable or unwilling to return to his 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." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

The burden of proof is on the alien to establish eligibility for asylum. Feleke v. INS, 118 F.3d 594, 598 (8th Cir. 1997); 8 C.F.R. § 208.13(a) (1999). That is, an asylum applicant bears the burden of proving (1) statutory eligibility, that is, past persecution or a well-founded fear of persecution on account of a qualifying ground; and (2) that she merits asylum as a matter of discretion. See 8 C.F.R. § 208.13.

An alien seeking asylum based on past persecution need only prove the objective fact of past persecution.⁴ Lopez-Galarza v. INS,

⁴ However, even if the applicant establishes asylum eligibility based upon past persecution, the Board may still deny asylum in the exercise of discretion if the applicant faces no risk of future persecution, unless the applicant demonstrates compelling humanitarian factors, such as exceptionally severe past persecution. See Kazlauskas v. INS, 46 F.3d 902, 905-07 (9th Cir. 1996).

99 F.3d 954, 959 (9th Cir. 1996); Matter of Chen, 20 I.& N. 16, 17 (1989). However, "[p]ersecution is an extreme concept" which does not encompass every kind of treatment our society deems offensive or morally reprehensible. Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995).

An applicant can satisfy the well-founded fear test for asylum eligibility by demonstrating that he genuinely fears that he will be persecuted if returned to his native country, and that his fears are objectively reasonable. To establish eligibility, the alien must show that his fear is both subjectively genuine and objectively reasonable. Cardozo-Fonseca, 480 U.S. at 430-31; Feleke, 118 F.3d at 598; Hamzehi v. INS, 64 F.3d 1240, 1242 (8th Cir. 1995). "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. Specifically, the "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 v. INS, 7 F.3d at 1390; see also Yacoub v. INS, 999 F.2d 1296, 1297 (8th Cir. 1993).

The "on account of" standard requires the alien to establish a causal connection between the alleged persecution and the prescribed ground. Sangha v. INS, 103 F.3d 1482, 1486-87 (9th Cir. 1997).

A request for asylum in removal proceedings is automatically considered to include a request for withholding of removal. See INS v. Stevic, 467 U.S. 407, 420 n.13 (1984). Withholding of removal is governed by Section 241(b)(3) of the Act, 8 U.S.C. § 1251(b)(3). With certain exceptions not pertinent here, withholding of removal is mandatory if an "alien's life or freedom would be threatened [in the country of removal] on account of race, religion, nationality, membership in a particular social group, or political opinion." Id. In order to receive withholding of removal, the alien bears the burden of demonstrating a clear probability of persecution on account of one of the enumerated grounds if he or she were to return to the country in question. Stevic, 467 U.S. at 424, 430. The United States Supreme Court has observed that this standard is more stringent than the standard applicable to a claim for asylum. INS v. Cardoza-Fonseca, 480 U.S. at 449-50.

B. Standard Of Review

In the instant case, the Board reviewed the record of proceedings, the immigration judge's decision, and Bogdan's contentions on appeal. A.R. 3. After finding that the immigration judge adequately and correctly addressed the issues, the Board then adopted and affirmed the immigration judge's decision "for the reasons set forth therein." A.R. 3. If the Board relies on and adopts the reasoning of the immigration judge, the courts of appeals review the immigration judge's decision as the Board's decision. See Panrit v. INS, 19 F.3d 544, 546 (10th Cir. 1994); Shah v. INS,

220 F.3d 1062, 1067 (9th Cir. 2000)(Under circumstances in which the Board has exercised its power to conduct a *de novo* review of the record, this Court's review is limited to the decision of the Board, *except* to the extent that the immigration judge's opinion is expressly adopted by the Board.).

Pursuant to INA section 242(b)(4)(B), the administrative findings of fact regarding an alien's eligibility for asylum — including factual determinations regarding credibility — "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C.A. § 1252(b)(4)(B) (West 2000).⁵

With recent legislation, Congress has raised the barrier even further. See section 242(b)(4)(D) of the INA, 8 U.S.C. § 1252(b)(4)(D) ("The Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to law and an

^{5/} This new provision codifies, in effect, the substantial evidence standard of review articulated by the Supreme Court in INS v. Elias-Zacarias, 502 U.S. 478, 481 & n.1 (1992); Hajiani-Niroumand v. INS, 26 F.3d 832, 839 (8th Cir. 1994) (citing Behzadpour v. INS, 946 F.2d at 1353; Yacoub v. INS, 999 F.2d at 1297; Alsheweikh v. INS, 990 F.2d 1025, 1027 (8th Cir. 1993)). That standard, which is highly deferential, requires an asylum applicant to make essentially the same showing to obtain judicial reversal of a negative eligibility finding by the Board that a civil litigant must make under Federal Rule of Civil Procedure 50 to obtain a "judgment as a matter of law." Under Rule 50(a), judgment as a matter of law can be granted on an issue only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the party against whom the judgment is granted] on that issue" Fed. R. Civ. P. 50(a).

abuse of discretion."); Ali v. Reno, 237 F.3d 591, 593 (6th Cir. 2001).

C. Any Reasonable Adjudicator Would Not Be Compelled To Conclude That Bogdan Has Suffered Past Persecution Or Has A Well-Founded Fear Of Future Persecution in Ukraine On Account Of A Statutory Ground

Bogdan alleges that she is eligible for asylum because she was persecuted in Ukraine and because she has a well-founded fear of future persecution on account of her religion and/or on the basis of imputed political opinion.⁶ Pet'rs Br. at 28-46. The immigration judge, however, reasonably found that the encounters and threats she testified to with respect to both her and her daughter did not rise to the level of persecution as contemplated in the INA. A.R. at 207. In addition, the immigration judge reasonably found that Bogdan did not meet her burden of establishing that a reasonable person in her circumstances would have a well-founded fear of persecution. A.R. 208; see also Kratchmarov v. Heston, 172 F.3d 551, 554 (8th Cir. 1999).

1. Past Persecution

⁶/ Bogdan argues for the first time in her brief to this Court that she was "subject to threats of economic persecution at her workplace at the Naval Warehouse." Pet'rs Br. at 46. Because she failed to raise this issue before the Board, this Court lacks jurisdiction to consider this argument. Aiyadurai v. INS, 683 F.2d 1195, 1198 (8th Cir. 1982) ("[Petitioner] failed to exhaust her administrative remedies by appealing the immigration judge's finding of deportability to the BIA. Therefore, any judicial review by this court pertaining to that order of deportation is precluded."). In any event, "[f]ears of economic hardship or a lack of educational opportunities . . . do not establish a well-founded fear of persecution." Nyonzele v. INS, 83 F.3d at 982.

Bogdan claimed that she experienced the following problems while living in the Ukraine because of her Baptist faith and/or on the basis of imputed political opinion: (1) harassment by members of the mafia who slapped and kicked her on one occasion in April 1992 (A.R. 241-42) and grabbed and squeezed her on another occasion in the Winter of 1996 (A.R. 250-251) when she refused their demand that she pay back the money allegedly owed them by her husband and (2) being required by her work supervisor to work on Sundays, her Church day (A.R. 253). In addition, Bogdan claimed that her daughter was subjected to name-calling from her Tartar classmates who were Muslims (A.R. 254). Although regrettable, the experiences encountered by Bogdan and her daughter do not rise to the level of persecution contemplated by the INA. See, e.g., Rucu-Roberti, 177 F.3d at 670 (finding no past persecution where petitioner from Guatemala testified that she had been beaten once by unidentified guerrillas and that one of her sisters had mysteriously disappeared); Aguilar-Solis v. INS, 168 F.3d 565, 569-70 (1st Cir. 1999) (stating a generality that "persecution encompasses more than threats to life or freedom, see INS v. Stevic, 467 U.S. 407, 428 n.22 (1984). . . .); Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)(distinguishing between mere harassment or discrimination and persecution); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)(finding that persecution within the Act does not encompass all treatment that society regards as unfair, unjust or even lawful or unconstitutional). Certainly, the treatment received by Bogdan was not so extreme as to compel any reasonable factfinder to conclude that she suffered persecution. See

Prasad v. INS, 47 F.3d 336, 339-40 (9th Cir. 1995) (arrest, beating and four hour detention insufficient to establish persecution)(and cases cited therein).⁷

Even assuming that the harm suffered by Bogdan rises to the level of persecution, the immigration judge properly determined that such harm was not "on account of" religion or any other "protected bases for relief under the asylum laws." A.R. 205-06. See Marquez v. INS, 105 F. 3d 374, 377 (7th Cir. 1997)("First [petitioners] must demonstrate either past persecution or a well-founded fear of persecution in the future. Second, assuming that they can satisfy this first showing, petitioners must also show that the persecution they have endured is "on account of" one of the five statutory grounds.").

With respect to her religion, there is nothing in the record to show that the mistreatment she received by the mafia was on account of her religion. See Ghasemimehr v. INS, 7 F.3d 1389, 1390 (8th Cir. 1993)(per curiam) (holding that an alien seeking asylum must show that the "persecution or feared persecution is based on one of the five grounds listed in § 1101(a)(42)(A)"; Sangha v. INS, 103 F.3d at

^{7/} Moreover, the mafia attacks against Bogdan were perpetrated by non-governmental actors. As such, they do not support a claim of persecution under the Act. See Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 (9th Cir. 1985). In any event, Bogdan failed to base her persecution claim on the contention that the Ukrainian government was unable to control the mafia. Thus, she waived the issue on appeal. See Martinez-Serrano v. INS, 94 F.3d 1256, 1259 (9th Cir. 1996) (arguments not raised in the appellant's opening brief are waived); Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997)(the persecution must be by the government "or by persons or organizations that the government is unable or unwilling to control.").

1486 (alien must prove causal connection, that it, that persecution was "on account of statutory enumerated ground."). On the contrary, the record established that the mafia harassed and assaulted Bogdan in order to encourage her to pay back money owed to them by her husband, not because of her religion. A.R. 206, 240-41. And, as noted by the immigration judge, Bogdan's problems with the mafia occurred three years prior to her "religious affiliations." A.R. 206. Moreover, when asked why she believed that the mafia was after her, Bogdan stated that "they were requiring some money, and probably [my husband] really was involved in something serious [because] they were asking [for] money."). A.R. 243. Additionally, Bogdan testified that when she first applied for a visa in 1995, the reason provided to the consular officer for wanting to come to the United States was that she "was afraid to live over there and [that she] wanted to visit [her] friends." A.R. 256. Bogdan also told them that she was afraid of the mafia in Ukraine. Id. Bogdan further testified that she did not inform the embassy that she was being persecuted for religious reasons because "[t]hey didn't ask [her] about that." Id. Finally, when questioned at the hearing as to what she was afraid of when she actually left Ukraine in May 1996, Bogdan again testified that she was fearful of the mafia because of their belief that her husband owed them money. Id.

Nor did Bogdan establish that the harassment and assault she was subjected to was on the basis of an imputed political opinion. A political opinion is imputed when "[a] persecutor falsely attributes an opinion to a victim, and then persecutes the

victim because of that mistaken belief about the victim's views." Canas-Segovia v. INS, 970 F.2d at 602. Here, there is no evidence that the mafia harassed Bogdan because of political opinions attributed to her. Again, it is clear from the record that the members of the mafia harassed and assaulted Bogdan "for extortionary reasons" in order to get money from her. A.R. 206, 240-41. In fact, Bogdan never testified that she held any particular political opinion. See Bartesaaghi-Lay v. INS, 9 F.3d 819, 822-23 (10th Cir. 1993)(affirming denial of asylum and withholding of deportation where evidence permitted BIA's finding that "any possible persecution of petitioner on a return to Peru was not based on his 'political opinion' but on the fact that he refused to get involved in drug smuggling.").

Moreover, while the State Department notes that "[m]any applicants cite mistreatment by criminal elements, often described as 'mafias,' that engage in robbery, extortion, and occasionally kidnapping" and that "[t]here may be occasions when the ethnic, religious or political affiliations are related to criminal activity (some criminal groupings appear to be drawn from one or another ethnic group, for example), . . .," the State Department points out that it has "identified no pattern of mistreatment based on these factors." A.R. 281.

Additionally, as pointed out by the immigration judge, "the problems for the daughter really do not specifically relate to any connection to the Baptist church, but rather involve school

harassment by Muslims, which apparently would have been directed to any Christian religionist." A.R. 207. In any event, the immigration judge found that such mistreatment did not rise to a level of past persecution. Id.

In sum, the evidence of record is not so compelling that no reasonable factfinder could fail to find that Bogdan established persecution or that it was on account of a ground covered by the asylum statute. See A.R. 207 ("In the present case the evidence is just overwhelming that the mafia [was] after [Bogdan] because her husband had borrowed money from them. The Court does not believe that this type of criminal activity, which the Court does not dispute can be extremely threatening, falls within a protected basis under the Act.").

2. Well-Founded Fear Of Future Persecution

The immigration judge's conclusion that Bogdan does not face persecution in the event of her return to Ukraine is based on substantial evidence and should be upheld.

The record does not compel a finding that Bogden would be persecuted on the basis of her religion should she return to Ukraine. Indeed, the State Department report specifically stated that "[w]ith the overthrow of the Communist regime in 1991, Evangelicals are no longer denied religious freedom and they worship without interference." A.R. 278. Moreover, Bogdan herself testified that "there was about 600 members of her Russian Baptist Church by the time that she left Ukraine, that both Russians and

Ukrainians were members of the church and that some of the members worked for the government." A.R. 258.

In addition, other evidence presented by Bogdan serves to belie her claim of a well-founded fear of future persecution. Very significant is the fact that her family, including her brother and father, have been living in the same home where she resided in Ukraine since her departure without any evidence of harm to them. A.R. 258; see also Manivong v. INS, 164 F.3d 432, 433 (8th Cir. 1999)(Court affirming in part where petitioner's family members remained in her home country without being harmed). Moreover, she has submitted no evidence to establish that the mafia has any interest in persecuting her. See Lopez-Zeron v. INS, 8 F.3d at 638 ("[Petitioners'] claims amount to a fear of generalized violence and unrest in Honduras, which does not provide a basis for asylum eligibility under the INA."); Mendoza-Perez v. INS, 902 F.2d 760, 761 (9th Cir. 1990)("Evidence of general violence in the alien's home country is insufficient" to establish eligibility for asylum).

For these reasons, the immigration judge acted reasonably in failing to give weight to Bogdan's argument that she will be persecuted if she is returned to Ukraine. Bogdan has certainly not demonstrated that the evidence is 'so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution.'" Nyonzele, 83 F.3d at 981 (citing Hamzehi, 64 F.3d at 1242 (quoting Elias-Zacarias, 502 U.S. at 484)). Even if Bogdan's fear were subjectively genuine, it is not objectively reasonable.

As Bogdan failed to satisfy the lower burden of proof required for asylum, it follows that the immigration judge properly concluded that she also failed to satisfy the clear probability standard for withholding of removal. See Lopez-Zeron, 8 F.3d at 638.

II. THE COURT LACKS JURISDICTION OVER BOGDAN'S CONVENTION AGAINST TORTURE CLAIM

Bogdan argues that the Board erred in failing to provide him relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture"). Pet'rs Br. at 48. Bogdan's argument lacks merit. On October 21, 1999, former President Clinton signed into law legislation providing for the domestic implementation of Article 3 of the Convention Against Torture. See Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-822 (October 21, 1998) ("FARRA"). The new law, FARRA §2242, required the heads of the appropriate federal agencies "to prescribe regulations to implement the obligations of the United States under Article 3 of the [Torture Convention]." FARRA § 2242(b). On February 19, 1999, the INS published such regulations which now provide the relief requested in the petition. See 64 F.R. 8478 (Feb. 19, 1999).⁸

The record does not reflect that Bogdan has in fact applied for relief under the Convention Against Torture. Because Congress has

^{8/} The regulations became effective March 22, 1999. See id. at 8478; 8 C.F.R. § 208.18(b)(2)(1999); see also Ortiz v. INS, 179 F.3d 1148, 1152-53 (9th Cir. 1999)(the determination as to whether an alien is eligible for relief under the Convention Against Torture must first be raised to the Board).

specified the procedures by which aliens may obtain relief under the Convention Against Torture, Bogdan is required to exhaust these remedies. See Aiyadurai v. INS, 683 F.2d at 1198; Mojsilovic v. INS, 156 F.3d at 748 ("An alien must exhaust her administrative remedies before seeking review of a deportation order."). Moreover, because the INA expressly requires exhaustion of administrative remedies prior to seeking review in federal court, the failure to exhaust such remedies deprives the Court of jurisdiction. See Aiyadurai v. INS, 683 F.2d at 1198 ("[Petitioner] failed to exhaust her administrative remedies by appealing the immigration judge's finding of deportability to the BIA. Therefore, any judicial review by this court pertaining to that order of deportation is precluded."); Maxon Marine v. Director OWCP, 39 F.3d 144, 146 (7th Cir. 1994) ("When a statute specifies a procedure for obtaining judicial review of a federal agency's actions, that procedure normally is exclusive.") (citations omitted). Thus, the Court lacks jurisdiction over petitioner's claim. Moreover, the filing of a claim under the Convention Against Torture does not stay the execution of any decision made in the case. 8 C.F.R. §§ 3.2(f), 208.18(b)(3)(i)(B) (1998).

CONCLUSION

For the foregoing reasons, the decision of the Board of Immigration Appeals should be affirmed, and the petition for review should be denied.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), and Eighth Circuit Rule 28A(c), I certify that respondent's brief:

- (1) was prepared using Corel WordPerfect 9 and Courier type in font size 12;
- (2) is monospaced;
- (3) has 10.5 or less characters per inch;
- (4) does not exceed 50 pages; and
- (5) contains less than 1,300 lines of text.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2001, I caused two copies of the foregoing "Brief for Respondent" and one copy of a computer diskette containing the brief to be served upon petitioner's counsel by having them placed in the Department of Justice mailroom in sufficient time for same day mailing, first class postage prepaid, and addressed to:

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I further certify that the computer diskette has been scanned for viruses and it is virus-free.

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