

No. 03-71129

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VICTORIA TCHOUKHROVA, et al.,

Petitioners-Appellants,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent-Appellee.

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

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS-APPELLANTS
AND OPPOSING REHEARING EN BANC**

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Secondary Authority:

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INTRODUCTION

The attached motion and this brief of amicus curiae, Harvard Immigration and Refugee Clinic, Women Refugees Project (“Clinic and Project”), are submitted in support of the Petitioners-Appellants (Victoria Tchoukhrova, Dimitri Tchoukhrov, and Evgueni Tchoukhrov) and in connection with this Court’s consideration of Respondent-Appellee’s Petition for Rehearing En Banc of the panel’s decision in *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir 2005). Amicus curiae maintain that the panel’s decision should be allowed to stand. Contrary to Respondent-Appellee’s claims, the Court did not create a “newfangled means of obtaining asylum.” Respondent-Appellee’s Petition at 1, 12. Respondent-Appellee’s brandishing of the term “reverse-derivative asylum,” mentioned once during oral arguments and appearing nowhere in the decision, is a mischaracterization of the analysis applied in finding that Victoria had suffered past persecution. Instead, the Court acted consistently with well-established principles of asylum law in holding that the Tchoukhrovas were members of a particular social group, and the harm suffered by the child was “properly considered when adjudicating his mother’s claim.” *Tchoukhrova*, 404 F.3d at 1195.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Clinic and Project seeks the proper application and development of U.S. asylum law and has a special expertise in issues related to women, including

mothers, as are raised in this case. It has been accepted as *amicus curiae* in several asylum and immigration-related cases, such as the recent case involving family-based persecution *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

ARGUMENT

1. The Court correctly confirmed that the Tchoukhrovas are members of a “particular social group”

Victoria Tchoukhrova argued before the immigration judge (“IJ”) that she had suffered persecution on account of her membership in the particular social group of “parents of children born with severe disabilities.”¹ The IJ, upheld by the Board of

¹ Respondent-Appellee argues that neither the Board nor the IJ reached the issue of whether the Tchoukhrovas constituted a particular social group. This is unsupported by the record, as are Respondent-Appellee’s other assertions that this Court reviewed issues not decided by the IJ or BIA. After acknowledging that “the respondent and her family and child did suffer harm in Russia,” the IJ’s opinion stated that “[i]t does appear that this harm was a result of the fact that the respondents are a member of the particular social group [family members of children who are disabled],” thus finding both social group membership and the “on account of” element. RA 59. Additionally, the IJ discussed and decided issues of past persecution (RA 59-61), well-founded fear of future persecution (RA 61-62), and whether the Petitioners-Appellants were entitled to withholding of removal (RA 62-63). Significantly, the IJ specifically found that not only Victoria, but also her child, did not suffer harm that rose to the level of persecution. RA 61. Since the principle that harm to a child may constitute persecution of its parent is well-established, as discussed below, and the IJ expressly addressed harm to the child, this matter was properly before the Court on appeal.

Furthermore, the relevant issues were preserved and addressed on appeal. The Petitioners-Appellants’ Brief for Appeal to the BIA explicitly raised and discussed at length the issues of past persecution (RA 32-33), “on account of” (RA 28-30), membership in a particular social group (RA 30-31), well-founded fear of future persecution (RA 33-35), whether the Petitioners-Appellants merited a grant of

Immigration Appeals (“BIA” or “Board”), agreed that the Tchoukhrovas qualified as members of that particular social group. It is the settled law of both the BIA and this circuit that family may constitute a particular social group. In its seminal decision, *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) (*rev’d in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)), the Board described membership in a family unit as a classic example of the sort of “unchangeable” characteristic that defines the particular social group ground. The

asylum (RA 35-36), and whether they were entitled to withholding of removal (RA 36-37). The agency’s brief to the BIA stated that “[the IJ’s] decision is dispositive of all issues regarding the respondent’s appeal.” RA 17. Notably, the agency did not allege or present evidence of changed country conditions, though the issue of future persecution was raised both before the IJ and the Board.

In affirming the IJ’s decision, the Board cited *Matter of Burbano*, which stands for proposition that the BIA may adopt an IJ decision “in whole or in part, when we are in agreement with the reasoning and result of that decision,” and in such a case “the Board’s conclusions upon review of the record coincide with those which the immigration judge articulated in his or her decision.” 20 I. & N. Dec. 872, 874 (B.I.A. 1994). The Board thus adopted the IJ’s decision. The Respondent-Appellee suggested at oral argument that the Board only affirmed the holding of the IJ with respect to the issue of persecution. This assertion is unsupported by the plain text of the BIA decision, which contained no language limiting the adoption of the IJ decision and which recited each element of the asylum claim in affirming the IJ.

Since all claims and issues considered on appeal were reached by the IJ and preserved on appeal, the Respondent-Appellee’s reliance on *Ventura v. INS*, 537 U.S. 12 (2002), is misplaced. The agency had ample opportunity to present evidence and address claims at trial and before the Board and is not entitled to a remand so that it may relitigate these issues.

Ninth Circuit has also long recognized that family membership is the prototype of a “particular social group.”²

The IJ, affirmed by the Board, found that “family members of children who are disabled” in Russia constitutes a protected social group. RA 59. It is worth noting that the “immutable characteristics” formulation applied in this and other cases involving kinship ties does not recognize every person who is a “family member” as eligible for asylum. It encompasses only those individuals who (1) were or face a well-founded fear, (2) of being persecuted, (3) on account of, (4) their kinship ties, an immutable characteristic that cannot be changed at will and which serves to “restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.” *Acosta*, 19 I. & N. at 233. These requirements have and continue to serve a filtering function and were applied in this case, undermining Respondent-Appellee’s argument that the Court’s decision will affect a large number of cases.³

² See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). Most recently, the Ninth Circuit recognized family-based persecution in *Thomas v. Gonzales*. Other circuits have adopted similar approaches. See *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.1993) (“[t]here can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of the nuclear family”); *Iliev v. INS*, 127 F.3d 638, 642 & n. 4 (7th Cir.1997)); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

³ Additionally, Respondent-Appellee’s unsourced figures suggesting an increase in asylum applications are contradicted by official figures establishing an overall

2. The Court correctly considered the suffering of her son in determining Victoria had been persecuted.

The immigration judge denied asylum because he found “the harm suffered by the respondent’s family and her disabled child do not rise to the level of persecution.” RA 59. The concept of persecution includes serious harm from which the state has been unwilling or unable to provide protection.⁴ This Court asked whether “the harms suffered by a disabled child [can] be taken into account when determining whether to grant his parent’s asylum application” and concluded that they could. *Tchoukhrova*, 404 F.3d at 1190. This determination was highly relevant to the claim and consistent with established law, which provides that Victoria could have suffered direct persecution as a result of harms visited on her child.

Persecution unquestionably encompasses mental, emotional and psychological harm. Mental suffering may be the main element in a finding of severe past persecution warranting a grant of asylum,⁵ even absent a current fear of future

decline in applications in recent years. *See* OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 45-72 (2004), *available at* <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>; Executive Office of Immigration Review, FY 1997-2004 Asylum Statistics, *at* <http://www.usdoj.gov/eoir/eoia/foiafreq.htm>.

⁴ *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 171-83 (1999).

⁵ *See, e.g.,* *Kovac v. INS*, 407 F.2d 102, 106-07 (9th Cir. 1969).

persecution.⁶ In *In re Chen*, the BIA found repeated shaming, harassment, and humiliation to be a form of persecutory harm.⁷ Forced sterilization of a wife has been considered persecution of her spouse.⁸ “Rape” is considered persecution, in part because of the long-term associated psychological harm.⁹ The mental and emotional harm of witnessing the persecution of one’s family has also been held to be persecutory.¹⁰ “Torture,” under the accepted U.S. and international definitions, includes mental pain and suffering resulting from threats of harm to others.¹¹

Victoria, as the mother of a disabled child in Russia, undoubtedly suffered what amounts to “persecution.” A mother’s suffering is often inseparable from that of her child.¹² The harms Victoria suffered included: (1) having her newly born

⁶ See *In re Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989).

⁷ *Id.*

⁸ *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997); *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005).

⁹ See, e.g., *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996).

¹⁰ See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (noting the constant fear and anxiety petitioner experienced as a result of attacks and threats against her husband and sons); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir. 2002); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996).

¹¹ See ANKER, *supra* note 4 at 214-17.

¹² Indeed, the IJ appears to have recognized this: after concluding that “the harm suffered by the respondent does not rise to the level of persecution,” the facts the IJ discussed as relevant pertained exclusively to the treatment of the child. RA 59-61.

child discarded with abortion and other medical waste;¹³ (2) being denied the right to see her disabled child, after he was born; (3) having her disabled child institutionalized, against her will, and subjected to hideous and abusive conditions;¹⁴ (4) witnessing and living with her child, as he was denied access to effective medical care and access to the public education available to others; (5) experiencing her child's severe ostracism and harassment, including being brutally beaten with resulting broken arm, head trauma and hospitalization;¹⁵ (6) being denied any

¹³ Respondent-Appellee claims that this constituted “de novo factfinding and an unexhausted claim.” Respondent-Appellee’s Petition at 9, n. 3. Victoria’s affidavit, in which these facts were set forward, is part of the record of this case and was considered by the IJ, who stated that “it appears to me, from my review of the case, that the facts are relatively clear and I don’t think we need to go through seven hours of testimony to confirm these facts.” RA 80. In addition, the IJ discussed Victoria’s affidavit, swore her to its contents during a hearing, RA 85-88, and specifically stated in his decision that the affidavit was part of the record. RA 54. Since the IJ found Victoria credible and the Board affirmed this finding, the circumstances surrounding Victoria’s giving birth were properly considered by this Court.

¹⁴ Respondent-Appellee notes that the child was too young to have been sent to an *internat*. The Human Rights Watch Report, properly in the record, documents similarly deplorable conditions in both *internaty* and “baby houses” AR 253-254. Whatever name used, the IJ’s explicit findings were that the conditions at the “hospital” in which the child was “confined” and “deprived of his parents” were “deplorable,” with children “wet and dirty,” “not properly fed,” and some “crying out in pain.” RA 56.

¹⁵ Respondent-Appellee misdescribes and belittles this vicious attack on Victoria’s child, noting that “three ‘young lads’ ran with the boy and ‘dropped him on the ground,’” causing the injuries. Respondent-Appellee’s Brief at 6. This bizarre amalgamation of quotations appears, at best, unconnected to a concern for

remedy for this harassment by authorities; and (7) being effectively forced to hide her child in her home.

That these conditions constitute persecution is a matter of basic human rights, basic morality, and basic law. The policies of the Russian government, from which this mother suffered directly, are aimed at breaking the family bond, forcing collective, institutional warehousing of disabled children, under the most reprehensible of conditions. These circumstances were part of the trial record, were credited by the IJ, and were properly considered by this Court. It is undisputed that the issue of persecution was squarely before the Court. It is also apparent from the IJ's decision that he considered the effect of harms to her son in finding that Victoria had not suffered persecution. This Court acted within its proper scope of review and well-established law pertaining to persecution in determining that the facts compelled a different result.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court let its decision stand and deny the Respondent-Appellee's Petition for Rehearing En Banc.

accurately representing undisputed facts relating to the harm suffered by Victoria's son.

Dated: August 31, 2005

Respectfully submitted,



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On Brief (Harvard Law School student)
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**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4
AND 40-1 FOR CASE NO. 03-71129**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached amicus brief in support of Petitioners-Appellants has been formatted in proportionally spaced Times New Roman 14 point type, the text is double-spaced and consists of 11 pages, and consists of 2,099 words. The footnotes are in Times New Roman 14 point type, and are single spaced.

Dated: August 31, 2005

A handwritten signature in cursive script that reads "Deborah Anker". The signature is written in black ink and is positioned above a horizontal line.

Deborah Anker
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Women Refugees Project