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MEMORANDUM

To: Interested Parties

From: Deborah Anker

Re: Tchoukhrova v. Gonzales, 404 F.3d 1181 (9th Cir. 2005)

Date: July 26, 2005

This memorandum addresses the status and legal issues in the case of Victoria Tchoukhrova, *et al.*, v. Gonzales, 404 F.3d 1181 (9th Cir. 2005), which was decided by the court on April 21, 2005.

Ms. Tchoukhrova applied for asylum under section 208 of the Immigration and Nationality Act, with her son and husband included as derivative applicants. The immigration judge denied asylum. The Board of Immigration Appeals, Department of Justice (DOJ), affirmed that decision. Ms. Tchoukhrova appealed to the circuit court. The court, in its April 2005 decision, remanded to the administrative agency, finding that the applicants were eligible for asylum and should be granted that protection.

On Friday, July 22, the DOJ filed a Petition for Rehearing En Banc, asking that the entire court of the federal court of appeals for the ninth circuit reconsider the decision, and uphold the administrative agency's determination, denying asylum to the Tchoukhrova family.

If the DOJ position prevails, the Tchoukhrova family will be returned to Russia.

Facts

Victoria is the mother of Evgeni, a now 14-year-old boy, who was born in 1991 in Vladivostok, Russia with cerebral palsy. His disability resulted primarily from the gross negligence of staff of the Russian state-owned hospital, which after inducing labor at the time of his birth, abandoned her for the entire night, and upon returning the next morning, forcibly extracted the child from Victoria's body, breaking his neck in the process.

Victoria's claim of persecution is based primarily on what happened to her and her family

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following Evgeni's birth. After noticing the disability, the hospital staff took the newborn Evgeni and threw him away, into a container holding abortion and other medical waste.¹ The staff told Victoria "they didn't see the reason why he needed to live." Having lost a great deal of blood, Victoria fell into a state of unconsciousness.

Somehow Evgeni survived, and was retrieved from the disposal bin. Victoria begged to see him, but hospital staff denied her plea, telling her that she should "refuse" him. (It is well-documented in the record, including in the Human Rights Watch Report, in a document adopted by the U.S. Department of State, that in Russia "severely disabled babies are routinely abandoned at the state-run maternity wards, under pressure from medical personnel who warn the recuperating mothers of a life as social pariahs if they keep a 'defective' child"). Victoria finally convinced a nurse to break the rules (begging that she "wanted desperately to see [her child] and to hold his lifeless body close to [her] heart") and was able to see Evgeni.

Victoria and her husband suffered further persecution as the Russian authorities tried to intimidate them into abandoning Evgeni. They refused. Victoria then suffered among the worst forms of persecution a parent could experience: against her will, the Russian authorities took Evgeni from her and forcibly institutionalized him in a so-called "hospital" for children with birth defects.

Again, Victoria suffered persecution as, following the forced institutionalization, she was denied permission to see her child. Finally, after two months, she prevailed and was able to visit him. What she witnessed at the so-called "hospital" was horrifying: children crying out for hunger, wrapped in old, wet, dirty clothes, writhing in pain, receiving no treatment. That these conditions exist is well documented in the record of the case. Human Rights Watch reports the unveiling by researchers in recent years of "a tableau of horrific conditions and malign neglect in institutions [for 'abandoned' and orphaned children] from the heart of Moscow to remote rural provinces."

The Human Rights Watch report documents that in Russian state-run institutions for "orphans" (95% of whom, like Evgeni, still have a living parent, who was often pressured to give the child up at birth), children "are exposed to shocking levels of cruelty and neglect. Infants classified as disabled are segregated into 'lying-down' rooms, where they are changed and fed but are bereft of stimulation and lacking in medical care."

Victoria resisted intense pressure to permanently institutionalize Evgeni, where he could have been placed in long-term "internaty" confinement. "Internaty" is a type of confinement, carried over from the Soviet era, where, according to Human Rights Watch, "Russian orphans [which, again, includes those having a living parent] with severe disabilities are denied virtually every right to medical care, education and individual development." Under the internaty system

¹ In their petition for rehearing, the DOJ argues that this particular fact is not in the record. Yet, as the government notes, the unrefuted assertion was contained in Ms. Tchoukhrova's first asylum application. The applicant's asylum application is part of the record. That Ms. Tchoukhrova did not repeat the assertion at her hearing does not make it any less part of the record. In fact, based on my own experience supervising students presenting asylum claims, testimony at asylum hearings often if not usually involves facts not already presented, so as to avoid repetition. Indeed, immigration judges often so instruct – they do not want to have repeated at the hearing, facts that are already in the record by virtue of being contained in the asylum application.

(where many, including those without a mental disability but nonetheless labeled as “retarded,” are confined), children may be restrained in cloth sacks, tethered by a limb to furniture, denied stimulation, and sometimes left to lie half-naked in their own filth.”²

When Victoria and her husband succeeded in reclaiming their child from the state, they continued to suffer abuse and persecution. They experienced their child, because he was designated ‘disabled’, being denied any public medical support for his condition and any access to public education. The Russian government doctor insisted that if Victoria and her husband refused forced institutionalization, they must confine Evgeni to their house.

Because of the extreme public prejudice against the disabled, fostered by Russian government policy, on the occasions when Evgeni did go out his mother was forced to witness his severe harassment. Due to the public policy in favor of abandonment, isolation and institutionalization, few in Russian society ever see a disabled person in public. As a result, reactions to Evgeni were extremely abusive.

On one occasion, when he was six years old, Evgeni was beaten by several men, resulting in a broken arm, severe head trauma and a two month hospitalization.³ Evgeni was so frightened following the incident he refused to leave the family home. Victoria and her husband filed a police report, but the police never investigated. Instead the government continued the pressure to have him institutionalized.

Victoria and her husband suffered additional persecution. They joined with other parents of disabled children into an association called “Mothers Unite!” to change government policy, and they spoke out and organized in various ways. They were harassed, with stones thrown at them; the police refused to intervene. Victoria’s husband and Evgeni’s father, Dmitri, was fired from his job and told in subsequent job interviews that he should stop advocating for the rights of the disabled.

Victoria took her son on three occasions to the United States for treatment, where under the care of doctors, he thrived. But following incidents of sustained harassment, with hostilities towards the whole family increasing, suffering the persecution of knowing they would never be able to protect their son, and knowing they would never be able to provide him with a life free of persecution, Victoria and her husband fled to the United States in 2000. Once in the U.S., Victoria applied for asylum on behalf of herself, her husband and her son.

Legal Analysis

“Asylum” is a form of protection available to the foreign-born, based on an international treaty which the U.S. ratified and incorporated into domestic law. Asylum protects a person from

² Many children, like Evgeni, who suffer physical rather than mental disabilities, are nonetheless labeled as retarded and warehoused for life in psychoneurological internaty, under these conditions. The government, in its petition for rehearing, states that this is a non-existent risk, yet Human Rights Watch reports that their team of researchers found that in some cases, two-thirds of children deemed “retarded or “oligophrenic” were of average or better mental ability,” and suffered only from a physical disability.

³ Strangely, the government in its petition for rehearing, misdescribes and belittles this incident, noting that “three ‘young lads’ ran with the boy and ‘dropped him on the ground’ causing the injuries.

return to his or her country of origin where he or she has suffered persecution in the past, or faces a well-founded fear of persecution in the future “on account of race, religion, nationality, membership in a particular social group or political opinion.”

Victoria Tchoukhrova argued before the immigration judge⁴ that she had suffered persecution on account of her membership in a particular social group of “parents of children born with severe disabilities.” It is well-established (indeed it is 20-year -old, DOJ-endorsed law) that the “membership in a particular social group” category is defined by an “immutable characteristic”, a characteristic which the person cannot control or cannot or should not be forced to change.

The DOJ’s Board of Immigration Appeals found 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 (BIA 1987)), that membership in a family unit is a classic example of such an “unchangeable” characteristic, basic to identity. This is now the position of all the circuit courts that have addressed the issue.⁵ When a person has been persecuted in the past, or faces a well-founded fear of persecution in the future on account of such family membership, he or she qualifies for asylum.

In this case, there is no question (and indeed, the immigration judge so found, and the DOJ in its petition for rehearing does not dispute) that, based on the facts of this case, “parents of children born with severe disabilities” in Russia constitute such a protected group.

The immigration judge denied asylum because he found Victoria Tchoukhrova had not established that the harm and suffering she experienced in Russia constituted “persecution.” Persecution encompasses serious harm, such as a serious human rights violation, from which the state has been unwilling or unable to provide protection.⁶ As the court found on appeal, the immigration judge was wrong in finding that the harm Victoria suffered did not constitute persecution. The court reasoned in part that since the statute provides derivative asylum status for children and spouses, it should be understood to also include derivative status for parents of children who suffered persecution, as Evgeni certainly did. In any case, as discussed below and as Victoria presented her case, she herself, as the mother of Evgeni, directly suffered persecution.

Persecution unquestionably encompasses mental, emotional and psychological harm. Under some circumstances, threats and assaults can be considered persecution, depending upon their cumulative nature and other circumstances.⁷ Mental suffering can even be the main element in a

⁴This was the principle ground for applying for asylum.

⁵ The most recent decision is that of the ninth circuit in *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). *See, also.*, especially on the issue of immutable characteristics and family membership, *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) (accepting BIA ruling in *Acosta*, *supra*, that “kinship ties” qualify as a particular social group); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (“[w]e join our sister circuits in holding that ‘family’ constitutes a ‘particular social group’” and noting that every circuit court that has addressed the issue has found that family constitutes a particular social group) (citations omitted).

⁶ DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES*, 171-83 (1999) (Supp. 2002).

⁷ *See* ANKER, *supra* note 6 at 214-17.

finding of severe past persecution warranting a grant of asylum,⁸ even if country conditions have changed (of which there is no evidence in this case) — that is, even where there is no current fear of future persecution.⁹ In *In re Chen*, 20 I. & N. Dec. 16 (BIA 1989), the Board of Immigration Appeals, DOJ found that repeated shaming, harassment, and humiliation is a form of such extreme persecutory harm; among other harms Chen suffered was being forced to denounce his father. Forced sterilization of a wife has been considered persecution of a spouse.¹⁰ “Rape” is considered persecution, in part because of the long-term associated psychological harm.¹¹ The mental and emotional harm of witnessing the persecution of one’s family has also been held to be a form of persecution.¹² “Torture,” under the accepted U.S. and international definition, includes mental pain and suffering.¹³

Victoria Tchoukhrova, as the mother of a disabled child in Russia, and based on the facts of this case, undoubtedly suffered what amounts to “persecution.” A mother’s suffering is not separable from that of her child, especially under these circumstances. Harm to the child is harm to the mother, as this case so dramatically illustrates. The persecution she suffered included: (1) having her disabled child disposed of as waste; (2) being denied the right to see her disabled child, after he was born; (3) having her disabled child forcibly institutionalized, against her will, and subjected to hideous and abusive conditions; (4) witnessing and living with her child, as he was denied access to public medical care and any access to public education given to others; (5) experiencing her child’s harassment, including being severely beaten with resulting broken arm, head trauma and hospitalization; and (6) being effectively forced to hide her child in her home.

That these acts 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

⁸ See, e.g., *Kovac v. INS*, 407 F.2d 102, 106-07 (9th Cir. 1969) (holding that persecution encompasses both physical and mental suffering, and that my deleting the qualifier “physical” from the previous definition of persecution, Congress intended to include mental suffering);

⁹ See *In re Chen*, 20 I. & N. Dec. 16 (BIA 1989) (holding that although the respondent had failed to prove a well-founded fear of future of persecution, his fear of repatriation was genuine and understandable in light of the severity of his past persecution and warranted a grant of asylum).

¹⁰ *In re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997); *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005) (noting that “forced sterilization involves drastic and emotionally painful consequences” to the family because “[t]he couple is forever denied a procreative life together” and “the society and comfort of the child or children that might eventually have been born to them”),

¹¹ See, e.g., *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (emphasizing the “severe and long-lasting” psychological harms associated with rape).

¹² See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (noting the constant fear and anxiety the petitioner experienced as a result of attacks and threats against her husband and sons, and holding that the associated economic harm and emotional trauma compelled a finding of persecution); see also *Salazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir. 2002) (“[e]vidence of harm to Petitioner’s family supports a finding of past persecution.”); *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996) (finding persecution on basis of threats, violence against family members, and seizure of family land and ration card).

¹³ See ANKER, *supra* note 6 at 214-17.

children, under the most reprehensible of conditions. It is hard to imagine a more fundamental attack on the family bond, or a clearer example of persecution than this kind of attack on the family, and in particular on a mother's relationship with her child. It is, frankly, surprising that the U.S. government, especially an administration that has so vigorously promoted family values, would take a contrary position.