No. _____

In The
Supreme Court of the United States

UWE ANDREAS JOSEF ROMEIKE, *et al.*,
***Petitioners*,**

v.

ERIC H. HOLDER, JR.,
Attorney General,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Germany enforces its ban on most homeschooling by threatening jail, excessive fines, and the loss of custody of one's children. The Romeikes, a German homeschooling family, fled to the United States and sought asylum when officials threatened to remove their children. Germany openly states that its criminal prosecutions for homeschooling are motivated by a desire to discourage the development of religious minorities into "parallel societies."

1. Whether *prosecution* under a generally applicable law may constitute *persecution* when such a law violates human rights treaty obligations concerning a protected ground?

2. Whether *prosecution* under a generally applicable law may constitute *persecution* when there is direct evidence that one central reason for the government's motive for prosecution is the desire to suppress the applicant on a protected ground?

PARTIES TO THE PROCEEDING

Petitioners in this case are Uwe Andreas Josef Romeike, his wife, Hannelore Romeike, and their five minor children. Petitioners, who are citizens of Germany, are applicants for asylum.

Respondent, Eric H. Holder, is the Attorney General of the United States. The Attorney General and Department of Justice oppose the Romeikes' applications for asylum.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parties who are parent companies or publicly held companies owning stock in any corporation.

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The Sixth Circuit's order denying the Romeikes' Petition for Rehearing *en banc*, issued July 12, 2013, is reproduced at Pet.App. 52a-53a.

STATEMENT OF JURISDICTION

Petitioners, Uwe Romeike, his wife Hannelore, and their five children, filed for asylum on November 11, 2008, pursuant to 8 U.S.C. § 1158(a) (2012). U.S. Immigration Judge Lawrence O. Burman granted asylum to all seven petitioners on January 26, 2010. Pet.App. 49a. Respondent appealed to the Board of Immigration Appeals which reversed Judge Burman's decision on May 4, 2012. Pet.App. 29a.

The Romeikes appealed to the United States Court of Appeals for the Sixth Circuit, which denied the Romeikes' appeal in a published decision on May 14, 2013. The Romeikes timely filed a motion for rehearing *en banc*, which was rejected on July 12, 2013. Pet.App. 52a-53a. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2013).

STATUTORY PROVISIONS AND TREATIES INVOLVED IN THE CASE

8 U.S.C. § 1101(a)(42) (2013) defines "refugee," in pertinent part, as:

> [A]ny person who is outside any country of such person's nationality . . . 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. . . .

An asylum applicant's burden of proof is governed by 8 U.S.C. § 1158(b)(B)(ii) (2013):

> In general the burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

The full texts of 8 U.S.C. § 1101 and 8 U.S.C. § 1158 are reproduced in the appendix, as is 8 U.S.C.

§ 1229a (2013), which governed the removal proceedings initiated against the Romeikes.

The Romeikes also assert that Germany's ban on homeschooling is in violation of its own international human rights obligations, as evidenced by Article 26(3) of the Universal Declaration of Human Rights of 1948, 71 G.A. Res. 217 A (III), U.N. Doc A/810 (hereinafter "UDHR"), and Germany's ratification of Article 18(4) of the International Covenant on Civil and Political Rights of 1966, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter "ICCPR"), and Article 13(3) of the International Covenant on Economic, Social, and Cultural Rights of 1966, Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter "ICESCR"). These instruments are binding legal commitments which reflect the views of the world community expressed in the UDHR. These three instruments are reproduced, in full, in the appendix.

STATEMENT OF THE CASE

Factual History

Uwe and Hannelore Romeike, German nationals, believe that God requires them to teach their children at home. A.R. 358, 476-78. The Romeikes believe that they, as parents, "can never delegate their responsibility to teach their children to anyone else." A.R. 476 ¶ 10.

Germany's compulsory attendance law requires attendance at a public school or government–approved private school. A.R. 267-68.

Homeschooling is not a legally recognized exception to the compulsory attendance law. *Id.*

The Romeikes object to public school attendance because of their religious beliefs. The Romeikes believe that their Christian values will be undermined in the public school, which teaches evolution, disrespect for authority figures, bullying, and witchcraft, and promotes abortion and homosexuality. A.R. 479. The Romeikes reject "government-approved private schools" on similar grounds, because these schools must use the same textbooks as public schools. A.R. 331.

Prior to the 2006 school year, the Romeikes approached Mr. Kline, Director of the School District in Bissingen, Germany, to obtain a compulsory attendance exemption so they could homeschool. A.R. 309. His reply was that "there is no way to get an exemption." *Id*.

This is not technically true, as German law permits exemptions under the compulsory attendance law when "parents, due to their occupation, do not have a firm residence," A.R. 761 ¶ 12bb, *reproduced at* Pet.App. 218a, or when "the children are circus performers, inland shippers or are simply incapable physically or mentally from going to school." A.R. 913 ¶ 12.

Mr. Kline's denial of an exemption is, however, consistent with how virtually all German authorities respond to applications from parents who homeschool for "reasons of conscience." A.R. 921 ¶ 20. German authorities refuse to grant exemptions

to these parents and "proceed against the parents to compel them to send their children to school," A.R. 913 ¶ 14, with the express purpose, in the words of Germany's highest constitutional court, of preventing homeschoolers from developing into "religiously or philosophically motivated 'parallel societies.'" *Konrad*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] April 29, 2003, 1 BvR 436/03 (F.R.G.), *reproduced at* Pet.App. 216a ¶ 8.

In the fall of 2006, Uwe and Hannelore Romeike withdrew their children from the public schools, in accordance with their religious beliefs, and began homeschooling. Almost immediately, they were visited by the local school principal, who declared their homeschool illegal and threatened them with fines and police action. A.R. 307-308. On September 10, 2006, the Romeikes received a letter from the mayor, who stated that "homeschooling and not attending the public elementary school in Bissingen is illegal" and that he was "willing to forcefully take the students to school." A.R. 539-40. Eleven days later, the Romeikes received a letter from the principal, stating that the Romeikes were "obligated to take your children to the public school in Bissingen" and that failure to comply would result in "legal action against you." A.R. 535. Despite these threats, the Romeikes continued to homeschool, in accordance with their faith.

On Friday, October 20, 2006, just before 7:30 a.m., the Romeikes' doorbell rang. A.R. 310. Mr. Romeike peeked through the door and saw a huge police van. A.R. 310-311. One uniformed police

officer was talking with neighbors, who were gathering outside. A.R. 311. Another officer told Mr. Romeike that they were going to take the children to the public school. *Id*. Some of the children began to cry, and Mr. Romeike told the officer that the children were homeschooled. A.R. 311-12. The officer insisted that the children had to attend the public school. A.R. 312. The officer was armed, and his weapon was visible. A.R. 310.

The officers came into the Romeike home and threatened to go upstairs to seize the children. A.R. 355-356. The officers then rounded up the crying children, seized their school bags, forced them into the police van, and drove away. A.R. 311.

While German Courts have issued orders depriving parents of custody of their children solely because the parents homeschool, *see*, *e.g.*, *Plett*, A.R. 775, *reproduced at* Pet.App. 229a-230a ¶ 15, the Romeikes were never provided with a written order authorizing the removal of their children. A.R. 311-12.

On the day their children were seized, Mrs. Romeike went to the school during recess, collected her children, and hid with them at her sister's home until the end of the school day, afraid that the police would return. A.R. 312-313, 357. They returned home over the weekend.

The following Monday, armed and uniformed police officers once again came to the Romeike home to forcibly remove the children. A.R. 313, 546. This time, the police met other German homeschoolers

who were peacefully protesting outside the Romeike home, as well as a member of the press. A.R. 545-46. The officers once again came into the Romeike home and threatened to go upstairs to gather the children but the Romeikes refused. A.R. 546. The officers were eventually ordered by the mayor to leave the home without the Romeike children. A.R. 546-47.

The Romeikes were summoned to another meeting with Mr. Kline in December 2006 and were informed that they had to return to public school or they would face fines and "further legal action." A.R. 315. The Romeikes continued to homeschool. They were fined between €6,000 to €7,000, which far exceeded Mr. Romeike's total monthly income of between €1,000 and €1,200. A.R. 322-23. The Romeikes paid the first round of fines, about €400, but could not pay the rest. A.R. 323, 343.

In February 2007, the Romeikes challenged these fines and notices in court. A.R. 346. The State Court rejected their appeal and upheld the convictions:

> The school law does not allow for an exemption, when schools, as they exist, are refused, just on the basis of their curriculum or educational goals, or when parents want to protect their children from the influences of other students, which they deem harmful. . . . Neither the parents law to freely educate (raise) their children . . . nor the law of freedom to follow faith and conscience and the

> right to practice one's religion . . . are sufficient grounds for parents to be entitled to get an exemption for their children from the general school attendance requirement and the related permission to homeschool.

A.R. 580. The Romeikes appealed this decision to the Federal Constitutional Court of Germany, but their appeal was rejected. A.R. 346-347, 584.

The Romeikes came to the United States in August 2008 and applied for asylum. If returned to Germany, the Romeikes intend to homeschool in accordance with their religious beliefs, even though they fear further prosecution, fines, and the permanent loss of custody of their children. A.R. 325-26, 358-59.

Procedural History

On November 11, 2008, petitioners filed individual applications for asylum, Forms I-589. A.R. 463-74, 940-51, 970-74. On January 26, 2010, U.S. Immigration Judge Lawrence O. Burman granted asylum to the Romeikes, because they had a well-founded fear of future persecution on account of religion and were members of a particular social group—German parents who homeschool for religious reasons. Pet.App. 46a-47a. Judge Burman found the Romeikes, their expert witnesses, and all their evidence to be entirely credible. He was particularly disturbed by the oral testimony and written evidence from German officials that demonstrated that Germany's stance against

homeschoolers in general, and the Romeikes in particular, was motivated by a desire to prevent the development of religiously and philosophically-motivated "parallel societies." Pet.App. 44a, 47a.

The Board of Immigration Appeals ("the Board") reversed on May 4, 2012, holding that the Romeikes had not shown that "the compulsory attendance law is selectively applied to homeschoolers" or that "homeschoolers are more severely punished than others whose children do not comply with the compulsory school attendance law." Pet.App. 25a. The Board also concluded that German homeschoolers "lack the social visibility required to constitute a particular social group." Pet.App. 27a.

The Romeikes timely filed a Petition for Review on May 23, 2012, with the Sixth Circuit Court of Appeals, which affirmed the Board's ruling in a published decision issued on May 14, 2013. *Romeike v. Holder*, 718 F.3d 528, 534 (6th Cir. 2013), *reproduced at* Pet.App. 1a-17a. The court dismissed, as *dicta*, the Romeikes' reliance on *Perkovic v. I.N.S.*, 33 F.3d 615 (6th Cir. 1994), and held that a generally applicable law does not amount to persecution simply because it violates fundamental international human rights norms. *Romeike*, 718 F.3d at 534. The court also held that direct evidence of Germany's motive for enforcing the compulsory attendance statute against religious homeschoolers—to prevent the development of religiously and philosophically motivated "parallel societies"—"add[ed] little," if anything, to the issue of persecution. *Id.* at 534.

ARGUMENT

I

Introduction

This case presents two important questions regarding the meaning of "persecution" for the purposes of the United States law on asylum. On the first question, there is a clear split in the Circuits. On the second, we ask this Court to "resolve confusion in the Circuits." *Burnett v. Grattan*, 468 U.S. 42, 46 (1984).

The general rule is that prosecution under a generally applicable legitimate law does not constitute persecution for the purposes of our asylum law. While every Circuit recognizes that there are exceptions to this general rule, the grounds for granting exemptions vary from Circuit to Circuit.

The first question is whether prosecution under a generally applicable statute that violates human rights standards touching on a protected ground constitutes persecution. After *Romeike*, the Sixth and Tenth Circuits now reject international human rights instruments as an aid to identifying persecution in asylum cases. The Third and Ninth Circuits, on the other hand, contend that prosecution under a generally applicable law can constitute persecution if the law violates fundamental human rights standards that touch on a protected ground.

Although it is well established that our law on asylum is implementing legislation designed to fulfill

our obligations under the United Nations Protocol Relating to the Status of Refugees, Jan. 31 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (hereinafter "Protocol"), *Chang v. I.N.S.*, 199 F.3d 1055, 1061 (3d Cir. 1997), the Sixth Circuit refused to consider the Protocol—or any other international source of human rights law—when weighing the Romeikes' persecution claims, even though it had previously relied on the Protocol and its interpretive Handbook[1] to distinguish ordinary *prosecution* from *persecution*. *Perkovic*, 33 F.3d at 22.

On the second question, the circuits generally agree that "[c]riminal prosecution of a fairly administered law does not constitute persecution" within the meaning of 8 U.S.C. § 1101(a)(42) (2013). *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2005).[2] The Circuits also agree that there should be *exceptions* to this general rule, but there is

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[1] Office of the United Nations High Commissioner for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1961 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1 (Geneva: UNHCR 1992) (hereinafter "Handbook").

[2] *See Khalaf v. I.N.S.*, 909 F.2d 589, 591 (1st Cir. 1990); *Long v. Holder*, 620 F.3d 162, 166 (2d Cir. 2010); *Li v. Attorney General*, 633 F.3d 136, 137-38 (3d Cir. 2011); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 452 (4th Cir. 2007); *Tesfamichael v. Gonzales*, 469 F.3d 109, 117 (5th Cir. 2006); *Stserba v. Holder*, 646 F.3d 964, 977 (6th Cir. 2011); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004); *Li v. Holder*, 559 F.3d 1096, 1108 (9th Cir. 2009); *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1142 (10th Cir. 1994); *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 2006).

considerable disagreement on what exceptions are available.

The law in the Circuits is best described as "in disarray." Although there is a majority rule followed clearly in five Circuits, and implicitly in three others, applicants who claim persecution under generally applicable laws face vastly different outcomes, depending on the Circuit in which they find themselves. Had the Romeikes applied for asylum in one of these eight Circuits, their proffered direct evidence of Germany's persecutory motive would not have been summarily dismissed. Conversely, there is little doubt that many of the reported cases which resulted in successful appeals in other circuits would have ended in failure had they been analyzed under the criteria announced by the Sixth Circuit in the case at bar.

This case is exceptionally appropriate for resolving the inconsistencies among the Circuits. Since the Sixth Circuit purported to state a comprehensive rule governing the granting of exceptions. Despite its attempt to announce a comprehensive rule, the Sixth Circuit failed to cite, quote, or construe the controlling statute, or comprehensively review its own prior precedents or those of the sister Circuits. The resulting formula can only be described as idiosyncratic in character. No other decision—including those previously arising in the Sixth Circuit—comes anywhere close to "discovering" the rules announced below.

The correct criteria for granting exceptions to the general rule is easily discerned by consulting the

statutory text, this Court's decisions, the Protocol, and the Handbook, as evidenced by the majority rule in the Circuits. These sources stand in clear opposition to the hastily constructed formulation announced by the Sixth Circuit below.

II

The Circuits are Split on Whether a Prosecution under a Generally Applicable Law may Constitute Persecution if the Law Itself Violates Fundamental International Human Rights Standards

The United States law on asylum was designed as implementing legislation to fulfill our obligations under the Protocol. *See Chang*, 199 F.3d at 1061. Both the Protocol and the Handbook, while lacking the "force of law," nevertheless provide significant guidance in construing the meaning of our asylum statute. *Negusie v. Holder*, 555 U.S. 511, 536-37 (2009); *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).

"[T]he Refugee Act's legislative history reflects that Congress intended the Act to give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" Michael English, Comment, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 151 (2007) (footnotes and internal citations omitted) (hereinafter "English, Comment"). Thus, prosecution may constitute persecution "when the underlying law the foreign government seeks to enforce violates internationally

accepted human rights principles," even if that law is generally applicable to all of society. *Id.*

The right of parents to direct the education of their children, in accordance with the parents' own religious beliefs, is a fundamental human right clearly recognized by binding human rights treaties. The Sixth Court refused the Romeikes' repeated invitations to consider, much less determine, whether Germany's *prosecution* of religious homeschoolers constitutes *persecution* in the context of international human rights norms.

A

Germany's Ban on Religious Homeschooling Violates International Human Rights Standards

While human rights law permits, and even encourages, nations to adopt compulsory attendance laws and impose reasonable academic standards upon private and home school alternatives, international standards expressly require a nation to permit parents to choose educational alternatives which honor the parents' religious values. Philosophical control by governments over private education is expressly forbidden.

It is beyond dispute that the UDHR arose "out of the desire to respond forcefully to the evils perpetrated by Nazi Germany." Kathleen Renee Cronin-Furman, *60 Years of the Universal Declaration of Human Rights: Toward an Individual Responsibility to Protect*, 25 AM. U. INT'L L. REV. 175,

176 (2009). The UDHR's provisions on parents and children are no exception. Dr. Lisa Pine, who specializes in Holocaust Studies and Nazi Germany at London South Bank University, writes that Germany's ban on private education in that era was designed for the express purpose of achieving philosophical uniformity: "division—separation into different schools according to religious belief—cannot continue. . . . Children should be together in order to understand and appreciate the further unit of the community, our *Volk*." LISA PINE, EDUCATION IN NAZI GERMANY 29 (2009) (ellipses in original). This theory is clearly repudiated by Article 26(3) of the UDHR, which states that "parents have a prior right to choose the kind of education that shall be given to their children."

The aspirational articles of the UDHR were translated into the binding provisions of the two core human rights treaties of our era—the ICCPR and the ICESCR. Article 18(4) of the ICCPR pledges that State Parties will "have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions." Article 13(3) of the ICESCR repeats and expands upon this theme:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid

> down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

From these three instruments, collectively referred to as the "International Bill of Rights," emerge three truths concerning the relationship between the state and parents in the realm of education. First, parents have rights concerning the education of their children that are "prior" to any claim of the state, both in time and in rank. Second, among these "prior" rights is the right of parents to ensure that the education of the child conforms to the parents' moral convictions. Third, parents and others have the right to start schools that are separate from those offered by the state, in order to provide religious and moral education that conforms to the parents' convictions.

Germany is a party to both the ICESCR and the ICCPR. Thus, while Germany is permitted to exercise reasonable control over private education through the implementation of "minimal educational standards," ICESCR, Art. 13(3), Germany has promised the world that German parents will be free to choose an education for their children that is "in conformity with [the parents'] own convictions." *Id*. Conversely, an education policy that forecloses all opportunities for children to be educated in accordance with parental convictions is neither reasonable nor legitimate.

This, however, is precisely what Germany does in practice. Germany subjects all children to

compulsory attendance at government-approved schools. Exemptions are available when "parents, due to their occupation, do not have a firm residence," *Konrad*, Pet.App. 218a ¶ 12bb, or when children are "circus performers, inland shippers or are simply incapable physically or mentally from going to school." A.R. 913 ¶ 12. Exemptions are *not* granted to parents who homeschool for "reasons of conscience," like the Romeikes. A.R. 309; 921 ¶ 20.

The result is a cruel irony. Germany permits "inland shippers" to school their children on the road in the name of "family unity" but threatens to remove children from their parents if they desire to provide private religious instruction at home.

Why the difference in treatment? What is Germany's motive for this extraordinarily harsh approach toward those who wish to homeschool? While the Nazi regime is gone, "[s]trains of the nationalistic tendencies of Nazi Germany still infect parts of today's German Republic," as "[p]arents no longer have a right to educate their children at home, and procedures for setting up private schools are laborious." Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L & COMP. L. 225, 228-29 (2010).

According to Germany's own Federal Constitutional Court, the ban on homeschooling serves "a justified interest in counteracting the development of religiously or philosophically motivated 'parallel societies' . . . " *Konrad*, Pet.App. 216a ¶ 8. *Konrad* makes it plain that Germany's concern in banning homeschooling (while allowing

"on–the–road" schooling) is religious and philosophical, not academic. "It might be the case that the restriction of the state's educational mandate to the regular supervision of the practicing and success of home education can present a milder and also equally suitable method for serving the purpose of knowledge transfer." *Id.* at 215a ¶ 7. But according to Germany, home education fails to teach "tolerance" when education is allowed solely on the basis of the parents' religious views. *Id.* at 216a ¶ 7. Prosecution of homeschoolers is therefore necessary to "counteract[] the development of religiously or philosophically motivated 'parallel societies.'" *Id.* at 216a ¶ 8.

In *Plett*, the German Federal Court of Appeals further explained Germany's desire to control children's philosophical development "in a pluralistic society." *Plett*, Pet.App. 224a ¶ 7. To achieve the desired philosophical outcome, the *Plett* court held that it is appropriate to order "the removal of the right [of parents] to determine the residence of the children and to decide on the children's education." *Id.* at 229a ¶ 15c. Moreover, *Plett* held that it is "completely acceptable" for courts to "enforce the handover of the children, by force if necessary and by means of entering and searching the parental home," in order to prevent "the damage to the children, which is occurring through the continued exclusive teaching of the children of [*sic*] the mother at home." *Id.* at 229a-230a ¶ 15c. In the aftermath of *Plett*, the Jugendamt (Youth Office) "has the immediate task to take away all home schooled children." A.R. 740-41 ¶ 11. *See also* Letter from the German Secretary

of the Permanent Conference of the State Ministers for Cultural Affairs, A.R. 298.

Germany's law is not "legitimate" when measured against its own human rights commitments. The express motive of Germany is to suppress parents' minority religious values because it fears the development of a "parallel society"—preferring a society that is uniform in philosophical character.

If human rights standards are applicable, then German homeschoolers are clearly entitled to asylum. The level of punishment is very harsh—permanent loss of custody of one's children. The government's reason for prosecution is clearly connected to a protected ground—Germany wants to suppress religious minorities and a particular social group. And the law employed by Germany is marshaled for a purpose expressly forbidden by human rights standards: philosophical control of private, religious education.

B

There is a Clear Split in the Circuits on the Applicability of Human Rights Standards in Assessing the Legitimacy of General Laws

Despite this clear evidence that Germany's prosecution of religious homeschoolers violates international human rights, the Sixth Circuit declined to find that Germany's systematic prosecution of religious homeschoolers in general, and the Romeikes in particular, amounted to

persecution. In so doing, the Sixth Circuit joined the Tenth Circuit in refusing to consider violations of international human rights norms as a basis for a finding of persecution.

Prior to its decision in *Romeike*, the Sixth Circuit was clearly supportive of the use of international human rights law for this purpose. In *Perkovic*, the Court declared that "asylum laws" have the "intended effect of protecting the exercise of internationally recognized human rights." 33 F.3d at 622-23. *Perkovic* held that the Protocol was "deemed to have been incorporated into U.S. law," and that an applicant was entitled to asylum because he was prosecuted and punished for activities that were protected by the Protocol. *Id. See also Stserba v. Holder*, 646 F.3d 964, 974 (6th Cir. 2011).

In *Romeike*, however, the Sixth Circuit abandoned *Perkovic*, holding that its reliance on international human rights law was mere "*dicta*." 718 F.3d at 734. This is difficult to sustain upon both a fair reading of *Perkovic* and its treatment by a major treatise on the law of asylum. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 357 n. 12 (2013) (citing *Perkovic* for the proposition that "[p]rosecution for violation of laws that directly punish beliefs or actions protected by international human rights principles may also constitute persecution on account of political opinion"). Instead, the Sixth Circuit declined to even address the Protocol and Handbook, much less acknowledge its importance as an interpretive aid in U.S. asylum law.

By assigning *Perkovic*'s embrace of human rights standards to the netherworld of *dicta*, and explicitly rejecting the use of international human rights standards in *Romeike*, the Sixth Circuit now refuses to consider human rights violations in the course of determining the legitimacy of a foreign government's action.

Two sister Circuits have reached the opposite conclusion. The Third and Ninth Circuits consider violations of international human rights norms as potential evidence of "persecution," in accordance with the Protocol. As the Third Circuit has noted:

> [T]he courts have been guided by the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook"), which lacks the "force of law" but nonetheless provides significant guidance in construing the Protocol. [*I.N.S. v.*] *Cardoza–Fonseca*, 480 U.S. [421,] 439 n. 22 [1987]; *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996); *Osorio v. I.N.S.*, 18 F.3d 1017, 1027 (2d Cir. 1994). The Handbook unequivocally provides that persecution is not the same as "punishment for a common law offense," Handbook ¶ 56, but it is equally clear that prosecution under some laws—*such as those that do not conform with accepted human rights standards*—can constitute persecution. *Id.* at ¶ 59.

Chang, 199 F.3d at 1061 (emphasis added). Since *Chang* was decided, this Court has used the Handbook for similar purposes in two subsequent cases. *Negusie*, 555 U.S. at 536-37; *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999).

The Handbook contains several additional observations, which have important bearing on this case. Paragraph 60 suggests that to "evaluat[e] the laws of another country . . . recourse may usefully be had to the principles set out in the various international instruments relating to human rights." The Handbook specifically discusses the distinction between prosecution and persecution, noting that "it is possible for a law *not to be in conformity with accepted human rights standards*" (emphasis added). Handbook ¶ 60. The Handbook also lists, as an example of an improper statute, one that imposes "penal prosecution" in "respect to the 'illegal' religious instruction of a child," which "may in itself amount to persecution." Handbook ¶ 57.

Michael English catalogs a number of cases where the Circuits have failed to consider human rights standards when such considerations were self-evident on the facts, especially with regard to laws that persecute women.[3] The Tenth Circuit's decision in *Sadeghi v. I.N.S.*, 40 F.3d 1139 (10th Cir. 1994), is illustrative. In *Sadeghi*, the court denied asylum to an Iranian high school principal who was prosecuted for counseling a 14 year-old boy to avoid military service in violation of the Iranian law. The majority held that "[p]rosecution for illegal activities 'is a

[3] For further full discussion, see English, Comment, 60 OKLA. L. REV. at 167-73.

legitimate government act and not persecution.'" *Id.* at 1142 (internal citation omitted). Judge Kane filed a stinging dissent, in which he forcefully argued that sending children to war violated clearly established international human rights standards. That the prosecution was pursuant to a generally applicable law was no defense: "to recognize prosecution thereunder as a legitimate exercise of governmental authority would conflict with fundamental human rights under both the Geneva Convention and customary international law." *Id.* at 1147. Such a result not only "ignor[es] the very purpose of our immigration laws as intended by Congress," *id.* at 1148, but is "utterly lacking in justice." *Id*. at 1143.

In the aftermath of *Romeike*, the Third and Ninth Circuits now stand alone in holding that persecution may be proven by demonstrating that the law in question violates human rights standards. *Chang*, 199 F.3d at 1061; *Chanco v. I.N.S.*, 82 F.3d 298, 301 n. 3 (9th Cir. 1996) ("[W]e have held that prosecution for a crime can constitute persecution, when the underlying law being enforced is contrary to internationally accepted principles of human rights."). As we have shown, the Sixth and Tenth Circuits take the opposite view.

There must be some standard by which our courts determine which foreign laws are "legitimate" if we are to follow the rule that prosecutions under a legitimate law of general applicability do not constitute persecution. Using international human rights standards for this purpose avoids both subjective adjudication and any charge of unfairly

judging the actions of a foreign nation by American standards.

This Court should grant *certiorari* not only to resolve this split in the Circuits but to underscore our nation's belief that we grant asylum as a method of fulfilling this nation's commitment to fundamental human rights.

III

There is Substantial Confusion among the Circuits Concerning the Grounds for Finding Persecution Arising from Prosecution under a Generally Applicable Law

Congress explicitly addresses the burden of proof for establishing refugee status:

> In general the burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason for persecuting the applicant*.

8 U.S.C. § 1158(b)(B)(ii) (2013) (emphasis added).

Congress's inclusion of the "one central reason" requirement, inserted in 2005, is significant. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, 119 Stat. 231. As the Ninth Circuit has explained:

> First, an asylum applicant need not prove that a protected ground was the only central reason for the persecution she suffered. The Act requires that a protected ground serve as "*one* central reason" for the persecution, naturally suggesting that a persecutory act may have multiple causes. Second, an applicant need not prove that a protected ground was the most important reason why the persecution occurred. The Act states that a protected ground must constitute "at least one" of the central reasons for persecutory conduct; it does not require that such reason account for 51% of the persecutors' motivation.

Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009) (emphasis added).

As this Court unequivocally held in *I.N.S. v. Elias-Zacarias*, because the Immigration and Nationality Act (INA) "makes motive critical" to the question of persecution, a successful asylum applicant must provide "*some* evidence of it, direct or circumstantial." 502 U.S. 478, 483 (1992) (emphasis in original). A majority of the Circuits embrace the

motive requirement, holding that "prosecution" may amount to "persecution" if an illegitimate motive is one central reason for the government's prosecution. After *Romeike*, at least three Circuits appear to reject this view.

A

There is Clear Disagreement among the Circuits as to when "Prosecution" under a Generally Applicable Law Becomes "Persecution"

In general, "[c]ourts uniformly recognize that a state's prosecution of its citizens does not automatically equate with persecution." English, Comment, 60 OKLA. L. REV. at 124. Most courts recognize, however, that there are some exceptions to this general rule, where a prosecution ceases to be "legitimate," and becomes "persecution based on a protected ground." *Id.* There is significant confusion among the Circuits, however, as to what is required to justify an exception.

The Ninth Circuit's discussion of exemptions, in *Li*, illustrates the varied approaches employed by the Circuits. In *Li*, the Ninth Circuit surveyed its precedents and found that it had identified at least five potential exceptions which would turn prosecution into persecution: (1) disproportionately severe punishment; (2) pretextual prosecution; (3) a prosecution that lacked legitimacy; (4) a prosecution that lacked the process normally due; or (5) a prosecution lacking a legitimate prosecutorial

motive. 559 F.3d at 1109-10. The Circuit does not appear to suggest that this list is exhaustive.

The legal literature reflects a similar variance. The most comprehensive treatment is an 81-page law review comment that provides an instructive summary on the state of the law in the Circuits:

> The central inquiry in determining if prosecution equals persecution is whether the governmental conduct stems from an improper motivation. Three factors stand out as the most influential guides in evaluating whether the government has an invidious motivation that transforms legitimate prosecution into persecution: (1) the judicial process received by the alien, (2) the nature of the underlying law the state is enforcing, and (3) the context in which the prosecution occurs. Although not the only factors relied on, these are the most prominently applied, and they often prove crucial in the disposition of an asylum applicant's case.

English, Comment, 60 OKLA. L. REV. at 144.

Although English finds general patterns for distinguishing prosecution from persecution, he adds that "the jurisprudence concerning this distinction reveals two significant barriers to legitimate claims for refuge." *Id.* at 167. Specifically, applicants for

asylum "confront the inconsistent application of the human rights exception and the mixed-motive analysis, both of which are crucial in reaching just outcomes," in addition to the "tendency of many immigration courts to inaccurately apply relevant legal principles and the inability of appellate courts to meaningfully review those flawed decisions." *Id.* at 167. As a result, asylum law is interpreted unevenly, "even where a government has truly persecuted an alien." *Id.*

B

Most Circuits Focus on Motive to Determine if Prosecution is Persecution

The First, Third, Fourth, Fifth, and Ninth Circuits have held explicitly, in accordance with *Elias-Zacarias*, that evidence of motive is critical to whether "prosecution" amounts to "persecution." The Eighth, Tenth, and Eleventh Circuits have suggested that they would have done the same had the applicant presented evidence of an illegitimate government motive.

The Ninth Circuit's formulation is illustrative of this majority rule: "Although legitimate criminal prosecution generally does not constitute persecution, prosecution motivated by a protected ground does." *Bromfield v. Mukasey*, 543 F.3d 1071, 1077 (9th Cir. 2008). The rules in the Third, Fourth, and Fifth Circuits are identical in substance. *See Li*, 633 F.3d at 141 (holding that "the statute makes motive critical" in determining whether the prosecution amounted to persecution); *Menghesha v.*

Gonzales, 450 F.3d 142, 147 n. 2 (4th Cir. 2006) ("In fact, where the motive underlying a purported prosecution is illegitimate, such prosecution is more aptly called persecution."); *Li v. Gonzales*, 420 F.3d 500, 508 (5th Cir. 2005) ("Prosecution for violating laws of general applicability does not constitute persecution, unless the punishment was motivated by one of the enumerated grounds and the punishment was sufficiently serious or arbitrary.").

The Eighth Circuit announced a similar rule, albeit in the negative, when it declined to make a finding of "persecution" absent evidence that the applicant's prosecution was "improperly motivated." *Ngure*, 367 F.3d at 991. Although the Tenth Circuit rejects international human rights violations as potential evidence of persecution, that Circuit does imply that prosecution may become persecution if there is evidence of some other illicit government motive. *See Sadeghi*, 40 F.3d at 1142 (holding that the petitioner "had the burden of proving that the Iranian government sought him for purposes of persecution, rather than for the legitimate purpose of criminal prosecution."). The Eleventh Circuit appears to follow this approach. *Scheerer v. Attorney General*, 445 F.3d 1311, 1316 (11th Cir. 2006) ("If, however, the alien shows the prosecution is based on a statutorily-protected ground, and if the punishment under that law is sufficiently extreme to constitute persecution, the law may provide the basis for asylum or withholding of removal even if the law is generally applicable.").

Just ten days after *Romeike*, the First Circuit issued a decision that brings that Circuit in line with

the motive test required by this Court in *Elias-Zacarias* and the intent of Congress in § 1158(b)(B)(ii). In *Javed v. Holder*, the court reversed a Board decision that a Pakistani lawyer, who advocated on behalf of a minority political sect, had not suffered persecution. 715 F.3d 391 (1st Cir., May 24, 2013). The court correctly examined the record for evidence of the persecutor's *motive* and found that the record established that "[the applicant's] persecutors imputed a political opinion to him (albeit incorrectly), and that this opinion was at least a 'central reason' for their attacks on him." *Id.* at 397. This illicit motive was sufficient to establish persecution because it was "one central reason" for the government's actions. *Id.*

C

The Second and Seventh Circuits Examine Motive Using Different Standards

The Seventh Circuit employs a somewhat different test when a claim of persecution arises out of a state prosecution. In that Circuit, "punishment which results from violating a country's laws of general applicability" does not constitute persecution, "absent some showing that the punishment is being administered for a *nefarious purpose*." *Sharif v. I.N.S.*, 87 F.3d 932, 935 (7th Cir. 1996) (emphasis added). *See also Moosa v. Holder*, 644 F.3d 380, 387 (7th Cir. 2011); *Tuhin v. Ashcroft*, 60 Fed.Appx. 615, 619 (7th Cir. 2003) (UNPUBLISHED); *Qoku v. Ashcroft*, 72 Fed. Appx. 467, 468 (7th Cir. 2003) (UNPUBLISHED). The Circuit has not given meaningful guidance on what

showing is required to prove a "nefarious purpose," and no asylum applicant has yet succeeded in convincing the court that he has made this showing. However, the Seventh Circuit has recently decided a somewhat similar case without either using the "nefarious purpose" standard or clearly lining up with the majority rule. *Li v. Holder*, 718 F.3d 706 (7th Cir. 2013).

In *Long v. Holder*, 620 F.3d 162 (2d Cir. 2010), the Second Circuit held that applicants must show that their prosecution "is *pretext* for political persecution [and therefore] is not on account of law enforcement." *Id.* at 166. Absent proof of a "pretextual" prosecution, however, the court held that "the enforcement of generally applicable law cannot be said to be on account of the offender's political opinion, even if the offender objects to the law." *Id.*

Although a showing of "pretext" touches the motive of the persecutor, it goes further than the showing that Congress has imposed on asylum applicants. Pretext requires a showing that the *true* or *real* motive of the government is illicit. Congress, on the other hand, requires a showing that an illicit or illegitimate motive is "one central reason" for the government's actions, even if there are multiple motives at play. 8 U.S.C. § 1158(a).

D

The Sixth Circuit Requires Proof of Particular Governmental Actions as the *Sine Qua Non* of Persecution

The Sixth Circuit has uniquely adopted a test for "persecution" that relies on proof of particular actions rather than an illicit motive. The Sixth Circuit now requires proof that a government has *acted* in one of three specified manners, before it will deem prosecution under a general law to amount to persecution.

In *Romeike*, the Sixth Circuit held that when "it comes to showing that a foreign country's enforcement of a law will persecute individuals on the basis of religion, membership in a social group, or for that matter any other protected ground, there is an easy way and a hard way." 718 F.3d at 531. The "easy way" is "available when the foreign government enforces a law that persecutes on its face along one of these lines." *Id.* The hard way—"showing persecution through the enforcement of a generally applicable law"—was held to offer three options: (1) selective prosecution; (2) unequal punishment; or (3) "the government might enact a seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." *Id.* It is clear that the Circuit intends this to be a comprehensive standard governing all cases involving prosecutions under general laws. It is also clear that the "hard way" analysis is the applicable standard in this case since the Romeikes were prosecuted under a generally applicable law.

The legal discussion that surrounds the announcement of this new, comprehensive distillation of an important area of federal law was not marked by the kind of legal scholarship that one would reasonably expect. The Sixth Circuit failed to cite, quote, or construe the controlling statute, even though Congress recently amended § 1158 to include the "one central reason" test. Nor did the Circuit undertake a comprehensive review of either its own prior decisions on the issue or those of the sister circuits. A few scant references are found. The final "*Romeike*" rule—regarding a "seemingly neutral law"—cites but one case, *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006), and the holding of that case has nothing to do with the "rule" for which it is cited.

It is obvious that the Sixth Circuit has forgotten the most relevant holding of this Court in *Elias-Zacarias*: the INA "makes motive critical" to the question of persecution. 502 U.S. at 483. Accordingly, a successful asylum applicant must provide "*some* evidence of it, direct or circumstantial." *Id.* In this case, the proof of an improper motive is direct. Germany's highest courts and its education officials have stated, clearly and unambiguously, that the prosecution of homeschooling families (with home invasions and use of force) is born from a desire to suppress religious minorities.

In the rare case (including this one) when the government clearly announces its motive to suppress a protected class, it is unnecessary to also supply indirect evidence through proof of some form of

improper actions. Moreover, the three forms of improper actions that the Sixth Circuit enumerates cannot be said to be the exclusive methods of proving an improper motive through improper actions.

Actions may speak louder than words in some contexts. But when Germany says that it is suppressing religious minorities by prosecuting them for homeschooling, those words are loud enough.

In sum, eight Circuits require a successful asylum applicant to show that a motive relating to the suppression of a protected ground constitutes one central reason for the prosecution. The Second and Seventh Circuits also focus on the motive of the government but require a showing that the government's sole motive is either a pretextual prosecution (Second) or a prosecution brought for a "nefarious purpose" (Seventh). The Sixth Circuit stands alone by requiring proof of particular discriminatory actions rather than seeking to determine the motive of the prosecuting government.

E

The Different Rules in the Circuits Yield Disparate Results

1

The Romeikes Would Likely Have Prevailed in Most Circuits

In this case, there is no doubt that one of Germany's "central" motives in enforcing its

compulsory attendance law against homeschoolers is to prevent them from forming "religiously or philosophically motivated 'parallel societies.'" *Konrad*, Pet.App. 216a ¶ 8. This is clearly "evidence sufficient to establish an inference that [the Romeikes] would be persecuted '*because of*'" a protected ground. *Li*, 633 F.3d at 147. Thus, it is reasonably clear that the Third Circuit (using the *Li* approach) would have considered the statements of the German courts and education officials to be highly relevant in determining the motive of that nation in prosecuting homeschoolers like the Romeikes. The Sixth Circuit, however, found such evidence to be of little value. 718 F.3d at 534.

The same outcome could be expected in the Fourth Circuit, which found persecution where it was shown that an "illegitimate" motive was "underlying the prosecution." *Menghesha*, 450 F.3d at 148 n. 2. In *Menghesha*, an Ethiopian security officer warned student protestors of an impending arrest, based on his belief as a government security guard that the arrests were both inappropriate and might lead to the immediate execution of the students. Even though Menghesha was threatened with prosecution for obstruction of justice in Ethopia, the Immigration Judge and the Board denied asylum on the grounds that he was being prosecuted under a legitimate law of general applicability.

The Fourth Circuit reversed by looking to the totality of circumstances to conclude that the motive of the government was clearly persecutory in nature. The IJ erred in "discontinuing his inquiry" after

identifying an "arguably legitimate motive" behind the prosecution. *Id.* at 147. Instead, the IJ should have considered "uncontested evidence" of an illicit motive, found in the explicit threats made against Menghesha, and the close scrutiny he was subjected to on account of his sympathy for the student protestors. *Id.* at 148. In the Fourth Circuit, "even assuming that the . . . government had a lawful non-political motive for prosecuting [the applicant], the IJ had an obligation to consider the evidence of political motive" when proffered by the applicant. *Id.*

Here, the Romeikes proffered clear evidence of an illicit government motive behind their prosecution. Where the Fourth Circuit would have considered this argument, the Sixth Circuit ignored both the evidence and the argument, finding that Germany's prosecution of the Romeikes was not "motivated by anything other than law enforcement." *Romeike*, 718 F.3d at 533. The Sixth Circuit acknowledged that the Romeikes relied on direct statements by the German government that it sought to repress religious minorities, but summarily rejected these statements as "add[ing] little to the case." *Id.* at 534. This would have been reversible error in the Fourth Circuit, under *Menghesha*.

For similar reasons, the Romeikes' evidence would have received serious consideration before the First, Fifth, Eighth, Ninth, and Tenth Circuits, where motive remains the central inquiry. In the Ninth Circuit especially, where a "[p]ersecutors' motivation should not be questioned when the persecutors specifically articulate their reason for

attacking a victim," *Li*, 559 F.3d at 1111-12, it is hard to imagine the court summarily dismissing the express pronouncements of Germany's highest constitutional court as "add[ing] little" to the discussion of the motive behind Germany's compulsory attendance statute. *Id.* at 534.

2

The Sixth Circuit's Rule Would Yield Different Conclusions on Asylum Cases Favorably Decided by Other Circuits

The facts from *Menghesha* provide an extraordinarily clear example of the legal fissure created by the Sixth Circuit's opinion in the case at bar. If we lay the facts of *Menghesha* on the Procrustean bed of the Sixth Circuit's *Romeike* criteria, the security officer's fear that he might be executed would almost certainly come to pass. The Sixth Circuit would return this man to Ethiopia to face the death penalty for obstruction of justice. The Ethiopian law banning obstruction of justice is certainly not persecutory on its face. There was no showing that the rulers of Ethiopia subjected Menghesha to either unequal punishment or selective prosecution. Moreover, it is plain that the law against obstruction of justice was not structured as a "seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." The *Romeike* criteria clearly would result in a different outcome on the facts of *Menghesha.*

Similarly, the Sixth Circuit's current formula would not even permit a finding of persecution when

the punishment was manifestly disproportionate to the crime. *See*, *e.g.*, *Li*, 633 F.3d at 151 (noting that the Second and Ninth Circuits have also devoted "considerable attention" to the theory that punishment "disproportionate to the crime" constitutes persecution).

There is even a question as to whether the Sixth Circuit has gone further than other circuits that require more than just a central illicit motive. In *Li v. Holder*, for example, the Seventh Circuit considered an asylum claim by a Chinese Christian, who was associated with the house churches of that nation. 718 F.3d 706 (7th Cir. 2013). The generally applicable laws of China forbid both unregistered churches and proselytization. The requirement of church registration was examined on its substance by the Seventh Circuit and found to be a relic of religious persecution that resembled historic patterns of religious intolerance. *Id.* at 710-711.

It is difficult to see how Li could have convinced the Sixth Circuit that this Chinese requirement would be improper under its *Romeike* criteria. All those who attended unregistered churches were punished. Prosecutions were not demonstrably selective, nor was there evidence of unequal punishments. Moreover, it is not apparent why the church registration law would satisfy the standard of a "seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." The Seventh Circuit did not hold that church registration laws are facially invalid. It looked at the situation as a whole and implicitly concluded that the motivation behind the

laws amounted to persecution of a certain kind of Christian practice. China was seeking to repress religious minorities for philosophical reasons. Li made a good decision to reside in the Seventh Circuit, not the Sixth.

The Sixth Circuit has apparently become so accustomed to ferreting out circumstantial evidence of motive that it has forgotten this Court's holding in *Elias-Zacarias*: evidence of motive can be either "direct or circumstantial." 502 U.S. at 483. Germany's forthright statements that it seeks to repress the development of religious minorities are all that is needed.

IV

This Case is a Superior Vehicle for Addressing the Questions Presented

Before the decision below, there was already confusion among the Circuits as to the application of international law in granting asylum, as well as the proper standards for determining when to grant an exception to the general rule that prosecution under a law of general applicability is not persecution. The comprehensive rules announced by the Sixth Circuit move the law in the Circuits from confused to fractured.

This case presents an optimal opportunity for this Court to clarify the importance of international law in the United States' law of asylum. The Romeikes do not assert a "trivial" violation of international human rights standards, but "core"

human rights protections that are essential to liberty: religious freedom, an educated citizenry, and the parent-child relationship.

This is also the rare case where the motive of the government is stated, plainly and unambiguously, by the government itself in official statements. There is no need to find selective prosecution, unequal punishment, or punishment that is disparate to the crime as a means of determining the government's motive, when the government forthrightly announces its motive *and* plainly admits that it is seeking to repress the applicant on a protected ground.

Those who seek escape from governments that would coerce the heart, mind, or soul should have a safe haven in the United States of America.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted this 10th day of October, 2013.

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APPENDIX

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[ENTERED MAY 14, 2013]

United States Court of Appeals,
Sixth Circuit.
Uwe Andreas Josef ROMEIKE, et al., Petitioners,
v.
Eric H. HOLDER, Jr., Respondent.

No. 12–3641.
Argued: April 23, 2013.
Decided and Filed: May 14, 2013.
718 F.3d 528
Rehearing and Rehearing En Banc Denied July 12, 2013.

***529** ARGUED: Michael P. Farris, Home School Legal Defense Association, Purcellville, Virginia, for Petitioners. Walter Bocchini, United States Department of Justice, Washington, D.C., for Respondents. ON BRIEF: Michael P. Farris, James R. Mason III, Home School Legal Defense Association, Purcellville, Virginia, for Petitioners. Margot L. Carter, United States Department of Justice, Washington, D.C., for Respondents.

Before: GILMAN, ROGERS and SUTTON, Circuit Judges.

SUTTON, J., delivered the opinion of the court in which GILMAN and ***530** ROGERS, JJ., joined.

ROGERS, J. (pg. 535), delivered a separate concurring opinion.

OPINION

SUTTON, Circuit Judge.

Uwe and Hannelore Romeike have five children, ages twelve, eleven, nine, seven and two, at least at the time this dispute began. Rather than send their children to the local public schools, they would prefer to teach them at home, largely for religious reasons. The powers that be refused to let them do so and prosecuted them for truancy when they disobeyed orders to return the children to school. Had the Romeikes lived in America at the time, they would have had a lot of legal authority to work with in countering the prosecution. *See Wisconsin v. Yoder,* 406 U.S. 205, 213–14, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 400–01, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

But the Romeikes lived in Germany when this dispute began. When the Romeikes became fed up with Germany's ban on homeschooling and when their prosecution for failure to follow the law led to increasingly burdensome fines, they came to this country with the hope of obtaining asylum. Congress might have written the immigration laws to grant a

safe haven to people living elsewhere in the world who face government strictures that the United States Constitution prohibits. But it did not. The relevant legislation applies only to those who have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). There is a difference between the persecution of a discrete group and the prosecution of those who violate a generally applicable law. As the Board of Immigration Appeals permissibly found, the German authorities have not singled out the Romeikes in particular or homeschoolers in general for persecution. As a result, we must deny the Romeikes' petition for review and, with it, their applications for asylum.

I.

German law requires all children to attend public or state-approved private schools. The Romeikes feared that the public school curriculum would "influence [their children] against Christian values." A.R. 478. When the parents chose to homeschool their children, the government imposed fines for each unexcused absence. When the fines did not bring the Romeikes in line, the police went to the Romeikes' house and escorted the children to school. That strategy worked—once. The next time, four adults and seven children from the Romeikes' homeschooling support group intervened, and the

police, reluctant to use force, left the premises without the children.

The school district returned to a strategy of imposing fines rather than force. It prosecuted the Romeikes for, and a court found them guilty of, violating the compulsory-attendance law, leading to still more fines. The prosecution and the mounting fines were the last straws, and the family moved to the United States in 2008. At the time of their departure, they owed the government 7,000 euros or roughly $9,000.

The Romeikes entered the United States through a visa waiver program. Uwe applied for asylum, and his wife and five children sought relief as derivative applicants. An immigration judge approved the applications after finding that the Romeikes had a well-founded fear of persecution based on their membership in a "particular social group": homeschoolers. ****531*** The Board of Immigration Appeals overturned the immigration judge's decision. It explained that "[t]he record does not show that the compulsory school attendance law is selectively applied to homeschoolers like the applicants." *Id.* at 5. It added that homeschoolers were not punished more severely than other parents whose children broke the law. It concluded by reasoning that, even if the German government had singled out people like the Romeikes, "homeschoolers" are not protected by the

immigration laws because they "lack the social visibility" and "particularity required to be a cognizable social group." *Id.* at 7.

II.

To obtain asylum, an individual must prove that he cannot return to his native country because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). In trying to meet this requirement, the Romeikes have not claimed on appeal that the German government has persecuted them in the past; they claim that the government will persecute them in the future if they return.

When it comes to showing that a foreign country's enforcement of a law will persecute individuals on the basis of religion, membership in a social group or for that matter any other protected ground, there is an easy way and a hard way. The easy way is available when the foreign government enforces a law that persecutes on its face along one of these lines. Then there is the hard way—showing persecution through the enforcement of a generally applicable law. "[W]here the law that the native country seeks to enforce in its criminal prosecution is 'generally applicable,' " that usually will be the antithesis of persecution. *Cruz–Samayoa v. Holder,* 607 F.3d 1145, 1151 (6th Cir.2010). One normally

does not think of government officials persecuting their citizens when they enforce a law that applies equally to everyone, including the allegedly persecuted group and the officials themselves. That is why, generally speaking, "[p]unishment for violation of a generally applicable criminal law is not persecution." *Saleh v. U.S. Dep't of Justice,* 962 F.2d 234, 239 (2d Cir.1992). Enforcement of a neutral law usually is incompatible with persecution.

But usually is not the same as invariably. Even "[g]enerally applicable laws," we have recognized, "can be the source of a petitioner's persecution" in some cases. *Stserba v. Holder,* 646 F.3d 964, 977 (6th Cir.2011). The government, for example, might selectively enforce a neutral law, prosecuting some individuals but not others based on a protected ground or punishing some more harshly than others for the same crime based on a protected ground. *See Cruz–Samayoa,* 607 F.3d at 1151; *Abedini v. INS,* 971 F.2d 188, 191 (9th Cir.1992). Or the government might enact a seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground, say a law banning certain clothing worn only by a discrete religious group or a law "outlaw[ing] the display of the American flag." *Beskovic v. Gonzales,* 467 F.3d 223, 226 (2d Cir.2006). In either instance, if the applicant otherwise meets the requirements for establishing persecution, the fact that the government purported

to enforce a generally applicable law would not immunize it from a charge of persecution.

[1] This, however, is the hard way to show persecution, and regrettably for the Romeikes they have not shown that Germany's enforcement of its general school-attendance law amounts to persecution against them, whether on grounds of religion or membership in a recognized social ***532** group. Because the Board issued its own decision, as opposed to summarily affirming the immigration judge, we review its decision as the final agency determination. *Khalili v. Holder,* 557 F.3d 429, 435 (6th Cir.2009). The Board's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). And the Board's "decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." *Id.* § 1252(b)(4)(C).

The Romeikes have not met these standards. Even assuming for the sake of argument that faith-based homeschoolers (or for that matter homeschoolers in general) are a cognizable social group, a matter we need not resolve, "[t]he record does not show that the compulsory school attendance law is selectively applied to homeschoolers like the applicants," or that "homeschoolers are more severely punished than others whose children do not comply with the compulsory school attendance law."

A.R. 5. The petitioner's key witness, Michael Donnelly, testified that *all* parents who do not send their children to school face consequences ranging from fines to jail time to loss of custody. Donnelly identified parents punished for homeschooling their children for religious *and* secular reasons as well as parents punished for truant children who received no schooling at all.

The parents of Melissa Buzekros, for example, decided that it would be "better for her to learn at home." *Id.* at 272. Melissa's siblings continued to attend public school, but Melissa struggled due to "high noise levels and cancelled classes," prompting her parents to teach her at home. *Id.* at 587. In response, the government removed Melissa from her parents' custody—not to persecute her parents but to enforce the country's compulsory-attendance law. Other parents, too, have tried to homeschool their children for secular reasons, whether because they were "very unhappy" in public school, highly gifted or low performing, and they also were punished. *See id.* at 591–92 (affidavits of Tilman and Dagmar Neubronner) (explaining that they faced $9,500 in fines after trying to homeschool their kids who were "very unhappy" in public school); *id.* at 657–58 (affidavit of Jorg Grosselumern) (explaining that "people who would like to practice homeschooling" because of "educational needs of the child," such as being highly gifted or low performing, "do not dare to

practice homeschooling actively because of the varied sanctions").

The parents of "school skippers," truant students who do not show up for school, face civil fines as well. If the parents fail to convince their children to go to school, the government places them in alternative learning programs or special schools for truants. This enforcement of the law has nothing to do with homeschooling, whether for faith-based or secular reasons. For better or worse, Germany punishes any and all parents who fail to comply with the school-attendance law, no matter the reasons they provide.

So far as the record shows, the only evidence of selective enforcement comes from a paragraph of an affidavit of a German lawyer, Gabrielle Eckermann. "In my experience," Eckermann says, the "parents of truant children are treated differently than parents who homeschool," as they often are "permitted to participate in home based distance learning or correspondence schools." *Id.* at 913. But the Romeikes' expert, Donnelly, acknowledged that the State runs the distance-learning programs for truant children, confirming that the State does not exempt them from a state-run education. And, as Donnelly ****533*** also acknowledged, the State had ample reasons for distinguishing two groups of students: those not in school because their parents refuse to send them and

those not in school in spite of their parents' best efforts to make them go. In the case of the latter, the parents do not violate the law; the children do.

All of this suggests that what seems to be true on the face of this neutrally worded law is true. "There is no indication," the Board permissibly found, that the German officials "are motivated by anything other than law enforcement. These factors reflect appropriate administration of the law, not persecution." *Id.* at 5.

Not so quick, the Romeikes say: Germany has granted exemptions to *some* parents from the compulsory-attendance law, suggesting selective enforcement. Yet Germany granted those exemptions only in "extraordinary circumstances," when for example the children are "simply incapable physically or mentally [of] going to school," *id.* at 913, or when the parents' occupations require them to "constantly change their abode," *id.* at 761. On the rare occasions when the government grants an exemption, the government often sends teachers into the children's homes, showing that the parents alone are not responsible for their children's educations. Any exemptions thus are granted as a last resort, and even then only when state-approved schooling would necessarily require the "separation of the children from their parents." *Id.*

Also short of the mark are the Romeikes' other arguments. They claim that the Board overstepped its bounds in rejecting three fact findings by the immigration judge: that Germany applied the law selectively to homeschoolers; that the passage of the 1938 compulsory-attendance law was driven by animus toward faith-based homeschoolers; and that the government disproportionately punished faith-based homeschoolers under the law. They argue that the Board set aside the immigration judge's factual findings due to "deficiencies in the evidence" and "speculative" witness testimony, and, relying on *Tran v. Gonzales,* 447 F.3d 937, 943–44 (6th Cir.2006), they claim that these justifications do not suffice. But the Board set aside these findings for a different reason—they were "clearly erroneous"—and *Tran* stands for no such proposition anyway. *See Nasser v. Holder,* 392 Fed.Appx. 388, 391 (6th Cir.2010). *Tran* identified three reasons why the Board had overturned the immigration judge's factual findings—including evidentiary deficiencies and speculative testimony—and concluded that it was not clear whether the Board had used clear error or de novo review. *Tran,* 447 F.3d at 944. The decision does not foreclose the possibility that a lack of evidentiary support in the record or an unpersuasive witness might justify treating an immigration judge's findings as clearly erroneous.

To the extent the Romeikes mean to argue that the Board applied the incorrect standard of

review, that is wrong. The Board laid out the correct standard of review at the outset of its opinion—clear error, 8 C.F.R. § 1003.1(d)(3)—surveyed the factual record, often at great length, and concluded that the immigration judge's findings were "clearly erroneous," A.R. 6. In particular, the Board convincingly showed that the record simply did not support two "findings": that Germany selectively applied the law to faith-based homeschoolers and disproportionately punished them for violations.

[2] The third finding by the immigration judge—that "animus" and "vitriol" underlay enactment of the law—has even less support. For one, the judge never said that Germany enacted this law based on ***534*** animus toward faith-based homeschoolers or homeschoolers in general. Nothing in the record, indeed, suggests that such groups existed in 1938. For another, the record does not include the language of the original law, the history that led to its adoption or any contemporary understanding of what motivated it, if indeed that could be identified with respect to a law supported by different legislators with different perspectives. For still another reason, the only "finding" the immigration judge made—that the law showed an "intolerant" effort to "stamp out" "parallel societies" that might arise if parents could teach their children at home—sets sail at such a high level of generality as to add little to the case. Any compulsory-attendance law could be said to have this effect. But

that does not prove that this law, then or now, targets faith-based homeschoolers in general or the Romeikes in particular. If, as the Romeikes claim, the law emerged from the Nazi era, that would understandably make anyone, including the Romeikes, skeptical of the policy underlying it. But such a history would not by itself doom the law. The claimants still must show that enforcement of the law amounts to persecution under the immigration laws. They have not done so.

[3] To a similar end, the Romeikes complain that Germany's compulsory-attendance law violates their fundamental rights and various international standards and thus constitutes persecution regardless of whether it is selectively enforced. Each argument shares an Achilles' heel: Asylum provides refuge to individuals persecuted *on account of* a protected ground. 8 U.S.C. § 1101(a)(42)(A). The United States has not opened its doors to every victim of unfair treatment, even treatment that our laws do not allow. *Stserba,* 646 F.3d at 972. That the United States Constitution protects the rights of "parents and guardians to direct the upbringing and education of children under their control," *Yoder,* 406 U.S. at 233, 92 S.Ct. 1526; *see Pierce,* 268 U.S. at 534–35, 45 S.Ct. 571; *Meyer,* 262 U.S. at 400–01, 43 S.Ct. 625, does not mean that a contrary law in another country establishes persecution on religious or any other protected ground. And even if, as the Romeikes claim, several human-rights treaties

joined by Germany give parents the right to make decisions about their children's educations, *see, e.g.*, International Covenant on Civil and Political Rights art. 18(4), adopted Dec. 16, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), art. 26(3) (Dec. 10, 1948), that by itself does not require the granting of an American asylum application.

[4] Nor does *Perkovic v. INS,* 33 F.3d 615 (6th Cir.1994), hold that a treaty violation on its own establishes persecution. Two Yugoslavian citizens of ethnic Albanian descent sought asylum after they were arrested and beaten for posting pro-Albanian propaganda and for participating in demonstrations in favor of Albanian civil rights. *Id.* at 616–17. Noting that the Board's conclusion that the Yugoslavians had not been persecuted "was directly contrary ... to the manifest intent of Congress in enacting the asylum law," *id.* at 621, we held that the petitioners were refugees deserving of asylum. In doing so, we added in dicta that Yugoslavia's treatment of the petitioners violated international law, *id.* at 622, but that observation was neither a necessary nor a sufficient predicate to their status as refugees. Just as a petitioner cannot obtain asylum merely by proving an American constitutional violation, a petitioner cannot obtain asylum merely by proving a treaty violation.

***535** As then-Judge Alito explained, "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result." *Fatin v. INS,* 12 F.3d 1233, 1240 (3d Cir.1993); *see also Foroglou v. INS,* 170 F.3d 68, 72 (1st Cir.1999) ("The asylum statute does not inflict on foreign governments the obligation to construct their own draft laws to conform to this nation's own highly complex equal protection jurisprudence.").

The question is not whether Germany's policy violates the American Constitution, whether it violates the parameters of an international treaty or whether Germany's law is a good idea. It is whether the Romeikes have established the prerequisites of an asylum claim—a well-founded fear of persecution on account of a protected ground. *See INS v. Elias–Zacarias,* 502 U.S. 478, 483, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (explaining that, even if the petitioner could prove he held a particular political opinion, he must also show that he would be persecuted "*because of* [his] political opinion" rather than because he defied the guerilla army's general conscription policy); *Chen Zhou Chai v. Carroll,* 48 F.3d 1331, 1342 (4th Cir.1995) ("Even if the applicant can characterize his failure to comply with

the population control policy as a political opinion, the applicant must still demonstrate that the government's actions or threats against the applicant, even to the extent those actions or threats involve forced abortions or sterilizations, were taken for a reason other than to enforce the population control policy.").

The Romeikes have not met this burden. The German law does not on its face single out any protected group, and the Romeikes have not provided sufficient evidence to show that the law's application turns on prohibited classifications or animus based on any prohibited ground.

III.

For these reasons, we deny the Romeikes' petition.

ROGERS, Circuit Judge, concurring.

I join the majority opinion.

At one point in the petitioners' brief, they assert that "the sole question before this Court is whether Germany is violating binding norms of international law through its treatment of homeschoolers." Petitioners' Br. 37. Our role, however, is not that of an international court adjudicating Germany's obligations to other

countries in respect of its own citizens. Instead we sit as a court of the United States, enforcing statutes that implement some of the international obligations of the United States to other countries in respect of asylum applicants. As explained by the majority opinion, those obligations are fully met in this case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3641

UWE ANDREAS JOSEF ROMEIKE, et al.,
Petitioners,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

Before: GILMAN, ROGERS, and SUTTON, Circuit Judges.

FILED: May 14, 2013

JUDGMENT

THIS MATTER came before the court upon the petition by Uwe Andreas Josef Romeike and his family for review of a decision by the Board of Immigration Appeals.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the Romeikes' petition is DENIED.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk
[ENTERED MAY 4, 2012]

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A087 368 600 - Memphis, TN
A087 368 601 Date: May 4, 2012
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In re: UWE ANDREAS JOSEF ROMEIKE
HANNELORE ROMEIKE
[redacted] ROMEIKE
[redacted] ROMEIKE
[redacted] ROMEIKE
[redacted] ROMEIKE
[redacted] ROMEIKE

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANTS: William Henry Humble, III, Esquire

AMICUS CURIAE FOR APPLICANTS: Lori Windham, Esquire[1]

ON BEHALF OF DHS: Jerry A. Beatmann
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

The Department of Homeland Security (DHS) appeals the Immigration Judge's January 26, 2010, decision granting the applicants asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158. The applicants and an amicus have filed briefs in opposition. The appeal will be sustained.

We review findings of fact, including the determination of credibility, under a clearly erroneous standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, including whether the parties have met the relevant burden of proof, and issues of discretion under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii). The applicants' application was filed after May 11, 2005, and therefore is governed by the provisions of the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The applicants are a family, namely parents and five children, who are natives and citizens of

[1] An entry of appearance and amicus brief in support of the applicants were also filed by John Anthony Simmons, Sr., of the Family Research Council, although no formal request to appear as amicus was filed.

Germany.[2] They seek asylum in or withholding of removal from the United States on the ground that they were and will be persecuted in Germany because the parents choose to homeschool their children in contravention of German law.

The facts related to the family's experiences in Germany are not disputed. The adult applicants began homeschooling their children in September 2006 primarily for religious reasons. Their decision was in knowing violation of the compulsory school attendance law.[3] Several times in the following months, the applicants were warned verbally and in writing that they were in violation of the compulsory school attendance law. They were fined. Police forcibly escorted the children to school one day. The adult applicants were warned they could lose custody of their children if they continued to refuse to send their children to school. Legal proceedings resulted in the adult applicants being found guilty of violating the compulsory school attendance law. By the time the applicants left Germany, their fines had risen to approximately 7,000 Euros.

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[2] The lead applicant is the husband (A087 368 600), and the other applicants and derivative beneficiaries are his wife and children. Section 208(b)(3) of the Act, 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 1208.3(a). We note that the asylum claims of the lead applicant's wife and children rest upon his claim. They have not filed their own claims for withholding of removal or for protection under the Convention Against Torture. We further note the lead applicant's wife and children are not entitled to assert a derivative claim for withholding of removal or CAT protection. See *Matter of A-K-*, 24 I&N Dec. 275, 279 (BIA 2007).

[3] The text of the specific compulsory school attendance law(s) applicable to the applicants is not in the Record of Proceedings.

The Immigration Judge found the witnesses, including the adult applicants, credible. The Immigration Judge held that the applicants did not suffer past persecution, and thus are not entitled to a presumption of a well-founded fear of future persecution. The Immigration Judge also held the applicants did not establish a claim based on political opinion. The applicants did not appeal these aspects of the Immigration Judge's decision, so we deem those issues waived. The sole issue on appeal is whether they have shown a well-founded fear of persecution in the future on account of religion or membership in a particular social group.

The Board's adjudication of this matter does not involve an assessment of the merit of compulsory school attendance laws or the merit of homeschooling. The German government has the authority to require school attendance and enforce that requirement with reasonable penalties (see Exh. 2, Tab E at 120 (describing decision by European Court of Human Rights upholding German school attendance law)). The compulsory school attendance law at issue in this case is a law of general application. As such, its enforcement and any prosecution under it are not persecution unless the law is selectively enforced or one is punished more severely on account of a protected ground, so as to indicate that application of the law is a pretext for persecution. *See Stserba v. Holder*, 646 F.3d 964, 977-78 (6th Cir. 2011) (addressing generally applicable Estonian law invalidating Russian educational degrees); *see also Li v. Att'y Gen. of the U.S.*, 633 F.3d 136 (3d Cir. 2011); *Long v. Holder*, 620 F.3d 162 (2d Cir. 2010).

The record does not show that the compulsory school attendance law is selectively applied to homeschoolers like the applicants. The applicants argue that pretext is seen in the fact that enforcement is not sought in the same way against truants, and that truants are allowed to be schooled at home or through correspondence school. The only evidence that truants are treated more leniently is two sentences in an affidavit by a German lawyer, Gabriele Eckermann, who represents homeschoolers. She states her opinion that truant children are treated different from homeschooled children because "[i]n some cases" such children are allowed to participate in correspondence school or other home-based learning (Exh. 2, p. 409, ¶14).[4] This anecdotal evidence is not sufficient to establish that the compulsory school attendance law is applied selectively to homeschoolers and is not applied in the same way to truants. Even when truants are allowed to participate in distance learning, the program is administered by the school, not by the child's parents (Tr. at 47-48). Truants are not allowed to be homeschooled in the manner the applicants homeschooled their children.

The fact that some parents receive exemptions from the compulsory school attendance law does not indicate that the law is selectively applied. The record indicates that parents whose occupations preclude them from establishing a firm residence may be exempted from the compulsory school

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[4] The expert witness's similar testimony about the different treatment truants receive simply cites Ms. Eckermann and unnamed "other scholars" as the source for his knowledge (Tr. at 46-48).

attendance law (*see* Exh. 2, Tab H at 259). It is not clear whether such parents are permitted to homeschool their children or whether other options such as correspondence school or government-authorized tutors are employed. In any event, such exemptions simply recognize the impracticability of consistent public school attendance for some children.

The record also does not demonstrate that the burden of the compulsory school attendance law falls disproportionately on any religious minority, and specifically on the applicants' practice of Christianity. The applicants have not shown that most homeschoolers share their religious beliefs, or that most parents with their religious beliefs choose to homeschool. Homeschoolers in Germany are not a homogenous group. Parents have varied reasons for wanting to homeschool. Not all such reasons are religious-based. German homeschoolers include parents, like the applicants, who think public schools are too liberal and antiauthoritarian, as well as parents who think public schools are too rigid and authoritarian (Exh. 2, Tab J at 397; Tr. at 58-59).

Nothing in the record suggests that the compulsory school attendance law was or will be enforced against the applicants because of their opposition to the law's policy. Rather, the law is being enforced because they are violating it. There is no indication that officials are motivated by anything other than law enforcement. These factors reflect appropriate administration of the law, not persecution.

Nor does the record demonstrate that homeschoolers are more severely punished than others whose children do not comply with the compulsory school attendance law. The applicant's expert witness testified that the punishment the applicants fear most, loss of custody of their children, is penalty that is also applied to parents of truants (Tr. at 48).[5] The record does not contain any specific examples of truancy cases to show that parents of truants received smaller fines compared to homeschooling parents.

The applicants also argue that the compulsory school attendance law is categorically pretextual because its purpose is socialization, not education. A judicial ruling in the record describes one of the goals of compulsory school attendance as "counteracting the development of religiously or philosophically motivated 'parallel societies.'" (Exh. 2, Tab. H at 258). The ruling goes on to explain that, "[d]ialogue with such minorities is an enrichment for an open pluralistic society" so children can develop a "sense of experienced tolerance .... The presence of a broad spectrum of convictions in a classroom can sustainably develop the ability of all pupils in being tolerant and exercising the dialogue that is a basic

[5] The witness testified that he is unaware of any parents of truants being criminally prosecuted as some homeschooling parents have been (Tr. at 48). That difference does not necessarily reflect selective enforcement or imposition of disparate punishments. It is possible that parents of truants lack a mens rea required for criminal prosecution, as truants have been described as children who skip school without their parents' knowledge or consent. Without the text of the statute in the record, we cannot further assess this factor.

requirement of [the] democratic decision-making process." *Id*; *see also* Exh. 2, Tab H at 271,298.

These statements do not reflect a governmental objective to restrict or suppress religious or philosophical practice. See *Li v. Att'y Gen. of the U.S.*, *supra*, 633 F.3d at 144 (relying on the fact that no record evidence suggested law at issue was intended to silence or punish political dissent). The applicants are free to practice their religion and provide their children any religious or educational instruction they choose. The law simply does not permit them to do so to the exclusion of school attendance. One need not agree with this specific law or its method of enforcement to conclude that socialization of children is a legitimate, nonpretextual government objective that is not inherently hostile to or persecutory of those who advocate less intrusive means of socialization

The Immigration Judge's findings that "animus and vitriol" underlie the compulsory school attendance law and that the German government is enforcing a "Nazi era law against people that it purely seems to detest" are clearly erroneous (I.J. at 14). To the contrary, German judicial assessment of compulsory school attendance laws is that their purpose includes supporting tolerance and pluralism (Exh. 2, Tab H at 258, 271, 298). As previously discussed, the record does not show that the law is selectively enforced. The record does not contain the text or legislative history of the compulsory school law at issue to support the inflammatory suggestion that it is a Nazi-era law. This case does not involve a totalitarian government enforcing separation of

children from parents for the purpose of ideological indoctrination.

It is clear that the applicants homeschool for religious reasons; however, for the foregoing reasons, they have not shown that their religion, their religious-based desire to homeschool, or their status as homeschoolers is a central reason that the compulsory school attendance law was or will be enforced against them. *See* section 208(b)(1)(B)(i) of the Act.

Even if the applicants had shown that the compulsory school attendance law was selectively enforced against them, or they were punished disproportionately, on account of their status as homeschoolers, we conclude that German homeschoolers are not a particular social group cognizable under the Act. German homeschoolers lack the social visibility required to constitute a particular social group. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). The United States Court of Appeals for the Sixth Circuit has endorsed the social visibility requirement. *See*, *e.g.*, *Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011); *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009).[6] While the record contains some evidence of association and networking among homeschoolers, there is not sufficient evidence that society at large is generally aware of such association to consider homeschoolers a group.[7]

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[6] The element of social visibility does not mean ocularly visible, as the Immigration Judge's decision suggests (I.J. at 15).

While the applicants have professed homeschooling to be fundamental to their conscience, the strength of their conviction does not make homeschoolers a social group perceived by others as such.

German homeschoolers also lack the particularity required to be a cognizable social group under the Act. *See Matter of S-E-G-*, *supra*, at 584-86. The group is amorphous. A family may choose to homeschool one child yet send another child to school, or may homeschool during certain school years and send the child to school other years. One becomes or ceases to be a member of the group by a mutable choice, viz. sending one's children to school or not. Additionally, in relation to the population of Germany, the estimated number of 500 homeschooling families is quite small (Exh. 2, Tab F at 121). Their reasons for homeschooling are disparate (Exh. 2, Tab J at 397; Tr. at 58-59). These factors render homeschoolers too indistinct a group to be a particular social group.

The statutory definition of "refugee" requires persecution on account of one of the grounds specified therein, and does not include all persons who suffer punishment for acts of conscience. *Foroglou v. INS*, 170 F.3d 68, 71 (lst Cir. 1999) (addressing claim of conscientious objector to Greek military service). Having not shown any pretext in the enforcement of the compulsory school attendance law against them, the applicants did not establish a well-founded fear of persecution or the higher threshold of a clear probability of persecution.

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[7] This is not to suggest that homeschoolers are not a particular social group in other countries (including the United States).

Accordingly, we will sustain the DHS's appeal, and order the applicants' removal from the United States to Germany.

ORDER: The appeal is sustained.

FURTHER ORDER: The applicants are ordered removed from the United States to Germany.

/s/
FOR THE BOARD

[ENTERED JANUARY 26, 2010]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Memphis, Tennessee

File Nos.: A 087 368 600 January 26, 2010
A 087 368 601
A 087 368 602
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In the Matter of
UWE ANDREAS JOSEF ROMEIKE)
HANNELORE ROMEIKE)
[redacted] ROMEIKE)
[redacted] ROMEIKE)
[redacted] ROMEIKE)
[redacted] ROMEIKE)
[redacted] ROMEIKE)
)
Respondents)

IN ASYLUM PROCEEDINGS

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENTS:
William Henry Humble, III, Esquire

ON BEHALF OF DHS:
John F. Cook, II
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The Romeikes are a family from Germany that arrived in the United States August 17, 2008, and were admitted under the visa waiver program. They failed to depart within the 90 day time limit of that program.

The asylum application is based primarily on religion, but also political opinion and particular social group. The background facts are as follows. The two adult Romeikes, Uwe and Anna Laura, are both music teachers. In the summer of 2006, they made the decision to take their children out of school and to homeschool their children. The children involved in that particular decision were [redacted] and [redacted], who were currently in school, and [redacted] who was about to start school. The adult respondents are both 38 years of age, [redacted] is [redacted], [redacted] is [redacted], [redacted] is [redacted], [redacted] is [redacted], and [redacted] is [redacted] years of age.

The reasons they decided to homeschool their children was the fear that there were negative influences in school. They felt that school engendered a negative attitude toward family and parents and would tend to turn children against Christian values, as the Romeikes saw it.

Specifically, the Romeikes objected to the teaching of evolution, the endorsement of abortion and homosexuality, the implied disrespect for parents and family values, teaching of witchcraft and the occult, ridiculing Christian values and sex education.

Although the Court is still not exactly sure what the witchcraft and occult studies are, in German public schools, the other aspects are fairly typical criticisms of public schools in the United States as well.

The Romeikes decided to enroll their children in the Philadelphia School. The Philadelphia school was, at one time, a government sanctioned private school, but it no longer has classes as such, it operates as a private Christian correspondence school, assisting homeschoolers throughout Germany. [redacted], [redacted] and [redacted] were enrolled in the Philadelphia School.

Once the notification to the local school was received, respondents began to get attention from the government of their municipality. They actually cancelled he enrollment of their three children on September 15, 2006, and on September 20, 2006, Principal Rose came to visit them. Mr. Rose informed them that homeschooling is illegal in Germany and on the next day after they informed him that they were actually attending the

Philadelphia School, he returned and told them that the Philadelphia School is not an approved government school.

October [sic] 9, 2006, they got a letter from the mayor informing them that they would suffer a fine of about $45 per child, per day, and, if necessary, the government would use force. The Romeikes ignored that. On October 20, 2006, two armed police officers came to the house to take the children to school. This produced a very upsetting scene for the children, the children were crying and were upset, as the three children that were of school age were herded off to go to school. Apparently, the police had no warrant or other authorization to do this, however, the Romeikes were not aware that they had any basis to resist legally, so they allowed the children to go to school. However, Mrs. Romeike retrieved the children at lunch hour.

On October 23, 2006, the police appeared in force this time to take the children to school. However, the neighborhood apparently had been alerted and neighbors blocked the police from taking action. At that point, the government backed off for a while, obviously they were not sure what to do. Apparently these situations are fairly rare and apparently had not occurred in this town previously.

In December of 2006, the government began to get tough, they informed the Romeikes that the

children must attend school and there would be a fine of about $672 initially, which would only escalate in the future if they continued to resist.

Also the mayor informed them that in addition to the fines, which would escalate, that they might lose custody of the children. There is a social work organization, in Germany, called the Jugendamt, which apparently means youth office in German, and they have the authority to remove children from parents under certain circumstances.

Respondents did go to Court over this and explained the situation. The Judge did not accept their explanation, he found them guilty of not sending their children to school, which is a crime.

Respondents took various legal measures over the ensuing months and they were not successful at any level. They faced escalating fines which would eventually be more than they could afford to pay. The applicant makes about 12,000 Euros a month, and the family had been fined about 7,000 Euros at the time they left the country and the fines would only increase. If they were not able to pay the fines, they also stood to lose their property, but most importantly, they stood to lose custody of their children, and that was their main fear. There also is a possibility that they could have been sent to jail, as these are criminal statutes.

Michael Donnelly, a staff attorney, with the Homeschooling Legal Defense, testified very compellingly. He not only is an expert who has made intense study of the homeschooling situation worldwide, but he in fact has actually spoken to nearly all of the German parents who have been mentioned in the background evidence, and has virtually personal knowledge of their situations. He testified that there are very few homeschoolers in Germany, and it is not allowed by law. Further, the German Courts are not at all friendly towards homeschoolers. He testified that there are associations, that exist in Germany, about four of five of them, none of them very large. The problems started in the 1990's and they have accelerated as more people, such as the Romeikes, found out that it was possible to homeschool their children, if not legal. Mr. Donnelly stated that the fines could run from 50 Euros all the way up to 50,000 Euros, obviously a crushing fine, that the Jugendamt, would, in certain circumstances, take custody of the children, place them in foster homes or orphanages, and send them to public school from there. Although some people have been sentenced to imprisonment, not very many have actually served in jail. The Schmidt family served 14 days in jail. The Dudek family was sentenced to 90 days in jail, but they appealed, and apparently their case has been remanded. Once again the Dudeks and the Schmidtswere found guilty of not sending children to school, and are considered to be school refusers. Mr.

Donnelly further testified that there are private schools, in Germany, but the private schools must be government approved, and they must use the government curriculum, which contains the items which the Romeikes find offensive. Although there may be some places in Germany where the law is not enforced at the local level, that is not a legal place of refuge, that is merely just a case of the local officials not taking action, so there is actually no safe place in Germany for the Romeikes, or people like them, to live without having these problems. Mr. Donnelly also testified that if fines are levied, which cannot be paid, property is attached and seized and the Jugendamt does take children into foster homes and orphanages. He discussed the case of the Garbers, whose child was placed in a foster home for six months, and placed in public school, and they could not visit the child for six months. Even more disturbing, is the case of Melissa Vusekros. When her parents kept her out of school, she was treated as if she had a psychiatric affliction known as school phobia and she was actually placed in an asylum for the mentally ill while she was tested. This frankly is reminiscent of the Soviet Union treating political opposition as a psychiatric problem, not only a human rights violation, it is a misuse of the psychiatric profession. He discussed the Gile family, who were attempting to hide their children, having an underground school essentially, rather than something like the Philadelphia School, however, the social workers found them out and threatened them

with a 75,000 Euro fine, which is well over $100,000 U.S. When asked if some people were able to escape these penalties, Mr. Donnelly said yes they have, but it is only because they have fled from Germany, and he proceeded to list the various homeschoolers who have fled to many other countries, both in Europe and elsewhere, to escape fines, loss of custody of their children, and criminal sanctions. When asked whether there were any exceptions, he indicated the only real exception would be medical reasons, that if the child could be diagnosed with some psychological problem that would prevent being around other children, it might be possible to homeschool, although, in that case, what the government does is send in their own teachers who teach from the government curriculum. So even if that would work, and there is no evidence, in this case, that any of the children have any psychological problems, it would not achieve the goal.

The scariest thing that Mr. Donnelly testified to is the motivation of the German government in this matter. I certainly would have assumed that the motivation would be concern for the children. We certainly do some odd things, in the United States, out of concern for children, but the explanation is always given that the Government has a right and an interest to look after children in their country. However, that does not seem to be the explanation. Mr. Donnelly described the judicial decisions, in Germany, not so much being interested in the

welfare of the children, as being interested in stamping out groups that want to run a parallel society, and apparently there is a fair amount of vitriol involved in this attempt to stamp out these parallel societies. I found that odd. Another interesting fact, is the fact that this law has not always existed in Germany, it was enacted in 1938, when Adolph Hitler and the Nazi Party was in power in Germany, and it was enacted specifically to prevent parents from interfering with state control of their children, and we all know what kind of state control Hitler had in mind. It certainly was not for the good of the children, not even facial.

Now obviously Germany has changed since 1938. Germany is a Democratic country, Germany is an ally of the United States, and Germany does provide due process of law. However, this one incidence of Nazi legislation appears to still be in full force and effect, and that is the situation that Mr. Donnelly described, and the Romeikes fear.

On cross-examination, the Government attorney discussed, with Mr. Donnelly, his claim that there was a petition, before the European Union, that was still open. Apparently there was a case that had been fought in the European High Court of Human Rights, in Strasbourg, which was rejected. Mr. Donnelly stated that it was rejected on some unknown ground. Mr. Cook, the Government attorney, pointed out that apparently it had been

rejected on jurisdictional grounds. Regardless of who is right about that, it does not really affect the basic situation, that the European government is no more willing, than the German government, to make an exception for homeschooling for religious or philosophical reasons.

Oddly enough, although European countries are significantly less interested in the family than we are here in the United States, there is no other country, in Europe, that flat out bands homeschooling. Some of the other countries make it difficult, but the problems that I have been describing, that were described, by Mr. Donnelly, are largely restricted to Germany, they are nowhere near as bad in other European countries.

In the United States, no state bands homeschooling. There has been a lot of litigation regarding homeschooling, obviously the educational establishment, in many cases, wants to have control of children. However, the State Supreme Courts have, without exception, ruled in favor of the parents. For that reason no case has gone to the Supreme Court. However, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court made very clear how it would rule in this matter. That was a case of Amish parents who, for religious reasons, wanted their children taken completely out of the school, after just getting basic reading, writing and arithmetic. That was not homeschooling; that was no

school. And in that case, the Supreme Court found that there was a fundamental right of a parent to establish a home and bring up the children and worship God according to the dictates of his own conscious.

This is a central right, in America. Justice Brandeis described it as part of the greater right, the right to be let alone, that the Government does not own people, that people should control the Government. So, in the United States, obviously, the Romeikes would have no problem with their homeschooling.

However, our Constitution is not in effect everywhere in the world. Maybe the world would be a better place if it were, but it is not, and we do not necessarily have any right to expect other countries to do exactly the way we do in everything. It is not just the homeschooling, religion is not free in other countries, the United Kingdom, obviously, has an established religion, which is prohibited by our Constitution, but is central to theirs, it is not an unfree country, the right to freedom of speech, that we take for granted, is not nearly as strong, in the United Kingdom, or other parts of Europe, many things that we would consider to be perfectly acceptable and protected are not protected, and that is not necessarily persecution.

ASYLUM LAW

To qualify for asylum, pursuant to Section 208 of the Act, the applicant must show that he is a refugee within the meaning of Section 101(a)(42)(A) of the Act; that is that he suffered past persecution, or that he has a well-founded fear of future persecution in his country, on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). To qualify for withholding of removal, under Section 241(b)(3) of the Act, the applicant must show a clear probability that his life or freedom would be threatened on account of one of those factors. This is a higher burden of proof than for asylum.

The applicant is not applying for Convention against Torture protection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

First of all, as to credibility, I find that the Romeikes, and Mr. Donnelly, and all of their evidence is entirely credible and believable. They are clearly honest and decent people. Mr. Donnelly, although he certainly is a partisan in this dispute, has been a highly credible expert witness, and the Court was very impressed with his testimony.

As to what happened to the respondents, in Germany, I do not find that it is past persecution. This Court sits in the Sixth Circuit and the mistreatment that they suffered, as scary as it might be, certainly does not rise to the level of persecution. See Ali v. Ashcroft, 366 F.3d 407 (6th Cir. 2004). So no presumption arises, respondents have to demonstrate that they have a well-founded fear of persecution, or a likelihood of persecution, to qualify for asylum or withholding of removal.

As I stated, persecution is an extreme concept that normally does not include harassment, discrimination, or similar things, as morally reprehensible, as that may be. See Sako v. Gonzales, 434 F.3d 857 (6th Cir. 2006).

Normally economic deprivation, and employment discrimination fall short of persecution. Matter of H-M-, 20 I&N Dec. 683 (BIA 1993). However, severe economic deprivation, which constitutes a threat to the life or freedom of the applicant, would be persecution. Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

The central issue, in this case, is whether this situation, where a family is denied the right to homeschool their children, denied the right to educate their children in their religious faith, and in their way of thinking, would necessarily be persecution under the Act.

Respondents' counsel argues that there are three factors which constitute a nexus to the factors for which asylum can be granted. Those factors are political opinion, religion and membership in a particular social group. As to political opinion, I do not really see a political opinion here. Obviously any opinion could be a political opinion, if you look at it that way, however, applicant and his family have never been involved in any kind of political organization, they have never taken a formal stand on anything, other than the homeschooling, they have never spoken out and I do not believe there is any political opinion in this case.

As to religion, the Government attorney argues that their religion is a bit on the vague side. They do not appear to belong to any particular church whose rigid doctrines they are attempting to enforce. In fact almost all Christians, in Germany, do send their children to public school, or at least government private schools. Applicant has been somewhat vague as to his religious beliefs. He has not really identified a denomination that he belongs to. Nonetheless, there is no way the Court can look at this record and say the Romeikes do not have a religion. They clearly have a religion. It may be vague and unformed in some aspects, but it is quite specific in other aspects. Specifically the raising of their children, and Mr. Romeike made it very clear that this is not just his opinion, that he feels this is God's opinion, that he wants to raise his family and

also his wife wants to raise the family, in accordance with God's wishes as they understand them. There is no religious test, in the United States, and this Court is not going to have a religious test. There is certainly no reason to believe that the religious beliefs, that the Romeikes have, are anything other than entirely genuine and they certainly seem the basis of a problem here. However, is the government attempting to suppress their religion? Not really, the government is not acting against their religion, the government is only acting against their activities, which are very simple, not sending their children to school. The government is not trying to overcome their religious beliefs, however, the government is attempting to circumscribe their religious beliefs, and if the Romeikes remained in Germany, they would not be able to exercise their religion as they see it.

As to particular social group, initially I did not see that either. However, after listening to Mr. Donnelly's testimony, it does appear that there is animus and vitriol involved here, that the government of Germany really resents the homeschoolers, not just because they are not sending the children to school, but because they constitute a group that the government, for some unknown reason, wishes to suppress. I do not attempt to understand exactly what the government would mean by suppressing a parallel society, because it is so silly, obviously there are parallel societies in

Germany, as everywhere. There are different ethnic groups, there are different religions, there is a large Turkish population, in Germany, that has been there many generations. Clearly they are somewhat of an alternate society than made of Christian Germans. Yet, for some reason the government is not focused on that, the government is attempting to enforce this Nazi era law against people that it purely seems to detest because of their desire to keep their children out of school.

A problem with finding a particular social group is that whatever this particular social group is, parents who choose to homeschool, or however you define it, do not have any social visibility. There is no way you could tell a homeschoolers from an un-homeschooler walking the street. Therefore, under the Board's case law this would not constitute a particular social group for that reason.

However, the Board's social visibility standard has been harshly criticized in the Seventh Circuit, which held that it is actually nonsensical. I certainly do not think it is nonsensical, but the Seventh Circuit does. The Sixth Circuit, in which we sit, has never specifically impeached the social visibility standard, however, in a very recent case, Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009), the Sixth Circuit held that membership in a group opposing the repressive and discriminating customs governing marriage, in Yemen, would be considered

to be a particular social group. Now the Sixth Circuit, as I stated, did not really address the social visibility issue, although clearly, in the Al-Ghorbani case, there was no social visibility, so it does appear that in the Sixth Circuit, whether or not it has actually followed the Seventh Circuit all the way, the Sixth Circuit certainly believes that there are particular social groups that do not have social visibility.

Since the group of homeschoolers, that respondents belong to, has been fined, imprisoned, had the custody of their children taken away from them, in case after case after case, and since there actually seems to be a desire to overcome something, in the homeschooling movement, even though the Court cannot really understand what that might be, I do find that the homeschoolers are a particular social group for the purpose of asylum law, in the Sixth Circuit. Currently it more than meets all the requirements set out in Al-Ghorbani. In fact, Al-Ghorbani was largely a personal situation involving a particular marriage, whereas in this case we are dealing with principle and opposition to the government policy.

So, therefore, although I do not find that there is a political opinion in this case, I do find that the religious beliefs of the Romeikes are being frustrated, and the practice of their religion will not be permitted under current German law, dealing

with homeschooling, and also I find that they belong to a particular social group of homeschoolers who, for some reason, the government chooses to treat as a rebel organization, a parallel society, for reasons of its own.

As I stated above, this is not traditional German doctrine, this is Nazi doctrine, and it is, in this Court's mind, utterly repellant to everything that we believe in as Americans.

Religious freedom is in many ways the most basic freedom in this country, certainly most of the original refugees that came to the United States, in colonial times, and in the early days of the republic, were religious refugees, many of them from Germany, such as the Amish and the Mennonites and many other groups and, therefore, I find that it is not just a question of enforcing our Constitution on a foreign country, but rather the rights that are being violated in this case are basic to humanity, they are basic human rights which no country has a right to violate, even a country that is in many ways a good country, such as Germany.

Therefore, I find that respondents do have a well-founded fear of persecution if they returned to Germany. Although the fines could be considered to be not severe enough to be persecution, it does appear that the fines are constantly increased to the point where they cannot be paid, and that would

destroy the economic life of the Romeikes. The possibility that the children could be taken away from them, I find, to be persecution. I think most parents would rather serve two or three years in jail than to lose custody of their children during their minority. So the loss of custody is a very scary sanction, which is persecution. Then there is a possibility of jail as well, although it has not been imposed in too many cases, partly because people have fled the country. The very fact that some many of the homeschoolers have fled the country, after taking the legal system in Germany as far as they could, is certainly proof that this is no frivolous position. The Romeikes have uprooted themselves. They have not moved from a third world, they have moved from a country just as wealthy as the United States, with a very nice welfare system, free medical care, many things that some people think we need in this country. But if Germany is not willing to let them follow their religion, not willing to let them raise their children, then the United States should serve as a place of refuge for the applicants.

There is nothing in the exercise of discretion that would bar asylum to the applicants. The biometrics have been checked and there are no problems. Therefore, the Court will grant asylum in the exercise of discretion to Mr. Romeike and, as derivatives, to his wife and children.

In the light of an asylum grant, I am not going to make any ruling on withholding of removal.

The Court's orders are as follows:

(1) Asylum is granted to all respondents;

(2) any order of removal that has been entered by the Department of Homeland Security is vacated;

(3) these proceedings will be terminated.

_____

LAWRENCE O. BURMAN
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE LAWRENCE O. BURMAN, in the matter of:

UWE ANDREAS JOSEF ROMEIKE, A 087 368 600
HANNELORE ROMEIKE, A 087 368 601
[redacted] ROMEIKE, A 087 368 602
[redacted] ROMEIKE[A 087 368 603
[redacted] ROMEIKE, A 087 368 604
[redacted] ROMEIKE, A 087 368 605
[redacted] ROMEIKE, A 087 368 606

Memphis, Tennessee

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/
Cindy B. Whitlock, Transcriber
Free StateReporting, Inc.

March 23, 2010
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent and/or CD, as described in Section C, paragraph C.3.3.2 of the

contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

[ENTERED JULY 12, 2013]

No. 12-3641

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UWE ANDREAS JOSEF ROMEIKE, ET AL.,)
Petitioners,)
)
)
)
v.)
)
)
)
ERIC H. HOLDER, JR.,)
Respondent.)

FILED
Jul 12, 2013
DEBORAH S. HUNT, Clerk

ORDER

BEFORE: GILMAN, ROGERS, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Deborah S. Hunt, Clerk

8 U.S.C. § 1101. Definitions

(a) As used in this chapter--

(1) The term "administrator" means the official designated by the Secretary of State pursuant to section 1104(b) of this title.

(2) The term "advocates" includes, but is not limited to, advises, recommends, furthers by overt act, and admits belief in.

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations. Such regulations shall provide that (A) each such document include a biometric identifier (such as the fingerprint or handprint of the alien) that is machine readable and (B) an

alien presenting a border crossing identification card is not permitted to cross over the border into the United States unless the biometric identifier contained on the card matches the appropriate biometric characteristic of the alien.

(7) The term "clerk of court" means a clerk of a naturalization court.

(8) The terms "Commissioner" and "Deputy Commissioner" mean the Commissioner of Immigration and Naturalization and a Deputy Commissioner of Immigration and Naturalization, respectively.

(9) The term "consular officer" means any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or, when used in subchapter III of this chapter, for the purpose of adjudicating nationality.

(10) The term "crewman" means a person serving in any capacity on board a vessel or aircraft.

(11) The term "diplomatic visa" means a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.

(12) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(13)

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien--

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since

such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

(14) The term "foreign state" includes outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

(A)

(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

(ii) upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government

recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(C) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

(D)

(i) an alien crewman serving in good faith as such in a capacity required for normal operation and service on board a vessel, as defined in section 1288(a) of this title (other than a fishing vessel having its home port or an operating base in the United States), or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States who intends to land temporarily in Guam or the Commonwealth of the Northern Mariana Islands and solely in pursuit of his calling as a crewman and to depart from Guam or the Commonwealth of the Northern Mariana Islands with the vessel on which he arrived;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; (i) solely to carry on substantial trade, including

trade in services or trade in technology, principally between the United States and the foreign state of which he is a national; (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or (iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title;

(F)

(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of

Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn,

(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(G)

(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669)[22 U.S.C.A. 288 et seq.], accredited resident members of the staff of such

representatives, [FN1] and members of his or their immediate family;

(ii) other accredited representatives of such a foreign government to such international organizations, and the members of their immediate families;

(iii) an alien able to qualify under (i) or (ii) above except for the fact that the government of which such alien is an accredited representative is not recognized de jure by the United States, or that the government of which he is an accredited representative is not a member of such international organization; and the members of his immediate family;

(iv) officers, or employees of such international organizations, and the members of their immediate families;

(v) attendants, servants, and personal employees of any such representative, officer, or employee, and the members of the immediate families of such attendants, servants, and personal employees;

(H) an alien

(i)

(a) [Repealed. Pub.L. 106-95, § 2(c), Nov. 12, 1999, 113 Stat. 1316]

(b) subject to section 1182(j)(2) of this title, who is coming temporarily to the

United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 1184(i)(1) of this title or as a fashion model, who meets the requirements for the occupation specified in section 1184(i)(2) of this title or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title, or (b1) who is entitled to enter the United States under and in pursuance of the provisions of an agreement listed in section 1184(g)(8)(A) of this title, who is engaged in a specialty occupation described in section 1184(i)(3) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 1182(t)(1) of this title, or

(c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the

qualifications described in section 1182(m)(1) of this title, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 1182(m)(2) of this title for the facility (as defined in section 1182(m)(6) of this title) for which the alien will perform the services; or

(ii)

(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature, or

(b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to

perform services as members of the medical profession; or

(iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him;

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting,

demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 1182(j) of this title, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(K) subject to subsections (d) and (p) of section 1184 of this title, an alien who--

(i) is the fiancee or fiance of a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 1154(a)(1)(A)(viii)(I) of this title) who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(L) subject to section 1184(c)(2) of this title, an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

(M)

(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student

and if any such institution fails to make reports promptly the approval shall be withdrawn,

(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

(N)

(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i) (or under analogous authority under paragraph (27)(L)), but only if and while the alien is a child, or

(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) of paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

(O) an alien who--

(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by

sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

(ii)

(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or **(b)** in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both

inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

(IV) has a foreign residence which the alien has no intention of abandoning; or

(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

(P) an alien having a foreign residence which the alien has no intention of abandoning who--

(i) (a) is described in section 1184(c)(4)(A) of this title (relating to athletes), or **(b)** is described in section 1184(c)(4)(B) of this title (relating to entertainment groups);

(ii)

(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which

provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

(iii)

(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

(Q) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers;

(R) an alien, and the spouse and children of the alien if accompanying or following to join the alien, who--

(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

(S) subject to section 1184(k) of this title, an alien--

(i) who the Attorney General determines--

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine--

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of Title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

(T)

(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 7102 of Title 22;

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

(III)

(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

(cc) has not attained 18 years of age; and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

(III) any parent or unmarried sibling under 18 years of age, or any adult or minor children of a derivative beneficiary of the alien, as of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

(iii) Repealed. Pub.L. 110-457, Title II, § 201(a)(3), Dec. 23, 2008, 122 Stat. 5053

(U)

(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and

military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)--

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of Title 18); or attempt, conspiracy, or

solicitation to commit any of the above mentioned crimes; or

(V) subject to section 1184(q) of this title, an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A) of this title that was filed with the Attorney General under section 1154 of this title on or before December 21, 2000, if--

(i) such petition has been pending for 3 years or more; or

(ii) such petition has been approved, 3 years or more have elapsed since such filing date, and--

(I) an immigrant visa is not immediately available to the alien because of a waiting list of applicants for visas under section 1153(a)(2)(A) of this title; or

(II) the alien's application for an immigrant visa, or the alien's application for adjustment of status under section 1255 of this title, pursuant to the approval of such petition, remains pending.

(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office

outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens.

(18) The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title.

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76)[50 App. U.S.C.A. 454(a)], or under any section of this chapter, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an

immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(23) The term "naturalization" means the conferring of nationality of a state upon a person after birth, by any means whatsoever.

(24) Repealed. Pub.L. 102-232, Title III, § 305(m)(1), Dec. 12, 1991, 105 Stat. 1750.

(25) The term "noncombatant service" shall not include service in which the individual is not subject to military discipline, court martial, or does not wear the uniform of any branch of the armed forces.

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "special immigrant" means--

> **(A)** an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the immigrant, who--

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before September 30, 2015, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before September 30, 2015, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of Title 26) at the

request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i);

(D) an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: *Provided*, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status;

(E) an immigrant, and his accompanying spouse and children, who is or has been an employee of the Panama Canal Company or Canal Zone Government before the date on which the Panama Canal Treaty of 1977 (as described in section 3602(a)(1) of Title 22) enters into force [October 1, 1979], who was resident in the Canal Zone on the effective date of the exchange of instruments of ratification of such Treaty [April 1, 1979], and

who has performed faithful service as such an employee for one year or more;

(F) an immigrant, and his accompanying spouse and children, who is a Panamanian national and (i) who, before the date on which such Panama Canal Treaty of 1977 enters into force [October 1, 1979], has been honorably retired from United States Government employment in the Canal Zone with a total of 15 years or more of faithful service, or (ii) who, on the date on which such Treaty enters into force, has been employed by the United States Government in the Canal Zone with a total of 15 years or more of faithful service and who subsequently is honorably retired from such employment or continues to be employed by the United States Government in an area of the former Canal Zone;

(G) an immigrant, and his accompanying spouse and children, who was an employee of the Panama Canal Company or Canal Zone Government on the effective date of the exchange of instruments of ratification of such Panama Canal Treaty of 1977 [April 1, 1979], who has performed faithful service for five years or more as such an employee, and whose personal safety, or the personal safety of whose spouse or children, as a direct result of such Treaty, is reasonably placed in danger because of the special nature of any of that employment;

(H) an immigrant, and his accompanying spouse and children, who--

(i) has graduated from a medical school or has qualified to practice medicine in a foreign state,

(ii) was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date,

(iii) entered the United States as a nonimmigrant under subsection (a)(15)(H) or (a)(15)(J) of this section before January 10, 1978, and

(iv) has been continuously present in the United States in the practice or study of medicine since the date of such entry;

(I)

(i) an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and (II) applies for a visa or adjustment of

status under this subparagraph no later than his twenty-fifth birthday or six months after October 24, 1988, whichever is later;

(ii) an immigrant who is the surviving spouse of a deceased officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee, and (II) files a petition for status under this subparagraph no later than six months after the date of such death or six months after October 24, 1988, whichever is later;

(iii) an immigrant who is a retired officer or employee of such an international organization, and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least 15 years before the date of the officer

or employee's retirement from any such international organization, and (II) files a petition for status under this subparagraph no later than six months after the date of such retirement or six months after October 25, 1994, whichever is later; or

(iv) an immigrant who is the spouse of a retired officer or employee accorded the status of special immigrant under clause (iii), accompanying or following to join such retired officer or employee as a member of his immediate family;

(J) an immigrant who is present in the United States--

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's

previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter;

(K) an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on October 1, 1991) for a period or periods aggregating--

(i) 12 years and who, if separated from such service, was never separated except under honorable conditions, or

(ii) 6 years, in the case of an immigrant who is on active duty at the time of seeking special immigrant status under this subparagraph and who has reenlisted to incur a total active duty service obligation of at least 12 years,

and the spouse or child of any such immigrant if accompanying or following to join the immigrant, but only if the executive department under which the immigrant serves or served recommends the granting of special immigrant status to the immigrant;

(L) an immigrant who would be described in clause (i), (ii), (iii), or (iv) of subparagraph (I) if any reference in such a clause--

(i) to an international organization described in paragraph (15)(G)(i) were treated as a reference to the North Atlantic Treaty Organization (NATO);

(ii) to a nonimmigrant under paragraph (15)(G)(iv) were treated as a reference to a nonimmigrant classifiable under NATO-6 (as a member of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement, a member of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set

up pursuant to the North Atlantic Treaty, or as a dependent); and

(iii) to the Immigration Technical Corrections Act of 1988 or to the Immigration and Nationality Technical Corrections Act of 1994 were a reference to the American Competitiveness and Workforce Improvement Act of 1998 [FN2]

(M) subject to the numerical limitations of section 1153(b)(4) of this title, an immigrant who seeks to enter the United States to work as a broadcaster in the United States for the International Broadcasting Bureau of the Broadcasting Board of Governors, or for a grantee of the Broadcasting Board of Governors, and the immigrant's accompanying spouse and children.

(28) The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

(29) The term "outlying possessions of the United States" means American Samoa and Swains Island.

(30) The term "passport" means any travel document issued by competent authority showing the bearer's origin, identity, and nationality if

any, which is valid for the admission of the bearer into a foreign country.

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

(34) The term "Service" means the Immigration and Naturalization Service of the Department of Justice.

(35) The term "spouse", "wife", or "husband" do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.

(36) The term "State" includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands

of the United States, and the Commonwealth of the Northern Mariana Islands.

(37) The term "totalitarian party" means an organization which advocates the establishment in the United States of a totalitarian dictatorship or totalitarianism. The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

(39) The term "unmarried", when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married.

(40) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the

world through the medium of an internationally coordinated Communist political movement.

(41) The term "graduates of a medical school" means aliens who have graduated from a medical school or who have qualified to practice medicine in a foreign state, other than such aliens who are of national or international renown in the field of medicine.

(42) The term "refugee" means (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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular

social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at [FN3] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [FN3] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of

one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [FN4]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's

spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law

(including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(44)

(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An

individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

(45) The term "substantial" means, for purposes of paragraph (15)(E) with reference to trade or capital, such an amount of trade or capital as is established by the Secretary of State, after consultation with appropriate agencies of Government.

(46) The term "extraordinary ability" means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction.

(47)

(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of--

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of

such order by the Board of Immigration Appeals.

(48)

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

(49) The term "stowaway" means any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard such vessel or aircraft. A passenger who boards with a valid ticket is not to be considered a stowaway.

(50) The term "intended spouse" means any alien who meets the criteria set forth in section 1154(a)(1)(A)(iii)(II)(aa)(BB), 1154(a)(1)(B)(ii)(II)(aa)(BB), or 1229b(b)(2)(A)(i)(III) of this title.

(51) The term "VAWA self-petitioner" means an alien, or a child of the alien, who qualifies for relief under--

(A) clause (iii), (iv), or (vii) of section 1154(a)(1)(A) of this title;

(B) clause (ii) or (iii) of section 1154(a)(1)(B) of this title;

(C) section 1186a(c)(4)(C) of this title;

(D) the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;

(E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);

(F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or

(G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

(52) The term "accredited language training program" means a language training program that is accredited by an accrediting agency recognized by the Secretary of Education.

(b) As used in subchapters I and II of this chapter--

(1) The term "child" means an unmarried person under twenty-one years of age who is--

(A) a child born in wedlock;

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;

(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

(E)

(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years;

(F)

(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from,

both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(ii) subject to the same provisos as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i); (II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and (III) is otherwise

described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 1151(b) of this title; or

(G)

(i) a child, younger than 16 years of age at the time a petition is filed on the child's behalf to accord a classification as an immediate relative under section 1151(b) of this title, who has been adopted in a foreign state that is a party to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993, or who is emigrating from such a foreign state to be adopted in the United States by a United States citizen and spouse jointly or by an unmarried United States citizen who is at least 25 years of age, Provided, That--

(I) the Secretary of Homeland Security is satisfied that proper care will be furnished the child if admitted to the United States;

(II) the child's natural parents (or parent, in the case of a child who has one sole or surviving parent because of the death or disappearance of, abandonment or desertion by, the other parent), or other persons or institutions that retain legal custody of the child,

have freely given their written irrevocable consent to the termination of their legal relationship with the child, and to the child's emigration and adoption;

(III) in the case of a child having two living natural parents, the natural parents are incapable of providing proper care for the child;

(IV) the Secretary of Homeland Security is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated (and in carrying out both obligations under this subclause the Secretary of Homeland Security may consider whether there is a petition pending to confer immigrant status on one or both of such natural parents); and

(V) in the case of a child who has not been adopted--

> **(aa)** the competent authority of the foreign state has approved the child's emigration to the United States for the purpose of adoption by the prospective adoptive parent or parents; and

(bb) the prospective adoptive parent or parents has or have complied with any pre-adoption requirements of the child's proposed residence; and

(ii) except that no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; or

(iii) subject to the same provisos as in clauses (i) and (ii), a child who--

(I) is a natural sibling of a child described in clause (i), subparagraph (E)(i), or subparagraph (F)(i);

(II) was adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in clause (i), subparagraph (E)(i), or subparagraph (F)(i); and

(III) is otherwise described in clause (i), except that the child is younger than 18 years of age at the time a petition is filed on his or her behalf for classification as an immediate relative under section 1151(b) of this title.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the

circumstances set forth in subdivision (1) of this subsection, except that, for purposes of paragraph (1)(F) (other than the second proviso therein) and paragraph (1)(G)(i) in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term "parent" does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.

(3) The term "person" means an individual or an organization.

(4) The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(5) The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

(c) As used in subchapter III of this chapter--

(1) The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the United States or elsewhere, and, except as otherwise provided in sections 1431 and 1432 of this title, a child adopted in the United States, if such legitimation or adoption takes place before the child reaches the age of 16 years (except to the extent that the child is described in subparagraph (E)(ii) or (F)(ii) of subsection (b)(1) of this section), and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

(2) The terms "parent", "father", and "mother" include in the case of a posthumous child a deceased parent, father, and mother.

(d) Repealed. Pub.L. 100-525, § 9(a)(3), Oct. 24, 1988, 102 Stat. 2619.

(e) For the purposes of this chapter--

(1) The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.

(2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to

constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(3) Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(f) For the purposes of this chapter--

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was--

(1) a habitual drunkard;

(2) Repealed. Pub.L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section [FN5] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section); or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local

election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

(g) For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

(h) For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means-

(1) any felony;

(2) any crime of violence, as defined in section 16 of Title 18; or

(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

(i) With respect to each nonimmigrant alien described in subsection (a)(15)(T)(i) of this section--

(1) the Secretary of Homeland Security, the Attorney General, and other Government officials, where appropriate, shall provide the alien with a referral to a nongovernmental organization that would advise the alien regarding the alien's options while in the United States and the resources available to the alien; and

(2) the Secretary of Homeland Security shall, during the period the alien is in lawful temporary resident status under that subsection, grant the alien authorization to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

8 U.S.C. § 1158. Asylum

(a) Authority to apply for asylum

(1) In general. Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions.

(A) Safe third country. Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public

interest for the alien to receive asylum in the United States.

(B) Time limit. Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications. Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances. An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability. Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).

(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum.

(1) In general.

(A) Eligibility. The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof.

(i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion

was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden. The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency

between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions.

(A) In general. Paragraph (1) shall not apply to an alien if the Attorney General determines that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules.

(i) Conviction of aggravated felony. For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses. The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations. The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review. There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children.

(A) In general. A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be

granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children. An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction. An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of Title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status.

(1) In general. In the case of an alien granted asylum under subsection (b) of this section, the Attorney General--

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of

a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum. Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that--

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a

particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated. An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section [FN1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure.

(1) Applications. The Attorney General shall establish a procedure for the consideration of

asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment. An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees. The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application. At the time of filing an application for asylum, the Attorney General shall--

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications.

(A) Procedures. The procedure established under paragraph (1) shall provide that--

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions. The Attorney General may provide by regulation for any other conditions or limitations on the

consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications. If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action. Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands. The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

8 U.S.C. § 1229a. Removal Proceedings

(a) Proceeding

(1) In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges. An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures. Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge. The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of

the judge's proper exercise of authority under this chapter.

(2) Form of proceeding.

(A) In general. The proceeding may take place--

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases. An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien. If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding. In proceedings under this section, under regulations of the Attorney General--

(A) the alien shall have the privilege of being represented, at no expense to the

Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear.

(A) In general. Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if

provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information. No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order. Such an order may be rescinded only--

> **(i)** upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> **(ii)** upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review. Any petition for review under section 1252 of this title of an order entered in absentia under this

paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory. The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior. The Attorney General shall, by regulation--

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney

General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear. Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof.

(1) Decision

(A) In general. At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions. If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness,

or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien. In the proceeding the alien has the burden of establishing--

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general. In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based

upon reasonable, substantial, and probative evidence.

(B) Proof of convictions. In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records. In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is--

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general. An alien applying for relief or protection from removal has the burden of proof to establish that the alien--

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden. The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination. Considering the totality of the circumstances, and all relevant factors, the immigration judge may

base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice. If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general. The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline. The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents. The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents. The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum. There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and

was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear. The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents. Any limitation under this section on the deadlines for filing such motions shall not apply--

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,, section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time

limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title [FN3] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal. The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions. In this section and section 1229b of this title:

(1) Exceptional circumstances. The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien,

but not including less compelling circumstances) beyond the control of the alien.

(2) Removable. The term "removable" means--

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

UNIVERSAL DECLARATION OF HUMAN RIGHTS
71 G.A. Res. 217 A (III), U.N. Doc A/810 (1948)

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social

progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1.

All human beings are born free and equal in dignity and rights.They are endowed with reason

and conscience and should act towards one another in a spirit of brotherhood.

Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3.

Everyone has the right to life, liberty and security of person.

Article 4.

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15.

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20.

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights

indispensable for his dignity and the free development of his personality.

Article 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25.

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing,

housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26.

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for

the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

International Covenant on Economic, Social and Cultural Rights of 1966
Dec. 16, 1966, 993 U.N.T.S. 3

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding

fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers

should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by

making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in

particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2.

(a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies

concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all

peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the

Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

International Covenant on Civil and Political Rights of 1966
Dec. 16, 1966, 999 U.N.T.S. 171

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the

promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its

jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial

for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this

right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is

proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home

or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public),

the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications

received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a

brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the

Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable

solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the

relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at

the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

[ENTERED APRIL 29, 2003]

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 436/03 -

In the case relating
to
the constitutional complaint

1. Of Mr K...,
2. Of Mrs K...,
3. The child K...,
4. The child K...,

- Attorneys:

Attorney Professor Dr. Konrad Redeker und Koll.,
Mozartstraße 4-10, 53115 Bonn -

Against:

a) The decision by the Federal Court of Justice of January 7 2003 - BVerwG 6 B 66.02 -,
b) The decision of the Administrative Court Baden-Württemberg of. June 18 182002 - 9 S 2441/01-,
c) The decision of the Administrative Court Freiburg of July 11 2001 - 2 K 2467/00 -,
d) The response of the higher educational authority Freiburg of October 30 2000 to their objection - 720/40 Konrad -
e) The decision of the state educational office in Offenburg of August 28 2000 - 41-6601.0/19 –

the second chamber of the first senate of the Federal Constitutional Court represented by

Judges Jaeger,
Hömig,
Bryde,

unanimously decided on April 29 2003, in accordance with § 93b in combination with § 93 a BVerfGG in the version of the proclamation of August 11 1993 (BGB1 I S. 1473):

not to accept the constitutional complaint for arbitration.

Reasons:

I.

1
The complaint is directed against the refusal to allow homeschooling outside state or private schools by parents of school-aged children (cf. VGH Baden-Württemberg, ESVGH 52, 255 = DVB1 2003, S. 347). The complainants, parents and their children, who are subject to compulsory schooling, belong to a bible-believing Christian community and reject the attendance of state schools for religious reasons. They see the refusal to exempt their children from attendance of the state elementary school as a violation of their basic rights, in accordance with Art. 4 Sec. 1 and 2, Art. 6 Sec. 2 sentence 1, Art. 2 Sec. 1 in combination with Art. 1 Sec. 1 as well as in accordance with Art. 3 Sec. 1 and 3 sentence 1 of the German Basic Law.

II.

2

The conditions necessary for acceptance, according to § 93 a Sec. 2 of the Federal Constitutional Court Act, do not exist.

3

1. The constitutional complaint is not accorded significance under constitutional law, because the relevant constitutional issues have already been decided on by the Federal Constitutional Court. (cf. Particularly BVerfGE 41, 29; 47, 46; 52, 223; 93, 1).

4

2. Nor does the acceptance of the constitutional complaint betoken the implementation of the basic rights whose violation the complainants have criticized. (cf.BVerfGE 90, 22 <25 f.>). This is because the rejection of their application for an exemption does not raise any qualms under constitutional law.

5

a) The decisions that were criticized in the complaint violate neither the rights of the parents as derived from Art. 4 Sections. 1, 2 and Art. 6 Sec. 2 sentence 1 of the Basic Law nor the rights of the underaged complainants as derived from Art. 4 Sections. 1, 2, Art. 2 Sec. 1 in conjunction with Art. 1 Sec. 1 of the Basic Law.

6

The resolution of the conflict between the right of the parents, to convey their beliefs to their children and to keep them distant from what they regard as false or dangerous beliefs (cf. BVerfGE 93, 1 <17>), and the corresponding right of the children to be educated accordingly, as well as, on the one hand, the state's educational mandate, which has equal ranking with the parental right to educate, as derived from Art. 7 Sec. 1 of the Basic Law, and, on the other hand, the principal of practical concordance (cf. BVerfGE 93, 1 <21>), does not call for the granting of the exemption applied for by the complainants.

7

The duty to attend the state elementary school serves the legitimate goal of the implementation of the state's educational mandate and is suitable and necessary for the attainment of this aim. This mandate is not only aimed at the conveying of knowledge, but also at the development of responsible citizens, who should be able to take part in the democratic processes of a pluralistic society as equals and in a manner that demonstrates a sense of responsibility towards society as a whole. It might be the case that the restriction of the state's educational mandate to the regular supervision of the practising [sic] and success of home education can present a milder and and also equally suitable method for serving the purpose of knowledge transfer. Yet, the view that simple state supervision of home education does not have equal efficacy with

regard to the educational goal of conveying social and civic competence cannot be perceived as a misjudgment [sic]. This is because social competence in dealing with with [sic] people who have different opinions, lived tolerance, the ability to assert oneself and the assertion of a conviction that differs from that of majority opinion can be practiced more effectively if contacts with society and with the various views represented in society do not take place only occasionally, but rather are part of the everyday experience associated with regular school attendance.

8

The encroachment into the basic rights of the complainants that is connected with the duty to attend school is reasonably commensurate to the benefit that can be expected from the fulfilment of this duty for the state's educational mandate and the common interest that supports this mandate. The general public has a justified interest in counteracting the development of religiously or philosophically motivated "parallel societies" and in integrating minorities in this area. Integration does not only require that the majority of the population does not exclude religious or ideological minorities, but, in fact, that these minorities do not segregate themselves and that they do not close themselves off to a dialogue with dissenters and people of other beliefs. Dialogue with such minorities is an enrichment for an open pluralistic society. The learning and practising of this in the sense of experienced tolerance is an important lesson right from the elementary school stage. The presence of a

broad spectrum of convictions in a classroom can sustainably develop the ability of all pupils in being tolerant and exercising the dialogue that is a basic requirement of democratic decision-making process.

9

The encroachments into basic constitutional rights that thereby arise from compulsory school attendance are reasonable for those affected, both parents and children, because the severity of these encroachments are widely attenuated to a large degree by the obligation to respect differing religious convictions and by the remaining possibility for the parents to influence their children's education both in and out of the school. In the first respect mentioned above - not to mention that those affected can, in individual cases, sidestep this issue through the attendance of a private school according to Article 7, section 4 of the Basic Law – the obligation of public schools to exercise neutrality and tolerance has particular weight. The strict adherence to this obligation ensures not only that unreasonable conflicts of belief and conscience do not arise (cf.BVerfGE 41, 29 <51 f.>) and that there is no indoctrination of pupils in the area of sex education (cf. BVerfGE 47, 46 <75 ff.>). Rathermore, it obliges the state, through its teachers, to work towards the exercising of tolerance towards those who belong to religious minorities. The confrontation with the views and values of an increasingly secularly tinged pluralistic society that nonetheless arises out of school attendance can be endured by the complainants, in spite of the conflict with their own religious convictions.

10

b) Nor can the decisions which the complainants object to be constitutionally faulted with regard to equality.

11

aa) *A*rt. 3 see. 3 sentence 1 of the Basic Law is not violated thereby, that the complainants are treated the same as those members of society who are not brought into conflict with their religious beliefs through school education. General compulsory school attendance and the rejection of the above mentioned compulsory attendance serve the implementation of the state's educational mandate and do not tie in with religious beliefs, which is in line with *A*rticle 3, section 3, sentence 1 of the Basic Law. (cf.BVerfGE 85, 191 <206>; 97, 186 <197>).

12

bb) The differences between those who are "school refusers" for religious reasons and children who are exempt from compulsory school attendance because their parents, due to their occupation, do not have a firm residence are of such a nature and such a weight that they justify unequal treatment in accordance with article 3, section I of the Basic Law (All people are equal before the law). (cf. for example, BVerfGE 82, 126 <146>). While the encroachment associated with compulsory school attendance can be viewed as reasonable for the first group of people, this is not the case where the participation in public schooling for children of people who, due to their

occupations, have to constantly change their abode, can only be achieved through the separation of the children from their parents.

13

We refrain from further justification in accordance with § 93 d section 1 sentence 3 of the Federal Constitutional Court *A*ct.

14

This decision cannot be contested (§ 93 d section 1 sentence 2 Federal Constitutional Court Act).

Jaeger Hömig Bryde

[ENTERED OCTOBER 17, 2007]

BUNDESGERICHTSHOF
(Federal Court of Appeals)

DECISION

On
October 17, 2007

In the Family Case

Concerning underage children
Denis Plett, Geborea am 16. November 1995 und Mariane Plett, Gebnoren am 11 August 1997

Parties:

1. Parents: Andreas and Katharina Plett, #33 Artilleries Street, Paderborn represented by Attorney Dr. Nassall.
2. Guardian: Stadt Paderborn Youth Welfare Office 11 Abdingof Avenue Paderbom
3. Procedureal Guardian: Attomey Adloff 1b Bielken Place Paderborn

The twelfth Civil Senate of the German Federal Court on 17 October 2007, with Dr. Hahne as the chair, accompanied by the Judges Sprick, Weber-Monecke, Prof.Dr. Wagenitz and Dose,

Decided:

The legal complaint of the first Party against the decision of the sixth Senate for Family Issues of the

Higher Regional Court in Hamm on the 20th of February 2007 was rejected, inasfar [sic] as it is levelled [sic] against the partial removal of parental custody, the appointment of a curatorship for the children involved and the curator's mandate to require the parents to hand over the children, if necessary by means of force and by entering and searching the parental home.

For the rest (appointment of the second Party as curator's limitation of the curator's fight to determine the children's place of residence) the contested decision is rescinded and the case sent back to the Higher Regional Court for a rehearing and another arbitration, including the issue of the costs of the complaint procedure.

Value of the appeal: €3000

Grounds

I.

1.
The first party are the parents of the under-aged children M. and D, as well as three younger and three older siblings. They are faithful Baptists who came to Germany as returned settlers from Russia along with other members of their religious community. The child D. visited the first three classes of the state primary school. In September 2004, at the beginning of the child's fourth school year, the parents informed the school that the child D., as well as the child M. - who was supposed to start the first grade - were to be henceforth taught at

home, as the teaching content and methods of the state primary school, across all subjects, were incompatible with their religious beliefs. Discussions with the head of the school, the district government and the local commissioner for integration were as ineffective in persuading the parents to bring their children to school as the legal imposition of a fine of €250 for the parents. The legal process to enforce penalty payments was not successfully concluded. The parents and other members of their religious community aimed for the founding of a private school which was compatible with their religious convictions; but there is still no decision in this regard in the concomitant administrative procedure.

2.
The local district court, division for family issues, has removed parental custody in matters of schooling, as well as the parents' right to decide on the children's place of residence. It has also charged the second Party to ensure that, if a removal of the children from the parental abode is necessary, the children are not put in a children's home, but with a Baptist foster family which recognizes [sic] general compulsory schooling and would enable the children to be taught in a state primary school or other recognised [sic] private school. At the same time, the second Party was authorised [sic] to compel the parents to hand over the children by force. The Higher Regional Court dismissed the immediate appeal of the first Party against this decision.
3.
The children were registered as being resident in K. (Austria) in July/August 2005, with the consent of the second Party. They mainly stay there, living

with their mother, who still has her official place of residence in P., as well as with members of another Baptist family which also refuses to comply with German compulsory schooling, in a rented house. The father still lives with the other six children in P. and carries out his occupation there. The mother visits the rest of the family with the children D. and M. during school vacations and on long weekends. She does not want to live permanently in Austria with the children, but rather wants to return to P. once the case has been decided in the parents' favour. The second Party secured the permission of the Austrian authorities for the children to be taught at home according to §11 of the Austrian law on compulsory schooling. The children are taught by their mother, who has no relevant professional qualifications, utilising [sic] Austrian teaching materials. According to a report issued by V. High School, "After examination of the home education (law on compulsory schooling §11 paragraph 4)" the child D. completed the 1st Class (5th school year) with good success and is entitled to advance onto the 2nd Class (6th school year).

4.
In the main case, the Regional Court upheld the provision made by interim decree concerning the partial removal of custody and its transfer to the second party. The danger to the welfare of the children still exists in this regard, in spite of the children's schooling taking place in Austria, as the children would return to P., but would not attend the state school, if the decreed measures were rescinded. The Higher Regional Court rejected the appeal of the first Party against this decision. As an appeal was

allowed by that court, the first Party pursued their appeal further.

II

5
The remedy merely leads to the partial rescinding of the decision under appeal and thus to the case being sent back to the Higher Regional Court, but does not otherwise end in success.

6

1. According to the view of the Higher Regional Court, the Family Court was correct in removing the right to decide on the children's place of residence and the fight to decide on the education of their children D. and M. from the parents, according to §§ 1666, 1666a of the Civil Code and to transfer it to the second Party.

7.
The mental and emotional welfare of the children is lastingly endangered because the first Party rejects and hinders the school education which is important for the development of the children in a pluralistic society. It is a moot point whether the home education of the children ensures an adequate transfer of knowledge, as children should also grow up in communal life. It is necessary for children to be exposed to other influences aside from those of their parental home. As the Constitutional Court has stated, social competence in dealing with people of other beliefs, experienced tolerance, the ability to stand up for oneself and to uphold a conviction that

dissents with that of the majority can be exercised more effectively if contact with society, and with the various views represented in society, does not just occur occasionally but is part of an everyday experience connected with regular school attendance.

8.
The fact that the children are currently living in Austria and that compulsory schooling is being fulfilled by the teaching at home, according to the law there, is not in conflict with this. The children share the legal residence of their parents (§11, Civil Code), which, in the case of both parents, is still based in North Rhine-Westphalia. Their stay in Austria is, as the mother has repeatedly explained, merely of a temporary nature. As they have no intention of remaining there, it does not constitute a fixed residence. Thus the children are, as before, subject to compulsory schooling, according to §34 of the Education Law of North Rhine-Westphalia, which does not allow for children to be taught at home. The danger to the welfare of the children cannot also be denied because the second Party himself applied to the Austrian authorities for the children to fulfill the compulsory schooling requirements by being taught at home according to Austrian law. It is clear that the second Party's purpose was merely of placing the children in the position of at least being able to receive home education in Austria with the opportunity of sitting an exam according to §11 paragraph 4 of the Austrian law on compulsory schooling.

9.
Compulsory schooling does not infringe on the fundamental human rights of the first Party and the children. As the Constitutional Court pointed out, the duty to attend a state primary school serves the legitimate purpose of the implementation of the state's educational mandate and is appropriate and necessary for achieving this goal. The encroachment into the parents' fundamental rights which is associated with this duty is also in reasonable proportion to the benefit that the fulfilment [sic] of this duty has for the state's educational mandate and for the common good. Society at large has a rightful interest in working against the formation of religiously or ideologically coloured [sic] "parallel societies" and in integrating minorities in this respect. Integration also assumes thereby that religious or philosophical minorities do not isolate themselves and do not close themselves off to dialogue with dissenters and people of other beliefs. To learn and practice this tolerance through practical experiences is important, even in the primary school years.

10.
The measures decreed by the Family Court for enforcing school attendance are also in proportion; more minor interventions would not serve the purpose of averting the danger to the welfare of the children.

11.
2. These decrees essentially bear up against legal re-examination.

12.

a) The international jurisdiction of the German courts is a given, as the children continue to have their habitual residence in Germany (Art. 8, Para. 1 EU Regulation No. 2201/2003, EU ((translator's note: concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) – "Brussels II a"). The Higher Regional Court has not specified the habitual residence of the children. However, from the court's statements concerning the residence it can be inferred that the focal point of the children's bonds, and consequently the center of their existence (compare Federal Court judgement [sic] of 5 February 1975 - IV ZK 103/73 - FamRZ 1975,272) continues to be in Germany.

13.

b) We cannot find fault with the opinion of the Higher Regional Court, which states that the children are still subject to compulsory school attendance, according to German law, as the relevent [sic] paragraph 34 of the Education Law of NRW applies to the habitual residence of the children, the children share the residence of their parents (§ 11 sentence on BGB) and this is still in P. for both parents – according to the legally unobjectionable finding of the Higher Regional Court. Furthermore, it is correct that the German education law places on the parties involved the duty to ensure that their children adhere

to compulsory school attendence [sic] (compare §41 Pars. 1 Education Law NRW and Art. 8 Pura 2 of the Constitution of NRW). In addition it is also the case that the persistent refusal of the first Party to send their children to a state primary school or a recognised [sic] private school constitutes an abuse of parental custody which lastingly endangers the welfare of the children involves and necessitates measures by the Family Court according to §§ 1666, 1666a of the Civil Code. There are no reservations under constitutional law, either against compulsory school attendance or - in principle- against measures by the Family Courts taken to enforce school attendance, in line with the requirements of the §§ 1666, 1666a of the civil code. We refer to the decrees of the Higher Regional court and the jurisprudence of the Constitutional Court quoted in detail therein. According to this, the parents are also not entitled to withdraw their children from school if parts of the curriculum or methods utilised [sic] by the school are in opposition to the religious convictions of the parents. This, however, applies as long as the State appreciates its educational mandate responsibly in the sense of the requirements of the Basic Law; in this ease there is no evidence to the contrary.

14.
The Higher Regional Court was also legally entitled to refrain from taking up the First Party's offer of witnesses to support their allegation that the experiences in being taught in the schools of the

religious community, as well as in being home educated, have not created any danger to the welfare of the children. The attendance at a school of the religious community is not under discussion in the case before us. The pros and cons of home education are not, as the Higher Regional Court noted, something that can be ascertained by calling on witnesses but rather through a report by an expert. There is no necessity to call for such a report, as the advantages of school attendance and the relative disadvantages of home education, as described by the Higher Regional Court – in line with the jurisprudence of the Constitutional Court – are accessible to the judges' expert knowledge, with no other evidence being necessary, and furthermore are covered by the the [sic] evaluation of the legislators of education law in Germany as well as that of the Constitutional Court.

15.

c) The partial removal of custody and the appointment of a custodianship are also legally correct. These measures are basically suited to working against the abuse of parental custody by the First Party. The removal of the right to determine the residence of the children and to decide on the children's education creates, along with the appointment of a custodianship, creates the prerequisites for the children to be urged to impelled to attend a state or recognised [sic] private school in Germany and for damage to the children, which is occurring [sic] through the continued exclusive teaching of the children of the mother at home, to be averted. From a legal point of view, it is completely acceptable, as well as being selfevident [sic] in light

of the demonstrated resistance of the parents, that such a curator be empowered – as occurred in the judgement [sic] of the Family court – to enforce the handover of the children, by force if necessary and by means of entering and searching the parental home, with the aid of a marshall [sic] of the court of the police, if necessary. There are no gentler measures that can effectively protect the children from parental abuse and enforce the state's educational mandate in the clearly understood best interests of the children. The partial removal of custody and the appointment of a curatorship are not out of proportion to the welfare of the children which is being pursued thereby; they are necessary if the State is to observe its duty of oversight.

16.

c) It is, however, legally objectionable that the Family Court appointed the second Party as the curator, as this curator is not capable of effectively counteracting the danger to the children's welfare.

17.

It is, indeed, a basic duty of a judge to choose a suitable curator. The decision made by the Family Court in choosing this person as curator could only be examined to a limited degree by this court, in particularly as to whether the judge factored in the material circumstances in his decision to appoint this curator. This is obviously not the case here, as the Family Court did not consider the experiences arising from the actions of the second Party, as curator of the children, that it should have learnt from in the previous interim appointment process.

18.
Before the disputed decision, the second Party had agreed, as curator of the children, to their being registered in Austria - with the knowledge of the Family Court - and enabled the parents to bring them there. The registration of the children as residents in Austria took place, according the stated will of the first Part, with the purpose of withdrawing the children from compulsory school attendance in Germany and allowing them to be taught by their mother at home, as is permissible in Austria. The second Party then - also with the knowledge of the Family Court - enabled the children to be subject to teaching at home by their mother by initiating an application procedure with the Austrian authorities. Thus the success which the second Party had aimed for was achieved, namely the teaching of the children by the mother at home - although in Austria, not Germany.

19.
It is not apparent that the decision made by the Family Court in the main case, and which is being appealed against here, insofar as it transfers the right to determine the residence of the children and the right of custody in matters of schooling to the second Party, has changed anything in this situation created by the second Party. This view is partially shared by the Family Court, which therefore considers that there is continued danger to the welfare of the children and thus held that the partial removal of custody was, as before, still necessary, because otherwise “the children will return to P. without attending a public school there.” However they do not realise [sic] that the children are not

endangered because they are not attending a state school in Germany, but because they are not attending a school at all, even though they are subject to compulsory school attendant. The danger to the welfare of the children can thus not be confronted by preventing their return to Germany. The purpose of a measure based on §§1666, 1666a of the Civil Code can rather only be to ensure that the children attend a public school. This goal may be basically achievable by means of partial removal of parental custody and the appointment of a curatorship by the Family Court- but only when the Curator entrusted with the right to determine the residence of the children and the care of the children's schooling is willing to enforce the children's attendance in a public school and capable of taking this *steö*, or if he is held to this by appropriate instructions by the Family Court.

20.
The Family Court – in the full knowledge of the Curator's behaviour – has already failed to give appropriate instructions in the interim process. It also did not consider such instructions necessary in the main case. As the second Party had, even before the decision being appealed against was made, already not taken any suitable measures for enforcing school attendance and – on the contrary - was responsible for creating the conditions for the children to be taught at home in Austria, the appointment of the second Party as Curator, who was obviously unsuited to fulfilling his duty in this particular case, along with the simultaneous error of the Family Court in not giving any specific instructions, was insufficient for the purpose of

ensuring the welfare of the children. The appointment of an obviously unsuited curator does not call into question as such the legality of the partial removal of custody and of the appointment of a curatorship. It is, however, taken by itself, a legal error, as it undermined the efficacy of these measures, which were intrinsically correct.

21.

e) Insofar as the Family Court restricted the Curator's right to determine the residence of the children, stating that, if the children had to be removed from the family home, they were to be placed with a Baptist foster family rather than in a children's home, this restriction is based on the particular situation and possibilities in P., as evidenced by the grounds stated by the Family Court. The decision was obviously tailored to the the [sic] second Party as Curator and is thus not suited to nor intended to tie other curators in carrying out their right to determine the residence of the children. This restriction thus shares the legal fate of the appointment of the second Party as Curator and must be revised anew.

III

22.

In conclusion, the partial removal of custody and the appointment of a curatorship are thus, as such, legally unobjectionable. Therefore the legal appeal,

as far as it is directed against these measures, is rejected.

23.
The partial removal of custody and the appointment of a curatorship can ultimately only avert the danger to the welfare of the children flit is ensured, through the choice of a suitable curator or through appropriate instructions to the curator by the family court, that the school attendance of the children and the responsibility of the parents for adhering to this are enforced. This is the case as long as German law, including education law, is applicable, independent of whether the children are staying in Germany or overseas. Up till now the court has failed in this regard.

24.
The judgement [sic] under appeal is thus, as far as the appointment of the second Party as curator by the Family Court and the restrictions which applied to him are concerned, to be overturned. The case is returned to the Higher Regional Court so that it can ensure, by means of the appointment of another, more suitable curator, or by detailed instructions, that the school attendance of the children is enforced, in line with the obvious purpose of the appointment of the curatorship and the well understood interests of the children's welfare. The prohibition of the *reformatio in peius* (Translator's note: that courts are not allowed to make a decision that worsens the situation of the appellant) is no hindrance to such an alteration or extension of the Family Court's judgement [sic], as the maxim of disposition does not apply in a court case relating to

§§ 1666, 1666a of the Civil Code and thus the appellant must accept being placed in a worse situation (Higher Regional Court of Bavaria Fam RZ 1985, 635,636; Kedel/Kahl Freiwillige Gefichtsbarkeit (Unsolicited Jurisdiction) 15tb Edition. §19 Footnote 115).

Hahne, Sprick, Weber-Monecke, Wagenitz, Dose

Courts of lower instance:
Regional Court Paderborn, Judgement of 07.03.2006- 8 F 810/05-
Higher Regional Court Hamm, Judgement of 20.02.2007 - 6 UF 53/06-