UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

UWE ANDREAS JOSEF ROMEIKE,	)	
HANNELORE ROMEIKE,	)	
D.R.,	)	
L.R.,	)	
J.R.,	)	**Case No. 12-3641**
C.R.,	)	
D.D.R.,	)	
Petitioners,	)	
	)	
	)	
vs.	)	
	)	
	)	
ERIC C. HOLDER, Attorney General,	)	
Respondent.	)	

PETITIONER'S PETITION FOR REHEARING EN BANC

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STATEMENT OF THE ISSUES PURSUANT TO F.R.C.P. 35

The Panel decision held that the Romeikes, who escaped from Germany because of the threat that they would permanently lose custody of their children if they continued their religious homeschooling, did not have a well-founded fear of future persecution within the meaning of the United States law on asylum. The Panel decision conflicts with the law of this Circuit, the Supreme Court, and other circuits as follows:

1. The Panel's decision rejects the established criteria for evaluating asylum claims arising from prosecutions of laws of general applicability. Calling the holding of a leading case from this Circuit "dicta" (*Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1995)), the Panel effectively creates its own new rule for such cases. The new rule thus created is contrary to the established precedent of this Circuit and puts this Circuit at odds with virtually every circuit that has addressed the issue.

The established rule from this and other circuits is that prosecution under generally applicable laws constitutes grounds for asylum when such prosecution is *motivated*, at least in part, by a statutorily protected ground, and the punishment under the law is sufficiently serious. *Stserba v. Holder*, 646 F.3d 964, 977-78 (6th Cir. 2011); *Jin Jin Long v. Holder*, 620 F.3d 162, 166-67 (2nd Cir. 2010); *Beskovic v. Gonzales*, 467 F.3d 223, 226-27 (2nd Cir. 2006); *Scheerer v. U.S. Atty. Gen.*,

445 F.3d 1311, 1315-16 (11th Cir. 2006); *Shardar v. Ashcroft*, 383 F.3d 318, 323 (3rd Cir. 2004); *Chang v. INS*, 119 F.3d 1055, 1060-61 (3rd Cir. 1997).

In addition, the Panel improperly failed to follow the established rule of this Circuit (*Perkovic*) and other circuits by rejecting the use of human rights treaties in this context. The established rule followed by this Circuit in *Perkovic* was clearly articulated by the Third Circuit in *Chang v. INS*, 119 F.3d 1055, 1061 (3rd Cir. 1997): "it is equally clear that prosecution under some laws—such as those that do not conform with accepted human rights standards—can constitute persecution."

2. The Panel failed to address the motive of the German government in its ban of homeschooling and its extreme punishment of homeschooling. Consideration of the motive of the persecutor is a required element of asylum analysis. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Al-Ghorbani v. Holder*, 585 F.3d 980, 997 (6th Cir. 2009); *Stserba v. Holder*, 646 F.3d 964, 972 (6th Cir. 2011). Specifically, the Panel failed to examine or discuss the actual statements of the German government which explicitly proclaim that the motive for the ban of homeschooling is for the purpose of suppressing the development of religious and philosophical minorities. There is no doubt that Germany's desire to repress these minorities was "one central reason" for persecuting the Romeikes.

I. PROSECUTION UNDER A GENERALLY APPLICABLE LAW IS PERSECUTION WHEN THE GOVERNMENT'S MOTIVE IS BASED ON A PROTECTED GROUND

The Romeikes were prosecuted under Germany's generally applicable compulsory attendance law, but the government's motive for prosecuting the Romeikes—and all other religious homeschooling families—is completely unrelated to its motive for prosecuting ordinary truants. Parents of habitual truants are prosecuted because they are not ensuring that their children are being educated. Homeschoolers are prosecuted—according to the highest constitutional court in Germany—not for academic failure, but because "[t]he general public has a justified interest in counteracting the development of religious or philosophically motivated 'parallel societies' and in integrating minorities in this area." *Konrad*, Bundesverfassungsgericht [Federal Constitutional Court] April 29, 2003, 1 BvR 436/03 (F.R.G.). A.R. 760. While the compulsory attendance law itself is generally applicable, the motive for prosecution is entirely unrelated. Parents of truants are prosecuted for educational neglect. Homeschooling parents are prosecuted because the government is motivated to suppress the development of religious and philosophical parallel societies—that is, a group of people with minority views and values.

The central holding in the Panel's decision was that the Romeikes were ineligible for asylum because they were merely prosecuted under a generally applicable law. While acknowledging that "[e]ven '[g]enerally applicable laws'… 'can be the source of a petitioner's persecution' in some cases" (quoting *Stserba v. Holder*,

646 F.3d 964, 977 (6th Cir. 2011), the Panel did not follow the existing framework for analyzing such cases. *Slip. Op.* at 4. Rather, it announces what amounts to a new rule for analyzing cases—what the Panel uniquely calls the "easy way" and the "hard way." "The easy way is available when the foreign government enforces a law that persecutes on its face along one of these lines." *Slip. Op.* at 3. "Then there is the hard way—showing persecution through the enforcement of a generally applicable law." According to the Panel, persecution may be proven by prosecution under a generally applicable law when the government: 1) "selectively enforce[s] a neutral law, prosecuting some individuals but not others based on a protected ground;" 2) "punish[es] some more harshly than others for the same crime based on a protected ground;" or 3) "enact[s] a seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." *Id.* at 3-4.

While there is no doubt that persecution could be shown in any of these ways, it was clear error for the Panel to employ its unique listing as the full statement of the law. Like any idiosyncratic listing of examples, there is not only a great danger of leaving out other valid examples, but also the real possibility of failing to state the actual controlling rule. That is what has happened here.

There is an established rule governing the requirement for showing persecution under a law of general applicability, yet the Panel failed to identify or follow it. The relevant rule is a derivative of one of the central rules in all asylum cases.

The Supreme Court has made it clear that "the [asylum] statute makes motive critical" in determining whether punishment constitutes persecution. *INS v. Elias Zacarias*, 502 U.S. 478, 483 (1992). This Court has held that "a critical element of persecution is motive…." *Al-Ghorbani v. Holder*, 585 F.3d 980, 997 (6th Cir. 2009). In this and other circuits, even when dealing with laws of general applicability, courts have consistently looked to the issue of the government's motive to determine which cases are proper prosecution and which are persecution. "[I]f the prosecution is *motivated* by one of the enumerated factors, such as political opinion, and if the punishment under the law is sufficiently serious to constitute persecution, then the prosecution under the law of general applicability can justify asylum or withholding of deportation." *Shardar v. Ashcroft*, 382 F.3d 318, 323 (3rd Cir. 2004) [Emphasis added] [Internal quotations omitted]. *See also Stserba v. Holder*, 646 F.3d 964, 977 (6th Cir. 2011); *Perkovic v. INS*, 33 F.3d 615, 622-23 (6th Cir. 1995); *Jin Jin Long v. Holder*, 620 F.3d 162, 166-67 (2nd Cir. 2010); *Beskovic v. Gonzales*, 467 F.3d 223, 226-27 (2nd Cir. 2006); *Scheerer v. U.S. Atty. Gen.*, 445 F.3d 1311, 1315-16 (11th Cir. 2006); *Chang v. INS*, 119 F.3d 1055, 1060-61 (3rd Cir. 1997). Both *Stserba* and *Al-Ghorbani* deal with the question of mixed motives on the part of the government. So long as "one of the factors motivating the perse-

cution is a protected ground under the INA," the petitioner is eligible for asylum. *Stserba*, 646 F.3d at 972-73, quoting *Al Ghorbani*, 585 F.3d at 997.[1]

The Panel's listing of examples in its "hard way" category fails to discern the real rule. While an improper governmental motive may be demonstrated in all of the scenarios listed by the Panel, the Panel's list is incomplete and misses the central idea. Governmental motive is the essence of every case of persecution—even when the persecution arises from prosecution under a general law.

In *Chang v. INS*, 119 F.3d 1055, 1060-61 (3rd Cir. 1997), the Third Circuit has offered a comprehensive explanation of the reason for the rule regarding cases of prosecution under laws of general applicability:

> Nothing in the statute or legislative history suggests, however, that fear of prosecution under laws of general applicability may never provide the basis for asylum or withholding of deportation … The language of the statute makes no exceptions for "generally applied" laws; if the law itself is based on one of the enumerated factors and if the punishment under that law is sufficiently extreme to constitute persecution, the law may provide the basis for asylum or withholding of deportation even if the law is "generally" applicable.

It is essentially impossible to reconcile the Panel's truncated listing of examples of "hard way" cases and two of the cases cited by the Panel itself for this very purpose. The Panel cites *Stserba*, *supra,* for the proposition that even generally applicable laws can be the source of a petitioner's persecution in some cases.

[1] The Panel inaccurately attributes a singular motive for all German compulsory attendance prosecutions. As explained in more detail in Section II below, the highest court in Germany has made it plain that it has very different motives for its prosecution of ordinary truants and religious homeschoolers. *See Konrad*, A.R. 758-762. The German government's desire to suppress the development of religious minorities is undoubtedly one of the motivating factors in its prosecution of the Romeikes.

Stserba was held to have been persecuted by a generally applicable Estonian law that denied recognition to all college degrees awarded by Russian institutions after the breakup of the USSR. However, none of the Panel's three categories of "hard way" cases would appear to explain the ruling in *Stserba.* She was not subjected to selective prosecution. Nor was she punished more harshly than others under the general law. And it would require a double-jointed gymnast to cram Stserba's claim into the Panel's third category: "a seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." But the ruling in *Stserba* is perfectly consistent with the rule that when the motive of the government is aimed at one of the protected grounds, it is persecution despite the fact that the law is generally applicable.

The Panel also cites *Beskovic v. Gonzales,* 467 F.3d 223, 226-27 (2nd Cir. 2006), not for its actual holding, but for an illustration that the Second Circuit employed to explain the general rule. *Beskovic* held that if a "particular country outlawed the display of the American Flag, it would, to say the least, be anomalous to conclude that an individual arrested and mistreated for violating such a law would not be a victim of political persecution simply because the law was one of general applicability."

The Panel's three types of "hard cases" cannot explain this hypothetical flag possession case. Prosecution under a general law banning the American flag would

not be selective prosecution. Nor would it automatically involve disparate punishment. Nor is it a "seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." A person could want to display an American flag on a T-shirt to make a fashion statement—or there could be any number of reasons for owning and displaying an American flag other than a protected ground.

Thankfully, such hypothesizing is unnecessary, because the actual rule—examine the motive of the government—clearly explains the flag possession example. Even though such a law might be generally applicable, if the prosecution were motivated by a desire to suppress people who display the U.S. flag on a protected ground, it would be persecution.[2]

The Panel's invention of a new list of criteria to define those prosecutions under generally applicable laws which are in fact persecution is fundamentally flawed. It cannot explain the very cases the Panel uses to discuss its holding. And it overlooks the established rule followed by this and many other circuits.

A number of circuits, including this one, have looked to violations of international human rights standards to help judge the propriety of the motives for prosecutions under generally applicable laws. The Third Circuit's decision in *Chang* is

[2] Asylum cases often involve two questions of motive: the motive of the *government* for its persecution and the motive of the *applicant* in taking the action which leads to the act of persecution. Both motives must relate to a protected ground. There has been no question that the Romeikes' desire to homeschool is related to the protected ground of religion. The disputed question of motive relates solely to the German government's motive for banning homeschooling generally, and prosecuting the Romeikes in particular.

explicit: "[I]t is equally clear that prosecution under some laws—such as those that do not conform with accepted human rights standards—can constitute persecution." 119 F.3d at 1061.

The Third Circuit's analysis in *Chang* relies heavily on the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979). The Supreme Court has used the Handbook in a similar manner in three separate cases. *See Negusie v. Holder*, 555 U.S. 511, 536-37 (2009); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987).

The Handbook contains several observations that are relevant to this case. Paragraph 59 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." 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." ¶ 60. Perhaps the most significant statement in the Handbook for this case is an example of an improper statute as one that imposes "penal prosecution" in "respect to the 'illegal' religious instruction of a child," which "may in itself amount to persecution." ¶ 57.

It is hard to imagine an example of an improper law that is more akin to the German ban on religious homeschooling than this Handbook example. Germany bans religious home education for the express purpose of suppressing the development of religious minorities. The fact that Germany also uses the compulsory attendance laws to prosecute school skippers does not sanitize its improper motive in suppressing homeschooling lest religious minorities grow into "parallel societies." *Konrad,* A.R. 760.

This Court has previously used international human rights laws to help guide its evaluation of the legitimacy of laws of general applicability in asylum cases.[3] In *Perkovic v. INS,* 33 F.3d 615, 622 (6th Cir. 1995), this Court employed international human rights standards to help guide its grant of asylum:

> Although international law allows sovereign countries to protect themselves from criminals and revolutionaries, it does not permit the prohibition and punishment of peaceful political expression and activity, the very sort of conduct in which the petitioners engaged here. *Universal Declaration of Human Rights,* U.N.G.A.Res. 217A(III), U.N.Doc. A/810 (1948); Helsinki Final Act, Conf. on Security and Cooperation in Europe, 14 I.L.M. 1292 (1975).

The Panel decision deemed this use of international law to be "dicta." *Slip. Op*. at 9. This conclusion is difficult to sustain upon a fair reading of *Perkovic*.

[3] The Romeikes have demonstrated in their prior briefs that the German ban on homeschooling violates the clear standards of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. See Brief of Petitioners, pp. 35-37; Reply Brief of Petitioners, pp. 10-11. The Panel tacitly acknowledges these violations, but argues that even if true, they were irrelevant in an asylum determination. *Slip Op.* at 8-9.

Moreover, this Court also employed international human rights standards to help guide its evaluation of the legitimacy of the generally applicable law in *Stserba,* 646 F.3d at 974 (citing the Universal Declaration of Human Rights regarding statelessness).

The Panel's aversion to the use of international human rights norms appears to arise out of a misconception of the Romeikes' claims. We do not argue that every violation of a human rights standard would *ipso facto* justify the grant of asylum. For example, it is nearly impossible to envision an asylum case that could legitimately arise out of the denial of a child's "right to play" enumerated by Article 31 of the United Nations Convention on the Rights of the Child.

Rather, the Romeikes simply argue that where a law of general applicability is *motivated* by the desire to deny a recognized human right (either facially or as applied to the applicant) *and* the human right in question relates to a protected ground, then the applicant should be deemed to have proven that the government's motive is improper, and any "prosecution" is a pretext for persecution. To ultimately prevail on the asylum claim, other elements would still remain to be proven as in any other case—especially, that the punishment in question was sufficiently severe to rise to the level of persecution. But, as stated in the Handbook, and as employed in both *Perkovic* and *Stserba*, when there is evidence that the govern-

ment's motive involves a desire to suppress the exercise of a fundamental human right, it is no defense that the prosecution arises under a generally applicable law.

If allowed to stand, the Panel's opinion will create a conflicting rule that will confuse the determination of future cases involving claims arising from prosecutions under generally applicable laws. The Romeikes have been subjected to a great injustice by the Panel's approach. But they will not be the last legitimate applicants for asylum who are harmed by this improper invention of a new asylum standard of "easy cases" and "hard cases."

II. THE FAILURE TO ADDRESS THE GERMAN GOVERNMENT'S MOTIVE FOR ITS ANTI-HOMESCHOOLING POLICIES AND PUNISHMENTS IS CONTRARY TO PRECEDENT

Since "the [asylum] statute makes motive critical" in determining whether punishment constitutes persecution, *INS v. Elias Zacarias* 502 U.S. 478, 483 (1992), the failure to properly consider the motive of the persecutor is a "fail[ure] to consider a legal issue central to [the] resolution of the petitioner's claims." *Stserba*, 646 F.3d at 976, quoting *Mapouya v. Gonzales*, 487 F.3d 396, 405 (6th Cir. 2007).

The Panel said that "[t]here is no indication…that the German officials are motivated by anything other than law enforcement." *Slip Op*. at 6. The Panel was able to reach this conclusion only by entirely ignoring the direct statements by the German government concerning its motive for its anti-homeschooling policy.

The Panel failed to directly address the explanation for Germany's ban on homeschooling made by the German Federal Constitutional Court in *Konrad.* That court characterized the ban as serving "a justified interest in counteracting the development of religiously or philosophically motivated 'parallel societies'…." *Konrad,* A.R. 760 ¶8.

The German Federal Court of Appeals elaborated on Germany's desire to control the philosophical development of children "in a pluralistic society." *Plett,* A.R. at 773, ¶ 7. *See also* Letter from the German Secretary of the Permanent Conference of the State Ministers for Cultural Affairs, A.R. 298. To achieve the desired philosophical outcome, the *Plett* court held that it is appropriate to use the German family courts to seek "the removal of the right [of parents] to determine the residence of the children and to decide on the children's education." A.R. at 775 ¶ 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." A.R. at 775 ¶ 15c. In the aftermath of *Plett,* the Jugendamt "has the immediate task to take away all home schooled children," and some German states have even changed their local school laws so that there is "no need for

the German Jugendamt to justify in a court the taking away of Children out of their families." A.R. at 740-41 ¶ 11.

These facts were entirely ignored by the Panel's holding that Germany's prosecution of homeschoolers was motivated by ordinary law enforcement considerations. As the Third Circuit said in *Espinosa–Cortez v. U.S. Atty. Gen.*, 607 F.3d 101, 113-14 (3d Cir. 2010), "an applicant for asylum is entitled to a reasoned analysis, not one which wholly disregards relevant, probative evidence."

The Panel makes the briefest of references to the claim that Germany's ban of homeschooling is an "intolerant effort to stamp out parallel societies." *Slip Op*. at 8. However, the Panel attributes this claim to a finding of the Immigration Judge without ever acknowledging that the IJ was quoting the German Federal Constitutional Court in *Konrad*. The Panel's critique of this "finding" by the IJ entirely misses the mark because of the utter failure to recognize that it was a direct statement of the highest constitutional court of Germany.

Immediately after this critique, the Panel makes an incredibly troubling observation. "Any compulsory attendance law could be said to have this effect." *Slip Op*. at 8. The Panel's logical sequence is clear. Compulsory attendance laws are generally applicable and legitimately enforceable. Germany uses its compulsory attendance laws to suppress the development of religious and philosophical minorities. All compulsory attendance laws have this same effect. Thus, the suppression

of religious and philosophical minorities is a legitimate outcome from a legitimate law.

This alarming theory simply cannot be the law of this country. The *Beskovic* court acknowledged that it would be "anomalous" for the United States to refuse to grant asylum to those prosecuted under a law of general applicability which banned the display of the American flag—a symbol of freedom. But it is far more anomalous to deny the quintessential American freedom—first established at Plymouth Rock—to a family who asks for asylum from a nation that seeks to remove children from their parents so that the parents cannot teach their own children according to their faith.

Germany's motive is not law enforcement. Germany seeks to suppress religious minorities. This motive is wholly improper and gives rise to a valid claim for asylum.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request a rehearing *en banc* in order to conform the decision in this case to the established law of this Circuit, the Supreme Court, and other circuits.

Dated: May 28, 2013

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th of May, 2013, a true and accurate copy of the foregoing Petition for Rehearing En Banc was electronically filed via this Court's Electronic Case Filing (ECF) system. Notice of this filing was provided through ECF to Eric J. Holder, Jr., and a true and accurate copy of the foregoing was mailed on May 28, 2013, to:

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