U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A[redacted] - San Francisco
A[redacted]

Date: MAY 31 2007

In re: J[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Robert B. Jobe, Esquire

ON BEHALF OF DHS: Deborah K. Goodwin
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (both respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This matter was previously before us on April 28, 2005, when we dismissed the respondents' appeal from an Immigration Judge's August 28, 2003, decision denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). Additionally, we denied their motion to remand the proceedings to consider previously available evidence of treatment of psychiatric patients in Peru, an element of the lead respondent's claim. On October 6, 2005, we granted the respondents' motion to reopen after determining that their former counsel's ineffective assistance had caused them prejudice and finding that their new evidence established their *prima facie* eligibility for asylum.

The matter is before us now to consider the Department of Homeland Security's (DHS) appeal of the Immigration Judge's April 18, 2006, order granting the respondents' application for asylum. The respondents oppose the appeal, which will be dismissed.

The Immigration Judge found that the lead respondent had not demonstrated past persecution[1], but had established a well-founded fear of persecution as a member of the particular social group defined as "Peruvian psychiatric patients with serious and chronic mental illness." The Immigration Judge concluded that there existed at least a ten percent possibility that the respondent's bipolar

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[1] The respondents, who did not cross-appeal, argued in their appellate brief that this finding was erroneous. In light of our determination that the Immigration Judge properly granted the lead respondent's asylum application, we do not address this issue.

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disorder would cause him to be persecuted in a state psychiatric hospital, where he would be forced to undergo electroconvulsive therapy (ECT) without anesthesia. The DHS challenges the determination that the group, as defined, constitutes a particular social group. The DHS further contends that the lead respondent did not establish an objectively well-founded fear of persecution, because the Immigration Judge relied on a chain of hypothetical events to conclude that he would be involuntarily subjected to ECT for treatment of his bipolar disorder if he returned to Peru.

We established that members of a particular social group must "share a common, immutable characteristic" that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 73 (BIA 2007) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)). Social visibility is a factor in identifying a particular social group, as the shared characteristic should generally be recognizable by others in the community. *Matter of C-A-*, 23 I&N Dec. 951, 957 (BIA 2006). A particular social group should be small and readily identifiable. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000) (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986)).

Here the Immigration Judge found, based on the expert testimony and record evidence, that the lead respondent's bipolar disorder was a chronic psychiatric condition subject to treatment but not cure, and thus it was an immutable characteristic. Inherent in that finding is the fact that the characteristic cannot be changed. We note that the Immigration Judge did not analyze the social visibility of Peruvian psychiatric patients with serious and chronic mental illness, a factor to consider, but that does not compel us to disturb the conclusion that such individuals constitute a particular social group. The respondent's fear of persecution arises from the practice in Peruvian state hospitals of subjecting psychiatric patients to ECT without anesthesia, and since there is no evidence or allegation that ECT is administered randomly, psychiatric patients with serious mental illness are recognized as a discrete group who are treated with that procedure. We find no basis to reject the finding that Peruvian psychiatric patients with serious and chronic mental illness form a particular social group, and that the respondent is a member.

We next examine whether the lead respondent has satisfied the objective component of establishing a well-founded fear of persecution based on his membership in that group. The Immigration Judge found, based in part on the testimony of Dr. Marta Beatriz Rondon, an uncontested expert witness in mental health treatment in Peru, that substandard care was provided in some Peruvian psychiatric hospitals; that ECT without anesthesia, an unacceptable form of psychiatric treatment, was administered even in some well-regarded facilities; that the lead respondent is likely to be hospitalized even if he is properly medicated and even more likely to require hospitalization if he does not receive appropriate care; and that there was a ten percent chance that the lead respondent would be subjected to persecution in a state psychiatric hospital. He further found it more probable than not that the 60-year-old lead respondent would be unable to find employment that provided insurance coverage for care at a private facility. Upon review of the record, we cannot say that the factual findings were clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i). As a result, the Immigration Judge's conclusion that the lead respondent demonstrated an objectively well-founded fear of persecution based on his membership in a

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particular social group conforms with the controlling law. *See Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (holding that even a ten percent chance that an applicant will face future persecution is sufficient to establish a well-founded fear); *see also Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (finding that involuntary psychiatric treatment intended to cure rather than to punish can constitute persecution).

We conclude that the Immigration Judge's decision to grant the lead respondent's asylum application is supported by the record. Accordingly, we will dismiss the DHS's appeal.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

FOR THE BOARD

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