



U.S. Department of Justice

Executive Office for Immigration Review

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Name: L [REDACTED]-S [REDACTED], D [REDACTED] F [REDACTED]

A [REDACTED]-858

Date of this notice: 5/20/2010

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:

Greer, Anne J.
Pauley, Roger
Wendtland, Linda S.

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Falls Church, Virginia 22041

File: [REDACTED] 858 - San Francisco, CA

Date: MAY 20 2010

In re: D [REDACTED] F [REDACTED] L [REDACTED] - S [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert B. Jobe, Esquire

ON BEHALF OF DHS: J. Franklin Sigal
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

Lodged: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] -
Controlled substance violation

APPLICATION: Asylum; withholding of removal

This case was last before us on August 28, 2006, when we summarily affirmed an Immigration Judge's April 10, 2006, decision denying the respondent's applications for asylum, withholding of removal, protection under the Convention Against Torture, and voluntary departure.¹ In a decision dated December 11, 2009, the United States Court of Appeals for the Ninth Circuit denied all of the claims for relief except that it remanded for further assessment regarding whether the respondent could establish membership in a particular social group and, therefore, eligibility for asylum and withholding of removal. Specifically, the Ninth Circuit remanded to assess whether "Peruvians with serious chronic mental disabilities" constitutes a particular social group.

In his April 10, 2006, decision, the Immigration Judge found that the respondent had suffered persecution by his mother and his mother's boyfriends in Peru (I.J. at 19-20). However, he also

¹ Although the April 10, 2006, decision dealt with the respondent's and his father's applications for relief, the Immigration Judge incorporated by reference his September 23, 2003, decision in which he denied the respondent's father's suspension of deportation and voluntary departure applications and severed the respondent's case for independent consideration. We subsequently remanded the respondent's father's proceedings back to the Immigration Judge in 2005, based on a claim of ineffective assistance of counsel and in order to allow the respondent's father to apply for asylum, withholding of removal, and for protection under the Convention Against Torture. On May 12, 2005, the Immigration Judge again consolidated the respondent's and his father's cases. However, only the respondent's case has been remanded by the Ninth Circuit.

found that the respondent had failed to show that this past persecution, or even that any future persecution, was on account of a protected ground (I.J. at 21-22). In that regard, the Immigration Judge held that the respondent failed to establish a nexus between any persecution and the respondent's status as a chronically mentally disabled person in Peru (I.J. at 20-21).

The Immigration Judge compared the respondent's proposed social group to the group discussed in *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005) (I.J. at 20-21). In that case, the Ninth Circuit concluded that Russian children with disabilities that are serious and long-lasting or permanent in nature and parents who care for them qualify as a particular social group.² *Id.* The Immigration Judge found that case distinguishable from the respondent's, however, because (1) the disability here is mental as opposed to physical and it is not clear that the respondent's disability is permanent, and (2) the respondent could not establish the same level of stigmatization and denial of basic human rights that the alien in *Tchoukhrova* was able to show (I.J. at 21). Finally, the Immigration Judge noted that the respondent's proposed social group of people who have psychological problems "includes too broad a spectrum of society" (I.J. at 21).

Since the Immigration Judge appears to have already addressed the issue remanded by the Ninth Circuit, we interpret the court's remand order as a directive to reconsider. *Cf. Gonzales v. Thomas, supra* (requiring a remand so that the Board can consider the issue of membership in a particular social group rather than having the circuit court decide the question de novo). This is not unreasonable in light of recent case precedent issued by the Board which provides additional guidance on assessing membership in a particular social group. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *see also Donchev v. Mukasey*, 553 F.3d 1206 (9th Cir. 2009).

In order to establish membership in a group of persons, there must be an immutable or common characteristic which is shared by the members which they either cannot change or should not be required to change because it is "fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). As noted, we have recently added to this definition of "membership in a particular social group" the requirement that a purported social group have a particular and well-defined boundary, and that the group possess a recognized level of social visibility. *See Matter of A-M-E- & J-G-U-, supra; Matter of C-A-, supra.*

Upon reconsideration, we find the respondent's group is a particular social group. Mental disabilities are clearly immutable characteristics in that those suffering from them cannot change their disability. Furthermore, people with serious and chronic mental disabilities are socially visible and the evidence of record establishes that they are often discriminated against and treated in an inhumane manner (*see, e.g., Exhs. 8R, 10A, 14*). Indeed, the respondent testified to many instances of abuse which the Immigration Judge found constituted past persecution. *See Matter of C-A-, supra*, at 960 (stating that although a social group cannot be defined exclusively based on being

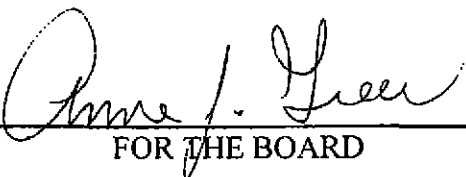
² The Ninth Circuit's decision was ultimately vacated by the United States Supreme Court because, like the case at hand, it is appropriate to allow the Board to decide such legal issues in the first instance. *Gonzales v. Tchoukhrova*, 549 U.S. 801 (2006) (vacating and remanding in light of *Gonzales v. Thomas*, 547 U.S. 183 (2006)). This is the reason for the current remand as well.

targeted for persecution, persecutory action toward the group may be a factor in determining its social visibility).

All of these factors lead us to conclude that this case is not as easily distinguishable from *Tchoukhrova* as suggested by the Immigration Judge. In addition, the respondent has attached to his appeal an unpublished 2007 Board decision in which we held that Peruvian psychiatric patients with serious and chronic mental illness can form a particular social group. While not binding, the case appears to have substantial similarities to the respondent's case. In particular, both cases contain evidence that mentally disabled persons are stigmatized and often subjected to substandard treatment including being forced to undergo electroconvulsive therapy without anesthesia.

Because we find that the respondent has established past persecution on account of membership in a particular social group, we will remand to give the Department of Homeland Security (DHS) an opportunity to rebut the presumption that the respondent has established a well-founded fear of future persecution. We decline to render an opinion on the issue of future persecution at this time. However, even if the DHS does rebut the presumption, we also direct the Immigration Judge to evaluate whether the respondent qualifies for humanitarian relief under 8 C.F.R. § 1208.13(b)(1)(iii).

ORDER: The record of proceedings is remanded for further proceedings consistent with this order.



FOR THE BOARD

Falls Church, Virginia 22041

File: [REDACTED] 858 - San Francisco, CA

Date: **MAY 20 2010**

In re: D [REDACTED] F [REDACTED] L [REDACTED] -S [REDACTED]

DISSENTING OPINION: Roger A. Pauley

I respectfully dissent. The majority's finding that "Peruvians with serious chronic mental disabilities" constitutes a particular social group is at odds with our precedents. Such a class of persons meets neither the particularity nor social visibility requirements as outlined in our cases.

Serious chronic mental disabilities take many forms, and produce symptoms ranging from individuals who constantly "act out" or are violent to individuals who are almost perpetually homebound due to fear, or silent, such that the particularity element of the purported social group is not satisfied. Moreover, the majority's statement that "people with serious and chronic mental disabilities are socially visible" is a pure ipse dixit assertion that is both unsupported by any authority and untrue. Many persons have serious mental disabilities that go unremarked and untreated, and those who suffer from them (including serial killers or rapists) are able to function in society without their illnesses being noticed, until (if ever) they are caught and prosecuted for their crimes.

The majority's decision appears to be based in large measure upon the respondent's sympathetic circumstances. But expanding the contours of a particular social group is not an appropriate response. The respondent's proposed group does not qualify him for asylum relief. Any expansion of such eligibility is for policymakers in Congress, not this Board.


BOARD MEMBER