File: (b) (6)

Date: JUN 19 2006

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Roberto Tschudin Lucheme, Esq.

ON BEHALF OF DHS: Robert K. Bingham
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APPLICATION: Asylum; Withholding of Removal

The United States Court of Appeals for the (b) (6) has remanded this case for the Board to address whether "affluent Guatemalans" are members of a particular social group within the meaning of the definition of "refugee" in section 101(a)(42)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. §1101(a)(42)(A). (b) (6) *v. Gonzales*, (b) (6) As discussed below, we conclude that the Immigration Judge did not err in ruling that the respondents have not shown that "affluent Guatemalans" are a particular social group as that term is used in section 101(a)(42)(A) of the INA. Nor did he err in ruling that the respondents did not otherwise demonstrate that they were persecuted or face a well-founded fear of persecution on account of a protected ground in the refugee definition. We therefore affirm the Immigration Judge's decision denying asylum and withholding of removal.[1]

I. Background.

The respondents are a married couple from Guatemala. They entered the United States in August 2001 using forged travel visas and false names. In sworn statements completed upon arrival at the San Ysidro Port of Entry, the male respondent indicated that he left his home country to come to the United States to "look for work" and the female respondent indicated that she came to visit her uncle in Los Angeles. In response to the question whether they had "any fear or concern about being returned to [Guatemala] or being removed from the United States," both respondents answered, "No."

[1] The respondents did not appeal the Immigration Judge's denial of voluntary departure or protection under the Convention Against Torture.

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In proceedings before the Immigration Judge, the respondents conceded removability but requested asylum, withholding of removal and protection under the Convention Against Torture.[2] In her asylum application filed on January 2, 2003, the female respondent provided the following account of events in Guatemala:

> My sister was kidnapped in December of 1996, and held until January, 1997. She was shot in the leg during the kidnapping. I started receiving extortionist threats, and threats against my life and that of my husband. We were forced to continually change our location, and such threats against ourselves continued until we sought refuge in the United States.
>
> We feel that at the very least, we will be harassed and threatened by the same group or groups that persecuted us in the past, and at worse, we could be found, kidnapped, physically harmed, even killed. The motivation for these threats are the same as those that caused harm to my sister: class hatred by organized political gangs.

At the hearing before the Immigration Judge, the respondents claimed to have been persecuted on account of membership in a particular social group composed of "higher socio-economic" Guatemalans. The (b) (6) summarized the respondents' testimony before the Immigration Judge as follows:

> * She came from a well-off family; she and her husband had a good life in Guatemala; they own a house that is presently rented out; the couple employed a housekeeper; and she attended college and obtained a teacher's degree.
>
> * In December 1996, the couple received anonymous phone calls demanding ransom for the release of her sister, and threatening that, unless the ransom was paid, they would face the same fate.
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> * By reason of telephonic and written threats, [the respondents] moved (in October 1998) to another town in Guatemala but the threats resumed several months later, forcing them to move once more.
>
> * After their final relocation, [the respondents] were unemployed and subsisted off savings and investment income.
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> * [the female respondent] twice reported the threats to the police, to no apparent effect.
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> * The couple never paid her sister's ransom, but the sister was released by her captors after they "saw her wounded in her leg."

Ucelo-Gomez, supra, at 182-3.

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[2] The female respondent filed the asylum application with her husband named as a derivative beneficiary.

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At the conclusion of the hearing, the Immigration Judge asked who was included within the proposed particular social group. Counsel for the respondents explained, "Basically, they are comprised on a relative scale at a higher socio-economic level, so they're being persecuted for that reason." (Tr. 58-59). The Immigration Judge then asked what information indicates "that people like this are being persecuted." Counsel for respondents replied:

> Well, it's rather ambiguous, Your Honor. For example, if you're looking through the Country Report, when people are being victimized in Guatemala, there's official reports that it may be criminal activity, but NGOs report that it seems like there's evidence that it may be related to other reasons ...

(Tr. 59). After further questioning, counsel for respondents described the proposed social group as "the upper class." (Tr. 61).

The Immigration Judge denied asylum and withholding of removal finding, in part, that the respondents failed to demonstrate that "affluent Guatemalans" were a particular social group. In so concluding, he applied the decision of the Board in *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), and the decision of the (b) (6) the circuit in which this case arises, (b) (6) *v. INS*, (b) (6) (b) (6). Under these cases, he found that the proposed group was not a particular social group because the group's shared characteristic was not "immutable," the group was not "readily identifiable" and was "too broad[ly]" defined to be a social group for purposes of asylum. IJ Decision at 7. He also found that the respondents had not provided sufficient evidence to show that similarly-situated Guatemalans would be identified by would-be persecutors. In particular, he found that there was "nothing in the background materials to indicate that wealthy Guatemalans are specifically being targeted for persecution." IJ Decision at 8. Additionally, he found no evidence that the persons calling the respondents were motivated by social group membership or any other protected ground.[3]

In their appellate brief to the Board, the respondents, through counsel, conceded that persecution based on "wealth alone is insufficient" to meet the nexus requirement and argued that the persecution "was motivated in part by their political opinion/membership etc.," Respondents' Appeal Brief at 2. This concession was consistent with our holdings in several published decisions that "in the absence of evidence of other motivations, evidence that the perpetrators were motivated by a victim's wealth will not support a finding of persecution." *Matter of S-V-*, 22 I&N Dec. 1307, 1310 (BIA 2000) (holding, in a case involving fear of kidnaping by Colombian guerrillas, that actions motivated by "perceived wealth" were insufficient, without more, to support a finding of persecution based on membership in a particular social

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[3] The Immigration Judge also found that the threats to the respondents did not rise to the level of harm required to demonstrate past persecution. He also made an adverse credibility finding based primarily on the conflict between the respondents' statements upon arrival that they had no fear of returning to Guatemala and their subsequent asylum claim to the contrary. We assume, without deciding, that the respondents provided a truthful account in their asylum application and in their testimony before the Immigration Judge.

group) overruled on other grounds, *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) (holding that "where the common trait shared by the victims of kidnappings in the Philippines is wealth, *i.e.*, their ability to pay large ransoms" the respondent did not demonstrate that persecution was on account of an enumerated ground); *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997) (finding no persecution on account of a protected ground where "the NPA's practice of securing financial support by the threats of force and actual harm [was] motivated by the victim's wealth, not the victim's political opinion"), reversed by *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (*en banc*) (finding imputed political opinion on the facts). *See also*, *Balshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (successful Russians targeted by criminals for extortion were not persecuted on account of a statutorily protected ground).

The respondents' arguments on appeal to the Board consisted of four paragraphs addressing the requisite nexus to a protected ground, the final one of which stated the substance of the argument as follows:

> The Respondents membership in the upper-class of Guatemala, and the history suffered by the family at the hands of terrorists, indicates they are targets of persecution. The IJ felt wealth alone is insufficient, and that is conceded. But, at trial, counsel for the Respondents indicated that in the U.S. State Department Country Reports for Guatemala, p. 8, there was a report that a nun was killed in Guatemala City, in what was reported as an attempted carjacking, but "various human rights groups did not rule out the possibility of political motive." The IJ noted that the nun dealt with war victims, and thus felt convinced that this could serve as some kind of imputed political ideology. This same issue was raised by counsel at trial, when he argued that the position of the Respondents was akin to a "mixed motives" case -- as amply demonstrated by the case of the nun cited in the Country Report. *See also Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (Persecution does not necessarily entail persecution for reasons exclusive to five classes. Thus if persecutor was motivated in part by victim's political opinion/membership etc., a successful claim to asylum can be made.)

Given the evidence of record, the nature of the Immigration Judge's decision, and the respondents' arguments advanced on appeal, the Board affirmed the Immigration Judge's decision without opinion. *See* 8 C.F.R. § 1003.1(e)(4) (2006).

After the (b) (6) remand, we afforded the parties an opportunity to provide further briefing. The respondents have submitted a supplemental brief in which they argue that "although it is true that Respondents did not know the motivation of their persecutors, such knowledge is not fatal to their case. So long as the actions were, at least in part, by one of the enumerated grounds." Supplemental Brief at 4. They then assert that they were persecuted based on social group membership combined with imputed political opinion. "Respondents are arguing (in part) that their political beliefs are imputed to them by virtue of their wealth *i.e.* they must support the status quo as it protects the wealth they have accumulated." *Id.*

(b) (6)

II. Analysis.

The (b) (6) has directed us on remand to "expand upon" *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), as to the meaning of "particular social group" and to explain why "affluent Guatemalans" are not a "particular social group." (b) (6) Initially, we note that the respondents have the burden of demonstrating both membership in a particular social group and that past or feared persecution satisfied the "on account of" requirement in the "refugee" definition. 8 C.F.R. §1208.13(a) (2006). In meeting this burden, the respondents must initially identify the "group" on which the claim is based and demonstrate that such a group is a "particular social group" as that term is used in the "refugee" definition. The proposed group has been variously described during the course of proceedings in this case in terms of "wealth," "affluence," "upper income level," "socio-economic level," "the monied class," and "the upper class." Although we generally refer to wealth or affluence as the identifying characteristic in our discussion below, our analysis applies to each of the descriptions of the group characteristic mentioned above.

In *Acosta*, we established that the members of a particular social group must "share a common, immutable characteristic." *Id.* at 233. The characteristic may be innate, such as "sex, color, or kinship ties" or it may be a shared past experience such as "former military leadership or land ownership." *Id.* In either event, the group characteristic must be one "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." *Id.* We agree with the Immigration Judge that "wealth" is not an immutable characteristic. This determination alone, however, is not dispositive if, for example, the shared characteristic is so fundamental to identity or conscience that it should not be expected to be changed. In this regard, we would not expect divestiture when considering wealth as a characteristic on which a social group might be based. Nonetheless, we find that the Immigration Judge correctly applied the *Matter of Acosta* framework in conjunction with the (b) (6) decision in (b) (6) *v. INS, supra*, in determining that the proposed group of "wealthy" Guatemalans is not so "readily identifiable" or sufficiently defined as to meet the requirements of a *particular* social group within the meaning of the refugee definition.

We recently reaffirmed the importance of social visibility as a factor in the particular social group determination. *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006) (holding that "non-criminal informants working against the Cali drug cartel" in Colombia were not a particular social group), affirmed *Castillo v. Attorney General*, -- F.3d -- , 2006 WL 1027726 (11th Cir. 2006). In *Matter of C-A-*, in reaffirming the requirement that the shared characteristic of the group should generally be recognizable by others in the community, we relied, in part, on the (b) (6) view that "the attributes of a particular social group must be recognizable and discrete," *Matter of C-A-*, at 956, quoting from (b) (6) *v. INS*, supra, at (b) (6) We also relied on our precedent decision in *Matter of H-*, 21 I&N Dec. 337 (BIA 1996). *Matter of C-A-*, at 959. We also referred to the 2002 UNHCR Guidelines which endorse an approach in which an important factor is whether the members of the group are "perceived as a group by society." *Matter of C-A-*, at 956. Although a social group cannot be defined exclusively by the fact that its members have been subjected to harm, we noted that the fact that a group has been subjected to harm may be a relevant factor in considering the group's visibility in society. *Id.* at 960.

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In *Matter of C-A-*, we also considered whether the group was defined with the requisite particularity. *Id at 957.* We found that the respondent's proposed group of "non-criminal informants" was "too loosely defined to meet the requirement of particularity." *Id.* In so holding, we noted that we do not generally require a "voluntary associational relationship," "cohesiveness" or strict homogeneity, among group members. *Id.* at 956-7.

Social Visibility.

Whether a proposed group has a shared characteristic with the requisite "social visibility" must be considered in the context of the country of concern and the persecution feared. The respondents in this case are victims of threats of criminal extortion. As the Immigration Judge found, there is little in the background evidence of record to indicate that wealthy Guatemalans would be recognized as a group that is at a greater risk of crime in general or of extortion or robbery in particular. The June 1997 Country Profile for Guatemala states:

> With the signing of the [1996] peace accords, the guerrillas renounced the use of force to achieve political goals. Although the level of crime and violence now seems to be higher than in the recent past, the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance.
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> The situation is further complicated by the fact that criminal elements, including some former combatants, are taking advantage of the instability of the transitional period. An August 1996 public opinion poll showed that 70 percent of those interviewed considered violence the major problem in Guatemala. In the past, most acts of violence in the country tended to be regarded as politically motivated, but the public perception seems to be changing now that the civil war has ended.

1997 Profile, at 4. Neither the 1997 Profile nor the U.S. State Department's 2001 Country Report on Guatemala suggests that the affluent, however defined, are exposed to more violence or human rights violations than other segments of society. Rather, violence and crime in Guatemala appear to be pervasive at all socio-economic levels. The respondents have provided no evidence, and we have no reason to believe, that the general societal perception would be otherwise.[4] Notably, the Profile's only specific reference to "extortion or robbery" occurs in the context of attacks against Indians, a relatively impoverished group in Guatemala. 1997 Profile, at 5. From the point of view of a criminal bent on extortion, persons with relatively modest resources or income may possess sufficient land, crops, or other

[4] In so finding, we do not rule out the possibility that, in appropriate circumstances, "wealth" may be a shared characteristic of a social group. For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that the class of wealthy persons, as defined by the government, would constitute a particular social group.

forms of wealth to make them potential targets. The proposed group of "wealthy Guatemalans" therefore fails the "social visibility" test.[5]

Particularity.

The respondents' proposed group also fails the particularity requirement of the refugee definition. The terms "wealthy" and "affluent" standing alone are too amorphous to provide an adequate benchmark for determining group membership. Depending upon one's perspective, the wealthy may be limited to the very top echelon; others could hold a more expansive view which includes small business owners and others living a relatively comfortable existence in a generally impoverished country. Because the concept of wealth is so indeterminate, the proposed group could vary from as little as one percent to as much as twenty percent of the population, or more.[6]

The respondents' proposed social group is indeterminate not just at the margins as will often be the case in describing group membership. Rather, when "wealth" is the sole criterion, group membership is difficult to pin down for a large swath of potential members. The characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group. We therefore find that the respondents have not demonstrated that "wealthy Guatemalans" constitute a particular social group.[7]

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[5] In (b) (6) *v. Gonzales* (b) (6)), the court recognized that women sold into marriage in a part of China where forced marriages are valid and enforceable were a particular social group. In so holding, the court distanced itself from (b) (6) *supra*, suggesting that (b) (6) can reasonably be read as limited to situations in which an applicant fails to show a risk of future persecution on the basis of the particular social group claimed, rather than as setting an *a priori* rule for which social groups are cognizable." *Id.* at 69. At the time of the Immigration Judge's decision and our summary affirmance, however, the approach outlined in (b) (6) v *INS*, *supra*, and the Board's decision in *Matter of H-*, *supra*, established that "social visibility" was an important factor in identifying a "particular social group."

[6] The 1997 Profile, at 10, notes that 80% of Guatemalans live in poverty, with 59% in extreme poverty.

[7] *Cf.*, *Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) (noting with approval the Board's decision in *Matter of V-T-S-*, *supra*, that a particular social group may not be based on wealth alone, but finding that "the educated, landowning class of cattle farmers targeted by FARC" constituted a distinct social group in Colombia). In so finding, the court relied upon the State Department Country Report which indicated that cattlemen were among the guerrillas' "preferred victims" and testimony of the applicant that the guerrillas told him that he was targeted because his father was a cattle rancher. *Id.*

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Other motives.

The respondents have not provided evidence to show that the person or persons making the threats were motivated by the respondents' political opinion or imputed political opinion.[8] Nor have they shown that the threats were motivated by "class envy." Indeed, the respondents are unaware of the identity of the person or persons who threatened them or the group with which they are affiliated, if any. The respondents have produced no evidence to show that the anonymous caller or callers had any motive other than attempted criminal extortion. *See, INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (claim that guerrilla recruitment attempts were based, in part, on imputed political opinion was unsupported by either direct or circumstantial evidence that the persecutor had a motive other than increasing the size of its forces). Here there is no indication that the person or persons who pursued the respondents had any motive other than increasing their own wealth at the expense of the respondents. We therefore find that the respondents failed to demonstrate that they were persecuted or have a well-founded fear of persecution based on a protected ground.

III. Conclusion

We affirm the Immigration Judge's finding that the respondents failed to demonstrate that "affluent Guatemalans" are a particular social group or that they were persecuted or fear persecution on account of a protected ground in the refugee definition. For these reasons, he correctly found that they failed to demonstrate eligibility for asylum or withholding of removal under section 241(b)(3) of the Act. We therefore dismiss the respondents' appeal.

ORDER: The respondents' appeal is dismissed.

FOR THE BOARD

[8] As the (b) (6) noted, the lead respondent "conceded that neither she nor her husband had any political involvement." (b) (6) *supra*, at note 3.