

Falls Church, Virginia 22041

File: A077 845 685 - Reno, NV

Date: NOV 14 2011

In re: LESLY YAJAYRA PERDOMO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alan Hutchison, Esquire

AS *AMICUS CURIAE*: Claudia Valenzuela, Esquire
National Immigrant Justice Center

Karen Musalo, Esquire
Center for Gender & Refugee Studies,
U.C. Hastings College of the Law

ON BEHALF OF DHS: Christian Parke
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case is before us pursuant to the July 12, 2010, decision of the United States Court of Appeals for the Ninth Circuit. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010). The record will be remanded.

In its decision, the Ninth Circuit granted the respondent's petition for review and concluded that this Board erred in rejecting the respondent's proposed particular social group of "all women in Guatemala" as over-broad and "a mere demographic division of the population rather than a particular social group." *Perdomo v. Holder, supra*, at 663-64. The Ninth Circuit found our decision dated March 6, 2006, was inconsistent with Board precedents and the Ninth Circuit's case law. *Id.* The Ninth Circuit acknowledged that "particular social group" is an amorphous term, and remanded the case to the Board "to determine in the first instance whether women in Guatemala constitute a particular social group, and, if so, whether [the respondent] has demonstrated a fear of persecution 'on account of' her membership in such a group." *Id.* at 669.

We acknowledge and appreciate the briefs submitted by the parties and by *amici curiae*. In its response to the briefs filed by *amici curiae*, the Department of Homeland Security (the "DHS") requested a remand based on the fact that the respondent first asserted her expanded particular social group – all women in Guatemala – on appeal. As such issue was not presented to the Immigration Judge, the DHS argues that further development of the record is required on the viability of the group and, assuming the respondent's particular social group is viable, further fact-finding is necessary to determine whether she has demonstrated a fear of persecution "on account of" her membership in such a group. DHS Response to *Amici Curiae* Briefs, at 1-4. Further, the DHS states that a remand

is appropriate because the department is engaged in rulemaking to clarify various “core asylum eligibility requirements” including issues related to claims “premised on gender based persecution.” *Id.* at 4-5.

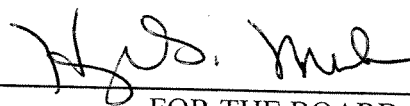
Amicus curiae (National Immigrant Justice Center) urges us to decide the particular social group issue prior to a remand, if deemed necessary. The respondent opposes the DHS’s request for a remand, and argues that the Ninth Circuit remanded the case to this Board to decide the particular social group issue “in the first instance” and that a remand would not comply with the Ninth Circuit’s mandate. Respondent’s Reply Brief to DHS Response to Briefs of *Amici Curiae*, at 2-3.

We find the DHS’s request for a remand persuasive. The Ninth Circuit’s decision does not prohibit a remand, and under the circumstances, further development of the record and fact-finding are warranted. 8 C.F.R. § 1003.1(d)(3)(iv) (“if further factfinding is needed in a particular case, the Board may remand the proceeding”); *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) (“The Board is an appellate body whose function is to review, not to create, a record.”). Further, the respondent first raised the expanded particular social group issue on appeal before us, and a remand will enable the Immigration Judge to consider such issue in the first instance and to engage in any fact-finding that may be needed to resolve the issues in this matter, consistent with standard Immigration Court practice and procedure. *See Matter of Jimenez-Santillano*, 21 I&N Dec. 567, 570 n. 2 (BIA 1996) (recognizing that we generally do not consider an issue raised for the first time on appeal); *see also United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir.1983) (“As a general rule, we will not consider an issue raised for the first time on appeal.”), *cert. denied*, 465 U.S. 1007 (1984).

In light of the above, we will remand this matter to the Immigration Judge for consideration of the particular social group issue, and whether the respondent has demonstrated a fear of persecution “on account of” her membership in such a group, as well as any other relevant issues regarding the respondent’s application for relief. *Perdomo v. Holder, supra*, at 669; 8 C.F.R. § 1003.1(d)(3)(iv) (discussing the Board’s limited fact-finding authority). Upon remand, both parties will have an opportunity to present evidence in support of their respective positions for consideration by the Immigration Judge.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion, and for the entry of a new decision.



FOR THE BOARD