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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERESA YOJANA URBINA-ROMERO, Petitioner, v. WILLIAM P. BARR, Attorney General, Respondent.	Nos. 16-73399 17-70730 Agency No. A202-096-036 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted February 11, 2019
San Francisco, California

Before: SCHROEDER and RAWLINSON, Circuit Judges, and LASNIK,[**] District Judge.

Petitioner Teresa Yojana Urbina-Romero, a native and citizen of Honduras, petitions for review the BIA's (1) September 2016 affirmance of an order of removal and denial of asylum, and (2) March 2017 denial of reopening or

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

reconsideration. The removal was based on the IJ's conclusion that Petitioner had failed to establish past persecution after the BIA's original decision ruled she had established past persecution and remanded for her to establish the other elements of an asylum claim. She contends that on remand the IJ should not have reconsidered the issue of past persecution without providing notice that it would do so, and hence she was deprived of the opportunity to be heard on the issue that was dispositive on remand.

She first argues that the doctrine of law of the case should have prevented the agency from reconsidering past persecution after it had determined Petitioner had established it. *See Silva–Pereira v. Lynch*, 827 F.3d 1176, 1190 (9th Cir. 2016). We need not decide that issue, because we agree with Petitioner's further contention that reconsideration of the issue without notice was a violation of due process.

It is well established that the Fifth Amendment guarantees due process in deportation proceedings. *See e.g. Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013). We have recognized that due process includes notice and an opportunity to respond to the government's contentions. *See Circu v. Gonzales*, 450 F.3d 990, 995 (9th Cir. 2006) (where the failure to give the respondent advance notice of State Department Country report violated due process). Here, the failure to

provide notice of the issue the IJ was going to decide was more prejudicial than the lack of notice in *Circu* of the records the IJ intended to rely upon. In this case, there appears to be more than a failure to provide notice, but an affirmative indication in both the BIA's original remand and in the IJ's instructions during the remand proceedings, that past persecution was no longer an issue. In its remand order, the BIA instructed Petitioner to provide evidence specifically only as to her social group and the Honduran government:

> We observe the Immigration Judge found that the experiences of the respondent rose to the level of past persecution. Therefore, if the respondent can establish membership in a particular social group based on her family relationship, and that the government is unable or unwilling to protect her, she is entitled to a presumption of future persecution.

Petitioner was never told that she needed to provide further evidence of past persecution.

Moreover, at the beginning of the second merits hearing, the IJ indicated the purpose of the hearing was limited. The IJ stated that the purpose of the remand was for Petitioner to provide evidence on nexus and the government:

> Your case was remanded for additional fact-finding and a determination on the issues of nexus and whether the Honduran government is unable or unwilling to protect you from your persecutors. On remand, which is what this case is here again for, I am to have -- you are to have the opportunity to introduce any

additional evidence based on these issues. That's the purpose of this remand. It was therefore a violation of due process for the IJ to reverse the previous finding that Petitioner had established past persecution without notifying Petitioner that past persecution was again at issue so that she could present evidence on the claim.

This case, while unusual, does not materially differ from the situation in *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 659 (9th Cir. 2003), where the BIA decided the case on the basis of an adverse credibility determination without notice that credibility was at issue. We held there had been a violation of due process. *Id*. at 662-663 (concluding the BIA violated the petitioner's right to due process when it made an adverse credibility finding without affording the petitioner notice and an opportunity to respond).

The Government argues this Court does not have jurisdiction over Petitioner's due process argument because Petitioner failed to exhaust it before the BIA. This is not correct. Petitioner specifically raised the argument in her briefing before the BIA, and cited case law stating immigration proceedings must adhere to Fifth Amendment due process requirements.

The Government also asserts Petitioner herself put past persecution at issue by taking the stand in the remand hearing and providing testimony regarding the past harm she suffered. Counsel for Petitioner, however, simply asked Petitioner

whether she remembered her previous testimony before the IJ and asked Petitioner to summarize it. This testimony merely served as foundation for the subsequent questioning regarding one of the issues the IJ had said was to be decided: whether the Honduran government, specifically the Honduran police, failed to protect Petitioner and her neighbors from gang violence.

Petition for review **GRANTED**.

***Urbina-Romero v. Barr*, Case Nos. 16-73399, 17-70730**
Rawlinson, Circuit Judge, dissenting:

I respectfully dissent. Our case law clearly establishes that the Immigration Judge (IJ) has the authority to revisit previously decided issues following a general remand, as occurred in this case. *See Bermudez-Ariza v. Sessions*, 893 F.3d 685, 686-87 (9th Cir. 2018). I disagree with the majority that the IJ revisited the issue of past persecution without notice to the petitioner. Rather, it was the petitioner who took the initiative to present additional evidence of past persecution that ultimately proved to be unpersuasive to the IJ. Under these circumstances, it cannot be fairly said that the petitioner was denied an opportunity to present evidence in support of her claims. *See Bondarenko v. Holder*, 733 F.3d 899, 906 (9th Cir. 2013) (concluding that a petitioner is entitled to "a *reasonable* opportunity to present evidence") (emphasis added). Petitioner was given that reasonable opportunity, took advantage of it, and failed to persuade the IJ. Due process requires no more. *See id.* Thus, I would deny the petition.