Files: [redacted] - Kansas City, MO

Date: NOV 22 2010

In re: FRANCIS GATIMI
JANE WAIRIMU GATIMI
COLLINS WAMUHIU GATIMI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Matthew L. Hoppock, Esquire

AMICI CURIAE FOR RESPONDENTS: The Harvard Immigration and Refugee Clinical Program; The Advocates for Human Rights; The Center for Gender and Refugee Studies; Greater Boston Legal Services; Hebrew Immigrant Aid Society and Council Migration Service of Philadelphia; The Immigrant Law Center of Minnesota; The National Immigrant Justice Center; The Tahirih Justice Center; Professor Mark R. Von Sternberg; and the United Nations High Commissioner for Refugees

ON BEHALF OF DHS: Jennifer A. May
Assistant Chief Counsel

CHARGE:

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

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case was last before us on August 4, 2008, when we dismissed the respondents' appeal from the Immigration Judge's September 17, 2007, decision denying the lead respondent's applications for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, and withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as protection under the Convention Against Torture.[1] On August 20, 2009, the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"), the jurisdiction in which this case arises,

[1] We note that respondents Jane Wairimu Gatimi [redacted] and Collins Wamuhiu Gatimi [redacted] were derivatives of the lead respondent's application for asylum.

vacated our August 4, 2008, decision and remanded proceedings to us. *See Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). The record will be remanded.

In *Gatimi v. Holder*, *supra*, we understand the Seventh Circuit to have found the respondents eligible for asylum. Moreover, under *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), we see no reason to deny relief as a matter of discretion. To the extent that the Department of Homeland Security (the "DHS") argues that the Seventh Circuit left open the questions of whether the lead respondent established past persecution, whether the Kenyan Government is unwilling or unable to protect the lead respondent from the Mungiki, and whether the female respondent is eligible for relief, we disagree. In *Gatimi v. Holder*, *supra*, at 614, the Seventh Circuit described the Immigration Judge's finding that the lead respondent failed to establish past persecution as "absurd." Moreover, although the Seventh Circuit referenced new evidence regarding the government of Kenya's willingness to protect people against the Mungiki, the Court indicated that the new evidence of the Kenyan government's complicity in the actions of the Mungiki is compelling. *See id.* at 617. Similarly, the Seventh Circuit found that the female respondent was eligible as a derivative claimant and that the only evidence of record establishes that she will be subjected to female genital mutilation if she is returned to Kenya. *See id.* at 617-18. We therefore find that the Seventh Circuit resolved these questions and that they are now the law of the case.

Finally, to the extent that the Amici Curiae for the lead respondent urge us to reconsider our precedent decisions discussing the social visibility requirement, we decline to reconsider those cases at this time.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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).

FOR THE BOARD

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DISSENTING OPINION: Roger A. Pauley

I regret that the majority is willing to accept, on remand, the Seventh Circuit's rejection of the social visibility component of a particular social group, as set forth in a series of Board precedents and applied currently by the Board in every circuit except (as a result of the instant Seventh Circuit decision) the Seventh. Evidently, the majority views the court's ruling as a holding that "social visibility" is an impermissible component of a particular social group determination, and as such constitutes the law of the case. I disagree. I do not regard the decision below, *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), as foreclosing the Board from once again determining that the lead respondent, as a former member of the Mungiki in Kenya, is not a member of a particular social group because such former members lack social visibility in Kenyan society. Rather, I view the opinion in *Gatimi* as reflecting a finding that the Board has failed adequately to explain why social visibility is a necessary element (or at least an important consideration in determining the existence) of a particular social group. See *id.* at 606 (acknowledging that other circuits have accepted social visibility as a criterion but stating that, since the proposed groups in those cases would otherwise not have qualified: "We just don't see what work 'social visibility' does").

Inasmuch as the majority's abandonment of the field leaves the law in disarray and is inconsistent with what I believe is our obligation to provide uniform guidance throughout the country as to the meaning of the ambiguous term "particular social group,"I would accept the Seventh Circuit's challenge to more thoroughly explain our social visibility test *in this case*, and having done so would reiterate our conclusion that the respondents are ineligible for asylum because the lead respondent is not a member of a particular social group.

BOARD MEMBER