KASINGA'S PROTECTION UNDERMINED? RECENT DEVELOPMENTS IN FEMALE GENITAL CUTTING JURISPRUDENCE

By Lisa Frydman and Kim Thuy Seelinger

I. INTRODUCTION:

In the fall of 2007, the Board of Immigration Appeals ("BIA" or "Board") rendered two decisions which have wreaked havoc on asylum claims involving female genital cutting ("FGC")[1]. In the first, *Matter of A-T-*,[2] the Board found that FGC is generally a one-time harm and that women who have already been cut ordinarily have no reason to fear cutting again. It rejected the notion that past FGC constitutes ongoing harm to a woman, and that the presumption of well-founded fear remains unrebutted by the continuing harms of the ritual. The second decision, *Matter of A-K-*,[3] had at its heart the question of whether a father was eligible for withholding of removal due to his fear for his daughters' safety from FGC in his country of origin. The BIA found that he was not and denied on factual and legal grounds. Characterizing the claim as derivative, the BIA denied on the legal ground that no basis in law exists for child-to-parent withholding of removal. The BIA also found that the evidence failed to establish a likelihood that the father's own life or freedom would be threatened upon removal.

Both decisions have disrupted almost a decade of refugee protection flowing from the Board's 1996 decision in *In re Fauziya Kasinga*,[4] when the BIA found FGC to be a form of persecution which had permanent and ongoing effects. Recent asylum claims raised by women who have been subjected to FGC in the past, or who fear the genital cutting of their daughters in the future, have been blocked by *Matter of A-T-* and *Matter of A-K-* at asylum office, immigration court, and BIA levels. Further, the *A-T-* and *A-K-* holdings have been misconstrued and mistakenly expanded by several asylum officers and immigration judges, which has often resulted in particularly wrongful denials of women's claims for refugee protection. The Center for Gender and Refugee Studies ("CGRS") is concerned by the Department of Homeland Security's ("DHS") aggressive exploitation of the decisions – as with DHS's reopening of grants already issued to women whose asylum was based on past FGC, and its efforts to impose the BIA's rulings even on circuit courts which have accepted FGC as a continuing form of persecution.

Given CGRS's role in contributing to the development of law and policy in gender-based asylum claims for women refugees in the U.S., we have actively engaged in legal efforts to overturn these two decisions- and have provided technical assistance on countless cases affected by them.[5] Treatment of the various legal theories surrounding past FGC and parent-child claims has differed throughout the federal courts which have addressed the questions thus far. The current swell of appellate litigation of both recent BIA decisions will critically impact the availability of relief under these types of claims in the future. CGRS remains involved in this litigation and seeks to hear from practitioners who are working on these issues. It is from this vantage point that we offer the following thoughts about *Matter of A-T-* and *Matter of A-K-*, and about how practitioners can best advocate for their clients at present.

II. FEMALE GENITAL CUTTING (FGC) AND ASYLUM

Female genital cutting (FGC), also referred to as "female genital mutilation" (FGM) and "female circumcision," is a practice deeply rooted in traditions of almost thirty African countries and in parts of Asia and the Middle East. It is defined by the World Health Organization (WHO) as "the partial or total removal of the female external genitalia or other injury to the

[1] Among these variant terms, Center for Gender and Refugee Studies ("CGRS") chooses to refer to the practice as "female genital cutting" ("FGC") in the context of this article in order to avoid the inappropriate comparison to male circumcision while also avoiding the stigmatization inherent in the word "mutilation." "Female genital cutting" is a neutral factual description of the practice in question. However, CGRS fully appreciates the decision of advocates, clients, and adjudicators to use "female genital mutilation" or "FGM" where the client in question has expressed a preference for the term. .

[2] 24 I. & N. Dec. 296 (BIA 2007).

[3] 24 I. & N. Dec. 275 (BIA 2007).

[4] 21 I. & N. Dec. 357 (BIA 1996).

[5] To request technical assistance from CGRS on a gender asylum case, please visit our website at: http://cgrs.uchastings.edu/ and click on "assistance."

female genital organs for cultural or other non-therapeutic reasons." WHO estimates that over 100 million to 140 million women and girls have been subjected to the practice worldwide, with different extents of cutting.[6] These range from partial removal of the clitoris and / or prepuce (Type I, clitoridectomy) or clitoris *and* inner or outer labia (Type II, excision), to partial closure of the vaginal opening created by cutting and healing of labia (Type III, infibulation), to other vaginal pricking, scraping, or cauterization (Type IV). [7] FGC is generally performed in unsanitary ritual conditions, with broken glass or unclean blades. Among countries where FGC is practiced, the highest prevalence rates are found in Guinea (99%), Egypt (97%), and Mali (92%).[8]

Reasons for FGC range from diminution of female sexuality in order to prevent promiscuity and ensure "cleanliness," to removal of the clitoris which is believed by some to either be too masculine itself, or pose danger to male infants in childbirth. Infibulation (Type III) creates a smooth vaginal seal upon healing, which is considered beautifying for many groups.[9] Clearly, the FGC differs by tribe and community. Some groups, such as communities on the Red Sea coast of Yemen generally perform FGC on girls as young as 2 weeks old.[10] Others, such as the Yacouba of Cote d'Ivoire have no customary age for cutting but require that it take place before a young woman is married. Some women who are infibulated (Type III cutting) undergo FGM more than once – where their vaginal openings are sealed early in life, and then when they are reinfibulated after childbirth or other reopening of the vaginal closure.

Short term consequences of FGC include severe pain and bleeding, infection (septicaemia, tetanus, HIV), immobility, and urinary retention. Longterm physical consequences include formation of abscesses, keloid scarring, infertility, accumulation of menstrual fluid, and serious complications during pregnancy and childbirth such as postpartum hemorrhage, stillbirth, and low birthweight.[11] Psychological impacts of FGC include eating and sleeping disorders, recurring nightmares, panic attacks, difficulty concentrating and learning, and permanent loss of erotic and sexual sensation.

Cultural significance notwithstanding, FGC has been identified as a violation of women's human rights. The Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the United Nations Declaration on the Elimination of Violence against Women recognize that practices harmful to women such as FGC are violations of human rights.[12] Further, in recognition of its extensive harms to women, the U.S. has outlawed the practice.[13],

III. *MATTER OF A-T-:* PAST FGC AND ASYLUM ELIGIBILITY

A. Theories in Past FGC Cases

Women who flee prospective cutting, or who have suffered it already and seek refuge on account of its attendant harms, have applied for asylum in the U.S. since at least the mid-1990s. While the contours of their respective legal arguments may differ based on pertinent facts and applicable precedent, these claims have generally drawn upon the basic legal theory that FGC is a persecutory practice in its execution and in its myriad on-going consequences.

1. Women Who Have Not Yet Been Cut

Where a woman has not yet been subjected to FGC and fled her country out to escape the practice, it can be argued that she has a well-founded fear of future persecution in the form of FGC. The clear precedent established in the BIA's 1996 decision in *Matter of*

---

[6] http://www.who.int/reproductive-health/fgm/index.html

[7] *Eliminating Female Genital Mutilation: An Inter-Agency Statement, 2008*. http://www.unifem.org/attachments/products/fgm_statement_2008_eng.pdf [last accessed 08/19/2008]; *See also Female Genital Mutilation and Obstetric Outcome, WHO Collaborative Prospective Study in Six African Countries*, available at http://www.who.int/topics/female_genital_mutilation/en/ [last accessed 08/19/2008].

[8] WHO Report: *Female Genital Mutilation – New Knowledge Spurs Optimism*. Progress, No. 72, 2006. http://www.who.int/reproductive-health/hrp/progress/72.pdf [last accessed 08/19/2008].

[9] Eliminating Female Genital Mutilation: An Inter-Agency Statement, 2008. http://www.unifem.org/attachments/products/fgm_statement_2008_eng.pdf [last accessed 08/19/2008].

[10] WHO Report: *Female Genital Mutilation – New Knowledge Spurs Optimism*. Progress, No. 72, 2006. http://www.who.int/reproductive-health/hrp/progress/72.pdf [last accessed on 08/19/2008].

[11] *Female Genital Mutilation and Obstetric Outcome, WHO Collaborative Prospective Study in Six African Countries*, available at http://www.who.int/topics/female_genital_mutilation/en/ [last accessed 08/19/2008].

[12] Declaration of the United Nations General Assembly on the Elimination of Violence Against Women, Plenary Session A/Res/48/104, December 20, 1993.

[13] 18 U.S.C. § 116.

Kasinga[14] supports asylum grants based on this theory, where an applicant's likelihood of future FGC is established. This is a fairly straightforward argument to assert, especially where country conditions information indicates a high prevalence rate of FGC in the applicant's tribe or community (regardless of government prohibition of the practice), and where personal history shows individualized risk or intent of a third party to force FGC upon the applicant. With high enough risk of future coercion or inability to resist FGC in the home country, an applicant should be able to establish both a subjectively genuine and objectively reasonable fear of future FGC.[15] The CGRS database of unpublished asylum office and immigration judge decisions indicates the clear precedent of *Kasinga* supports asylum in cases where an applicant can prove likely subjection to FGC upon return. Asylum has been denied mainly in cases where the applicant simply failed to make this requisite showing.

Further, there may be additional harmful consequences in store for a woman who has rejected her community's traditions and fled to the U.S. for protection – applicants often mention their fear of physical assault or other punishment at the hands of their families, should they be forced to return.

Even uncut women who might somehow successfully resist future cutting in their home countries may have a well-founded fear of persecution in societies where un-cut women are ostracized, targeted for violence, or otherwise harmed due to their "unclean" status. They may also fear other, related harms on account of the same grounds upon which they are threatened with FGC.

2. Women Who Have Already Been Cut

Women who have already been subjected to FGC generally assert a claim for asylum based on past persecution (the FGC), which entitles them to a presumption of well-founded fear of persecution.[16] Prior to *Matter of A-T-*, these cases were often granted on this theory of past persecution.

First, in cases where the asylum applicant comes from a community in which women can be cut more than once, for example, a woman infibulated as a child may undergo re-infibulation before marriage, as with the Somali applicant in the Ninth Circuit's *Mohammed v. Gonzales*, the likelihood of additional FGC should of course be explored and asserted.

In addition to the persecutory nature of past FGC itself, women who have been subjected to forced cutting may assert eligibility for asylum based on the on-going physical and psychological consequences of their genital cutting. This "ongoing harm" theory of past FGC follows the BIA logic in *In re Y-T-L*,[17] in which the Board determined that certain acts of persecution such as forced sterilization, constitute "a permanent and continuing act of persecution." Applicants who have undergone FGC argue that their genital cutting is similar in continuing impact: As described above, FGC is often accompanied by both short-term and long-term consequences that reach beyond the period of actual cutting, including formation of abscesses, loss of sexual sensation, painful intercourse, increased risk of complications in childbirth, increased infant mortality, and varying degrees of emotional and psychic traumatization.

Moreover, the regulations governing rebuttal of the presumption of well-founded fear do not require that one fear identical harm as that which was suffered in the past. Aside from the literal consequences of FGC, it can be asserted that the practice is related to a larger system of female subjugation, wherein a woman who has already suffered FGC may remain at risk for forced marriage, domestic violence, marital rape, and other related harms that country conditions information may indicate.

Finally, women who have already undergone genital cutting are able to assert eligibility for humanitarian asylum due to the "severe and atrocious" nature of the FGC they have suffered.[18]

B. Treatment of FGC Cases by the BIA (Pre-*Matter of A-T-*)

In re: *Fauziya Kasinga*.[19] Since 1996, the BIA has acknowledged that FGC is a form of persecution warranting a finding of asylum, as established by the landmark *In re Fauziya Kasinga*.[20] Ms. Kassindja[21],

[14] 21 I.&N. Dec 357 (BIA, 1996), discussed *infra* at III.B.

[15] Matter of Acosta, 19 I. & N. Dec. 211, 224 (BIA 1985), Matter of Mogharrabi, 19 I. & N. Dec. 493, 446 (BIA 1987).

[16] Claims of women who have undergone FGC and who fear its imposition on their daughters will be addressed in the following section, in light of the *Matter of A-K-* decision.

[17] 23 I. & N. Dec. 601 (BIA 2003).

[18] 8 C.F.R. §§ 208.13(b)(1)(iii)(A). Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989)

[19] 21 I.&N. Dec 357 (BIA 1996).

[20] 21 I. & N. Dec. 357 (BIA 1996).

[21] Fauziya Kassindja's name was misspelled at the beginning of her immigration proceedings, hence the BIA

who had never been cut, was fleeing FGC in her native Togo, where FGC-prevalence rates hovered at around 50%. She was a member of the Tchamba-Kunsuntu tribe, in which the practice of FGC was confirmed. The BIA found that FGC as practiced by Ms. Kassindja's tribe constituted persecution. In fact, the Board made strong reference to the permanent effects of genital cutting in general:

> [FGM] permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.[22]

The Board found Ms. Kassindja to be at risk of future FGC in Togo because she was a member of the particular social group, "young women of the Tchamba-Kunsuntu Tribe who had not had FGC, as practiced by that tribe, and who oppose the practice."[23] The BIA found that Togo did nothing to prevent the forced infliction of FGC on women, and that the practice was a country-wide problem. It thus determined that Ms. Kassindja had a well-founded fear of persecution in the form of FGM. This victory laid the groundwork for all FGC-related asylum claims since 1996.[24]

C. Treatment in the Federal Courts (Pre-*Matter of A-T-*)

There has been mixed treatment of FGC as an ongoing harm in federal courts, ranging from acknowledgment of the on-going harms of past FGC to recognition of FGC's relationship to other forms of gender-based violence, to dismissal of future risk of harm since the asylum applicant had already been subjected to FGC. It should be noted that the most sympathetic rulings acknowledging the ongoing harms of FGC are currently under attack as the DHS attempts to impose the agency decision in *Matter of A-T-* on the circuits by way of *National Cable & Telecommunications Assn. v. Brand X Internet Services.*[25]

1. Ninth Circuit: Mohammed v. Gonzales[26]

The Ninth Circuit has provided the most supportive case regarding FGM to issue from the federal courts thus far. In *Mohammed v. Gonzales*, a Somali woman from the Benadiri clan successfully petitioned for re-opening of her asylum denial, where her original attorney had failed to raise the fact that she had undergone FGC as a child in her asylum proceedings below.

The Ninth Circuit found that Ms. Mohammed was targeted for persecution on account on two possible social groups: "Somali females," or "young girls of the Benadiri clan."

In a powerful decision by Judge Reinhardt, the court held FGC to constitute a permanent and ongoing act of persecution, alluding to the fact that Congress outlawed FGC in 1996, largely due to recognition that the procedure "often results in the occurrence of physical and psychological health effects that harm the women involved."[27] In response to the government's argument that the presumption of well-founded fear based on past persecution was rebutted by the fact that, once cut, Ms. Mohammed was no longer at risk of FGC, the Ninth Circuit countered that, "[l]ike forced sterilization, genital mutilation permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life."[28] It explicitly concluded that, "*genital mutilation, like forced sterilization, is a 'permanent and continuing' act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.*"[29]

Further, the court noted that Ms. Mohammed's entitlement to a presumption of well-founded fear of future violence "that is related to her past persecution" would be difficult for the government to rebut, in light of Somali country conditions..[30] The Ninth Circuit cited country conditions information indicating that a Benadiri woman returned to Somalia faced great risk of other harm – noting that US DOS reports indicate a

---

decision reflects the administrative record's incorrect spelling of "Kasinga."

[22] 21 I.&N. Dec 357, 361 (BIA, 1996).

[23] 21 I.&N. Dec 357, 368 (BIA, 1996).

[24] *Kasinga* also involved a forced marriage claim, adjudication of which the BIA did not reach in its final holding. However, the relationship between FGC and forced marriage was noted in Judge Rosenberg's concurrence (at 374).

[25] 545 U.S. 967 (2005).

[26] 400 F.3d 785 (9th Cir. 2005).

[27] 400 F.3d 785, 795 (9th Cir. 2005).

[28] 400 F.3d 785, 799 (9th Cir. 2005).

[29] 400 F.3d 785, 800 (9th Cir. 2005) (emphasis added).

[30] 400 F.3d 785, 800 (9th Cir. 2005).

wide array of gender-based subordination and persecution she would likely face aside from FGC.

Alternately, the court found that, according to information in the record, Ms. Mohammed risked further FGM in the form of later infibulation, which is inflicted upon 80% of Somali women.[31]

The court also found that, even without the benefit of presumption, Ms. Mohammed could qualify for humanitarian asylum under 8 C.F.R. §1208.13(b)(1)(iii) based on the severe and atrocious nature of her past FGM, as well as on account of her risk of suffering other serious harms related to her being a female member of Somalia's Benadiri clan.[32]

Finally, the Ninth Circuit Court of Appeals found that Ms. Mohammed had viable claims to withholding of removal and relief under the CAT, given the nature of her past persecution and its ongoing effects. In sum, the *Mohammed* decision created a safe haven of the Ninth Circuit, where women who have already undergone FGC will be found to be suffering ongoing persecution as a result.

2. Eighth Circuit: Hassan v. Gonzales[33],

The Eighth Circuit has indicated similar protection. In a recent case involving the asylum application of a Somali woman who had been subjected to FGM, the court held that FGM constitutes persecution. It further found, in light of country condition information regarding the practice of FGM in Somalia, that Ms. Hassan suffered genital cutting on account of being a member in the social group of 'Somali females.'

Once past persecution on account of a protected ground was established, the court found Ms. Hassan to be entitled to an as of yet unrebutted presumption of well-founded fear of future harm. The court found that the BIA had not properly shifted the burden of proof to the government with regard to rebutting the presumption with evidence of changed circumstances.

In response to the government's contention that no well-founded fear of harm existed because Ms. Hassan allegedly could not be subjected to FGC again, the court noted that there were *other* prevalent forms of persecution aside from FGC to which Ms. Hassan could be subjected if returned to Somalia.[34] Notably, the court wrote, "We have never held that a petitioner must fear the repetition of the exact harm that she has suffered in the past. Our definition of persecution is not that narrow."[35]

3. Seventh Circuit: Oforji v. Ashcroft[36]

In this case, a Nigerian woman who had been subjected to FGC in the past sought asylum based, *inter alia*, on risk of FGC to her US citizen daughters. The court found that FGC constitutes torture, but that because Ms. Oforji had already undergone FGC, "there is no chance she would be personally tortured again."[37] It should be noted that Ms. Oforji's case was complicated by an adverse credibility finding, to which the court deferred when denying her claim for asylum and withholding.[38]

4. Fourth Circuit: Barry v. Gonzales[39]

The Fourth Circuit has found that where a woman had been subjected to past FGC but whose lawyer had failed to present evidence of her past cutting, the applicant would actually have been eligible for asylum: "[T]o the extent that Barry presented credible evidence that she was subjected to female genital mutilation . . . Barry has made out a *prima facie* case of persecution that would have entitled her to asylum . . ."[40]

However, when Ms. Barry's original counsel did not present evidence of her past FGC in her native Guinea, the petitioner's motion to reopen her BIA denial of asylum failed when the Fourth Circuit determined that she had not complied with *Lozada* measures regarding presenting an ineffective assistance of counsel motion.[41] The court went on to find that the BIA had not abused its discretion with respect to refusing to consider late-offered evidence of

---

[31] 400 F.3d 785, 801 (9th Cir. 2005).

[32] 400 F.3d 785, 801 (9th Cir. 2005).

[33] 484 F.3d 513 (8th Cir. 2007).

[34] The court cited to the 2005 US Department of State Report on Human Rights Practices in Somalia, finding, *inter alia*, that Somali women faced a high risk of rape from multiple sectors of society – including at the hands of the police. *Hassan*, 484 F.3d 513, 519 (8th Cir. 2007).

[35] 484 F.3d 513, 518 (8th Cir. 2007)

[36] 354 F. 3d 609 (7th Cir. 2003).

[37] 354 F.3d 609, 615 (7th Cir. 2003).

[38] The court's CAT finding with respect to the "derivative" asylum claim based on harm feared for petitioner's children will be discussed in section VIII.B.1.b of this article).

[39] 445 F.3d 741 (4th Cir. 2006).

[40] 445 F.3d 741, 745 (4th Cir. 2006).

[41] *See* Matter of Lozada, 19 I. & N. Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

FGC, stating that, "Although it was undisputed that Barry had been subjected to FGC in Guinea many years before she came to the U.S., and that Barry's daughter would likely be subjected to FGC if she is returned to Guinea, the BIA correctly determined that the FGC evidence had been available and could have been discovered or presented during the initial deportation proceedings." Thus the denial of asylum was quite factually specific – it indicated that where an applicant has timely made a showing of past FGC, she may be eligible for asylum in the Fourth Circuit.

IV. *MATTER OF A-T-* CASE SUMMARY

In October, 2000, a young woman from Mali entered the U.S. on a tourist visa. Like so many of her countrywomen, Ms. A-T- had been forced to undergo FGC at a young age and continued to suffer the ongoing effects of the procedure. Although she tried to make a new life in the U.S., Ms. A-T- learned in 2003 that her father demanded her to return to Mali so she could marry her first cousin - regardless of her personal objections. In his letter, Ms. A-T's father warned of harsh consequences that would follow if she did not return immediately to be married. Ms. A-T- filed for asylum in May, 2004. She claimed that her experience with FGC constituted both past and ongoing persecution, and that she had a well-founded fear of persecution in the form of a forced marriage to her first cousin in Mali.

Ms. A-T- was referred to Immigration Court, where in January, 2004, she was found statutorily ineligible for asylum on one year bar grounds. The IJ then denied Ms. A-T-'s claims for withholding of removal and Convention Against Torture (CAT) relief. Ms. A-T- appealed her case to the BIA.

In September, 2007, the BIA affirmed the IJ's one year bar finding that Ms. A-T- was statutorily barred from asylum relief. (It thus did not assess Ms. A-T-'s eligibility for humanitarian asylum.)

Moving on to Ms. A-T-'s withholding of removal claim, the BIA held that once inflicted, FGC does not generally happen again and so itself constitutes a change in circumstances sufficient to overcome any presumption of well-founded fear of future persecution. In doing so, the BIA rejected the theory that past FGC constitutes "continuing harm," put forth by *Mohammed*. The BIA then affirmed the IJ's denial of withholding of removal due to failure to establish the likelihood of future harm related to FGC by means of presumption or otherwise.

Finally, it affirmed denial of Ms. A-T- relief under the CAT, finding she had not proven sufficient likelihood that she would face torture upon return to Mali.

With regard to Ms. A-T-'s forced marriage claims, the BIA flatly denied withholding and CAT relief, saying that such an "arrangement" did not rise to the level of persecution required by statute – and, as the "arranged" marriage was unrelated to Ms. A-T-'s past FGC, it required an independent showing of clear probability of persecution, which she had failed to make.

Counsel for Ms. A-T- filed a motion to reopen with the BIA, which was denied. A petition for review was filed with the Fourth Circuit Court of Appeals and is currently pending.

V. ANALYSIS of *MATTER OF A-T-* FGC CLAIM

The BIA decision in *Matter of A-T-* is most problematic in its treatment of the following specific issues: a.) application of the one-year bar to asylum, b.) interpretation of the presumption of a well-founded fear of persecution with respect to FGC, c.) FGC as a continuing harm, d.) divergence from past agency FGC decisions, and e.) forced marriage as persecution at all. However, for the purposes of this article, we focus our discussion on the BIA's treatment of Ms. A-T-'s FGC-related claim.

A. One Year Bar

It should be noted at the outset that Ms. A-T- was found statutorily ineligible for asylum due to her having filed for asylum after one year of arrival in the U.S.[42].

The consequences of this determination were catastrophic for Ms. A-T-. Deemed statutorily ineligible for asylum, she was precluded from both humanitarian asylum under 8 CFR § 1208.13(b)(1)(iii) and the "well-founded fear of future persecution" asylum standard set forth in *INS v. Cardoza-Fonseca.*[43] Instead, Ms. A-T- was automatically limited to evaluation for withholding of removal under 8 CFR § 1208.16(b)(1) and relief under the CAT.

The Board reminded that withholding of removal bears no option to waive a showing of future harm as is possible through humanitarian asylum. "[T]he regulations do not provide for a discretionary grant of withholding of removal based on the severity of past

[42] *See* 8 CFR §1208.4(a)(4).

[43] 480 US 421 (1987).

persecution."[44] This would be confirmed in the spring of 2008, with the decision in *In Re S-A-K- and H-A-H-*.[45]

B. Rebutting the Presumption: Anomalous Outcomes and Risk of -Non-Identical Harm

In *Matter of A-T-*, the BIA also presents a dubious interpretation of the presumption of well-founded fear of future harm provided in 8 C.F.R. § 1208.13. The Board posits questionable reasoning on two counts: first, in finding that FGC can itself constitute a fundamental change sufficient to rebut the presumption of future harm, and second, in implying that an applicant must fear the identical harm as was faced in the past in order to benefit from the presumption of well-founded fear.

1. Anomalous Outcomes

As to the first point, the Board limits *Kasinga's* reach in *Matter of A-T-* by noting that, unlike Ms. Kassindja, who was fleeing FGC, Ms. A-T- has already undergone FGC and therefore is not at risk of being cut again. Without holding the government to its burden of rebutting the presumption, the Board *sua sponte* found that Ms. A-T-'s past cutting itself constitutes "changed circumstances" sufficient to rebut any presumption of future harm provided under 8 CFR §1208.16(b)(1)(i)(A). It should be noted that the same Board had once appreciated the "anomalous" result which would flow from holding that the one-time act of forced sterilization could be both persecution warranting asylum and the very change in circumstances rebutting the presumption.[46]

The BIA disingenuously asserts that Congress had carved out an exception for forced sterilization cases in the Immigration and Nationality Act (INA) in order to overcome the illogical finding of a one-time infliction of past persecution as itself constituting the "change in circumstances" that rebuts a presumption of future harm. The provisions in question, INA §101(a)(42), are referred to here as the "Coerced Population Control" (CPC) amendments, after the policies driving the practices of forced sterilization and abortion. The Board in *A-T-* implies that, had Congress similarly intended FGC to enjoy the same immunity, it would have legislated as much.

This assertion is not borne out by regulatory history. The regulations in effect at the time the CPC amendments were made to the INA did not in fact provide that a *general* change in circumstances – personal or otherwise - could rebut a presumption of future harm. Instead, in 1996, regulations only anticipated that a change in *country conditions* could rebut the presumption where past persecution had been established.[47] The operation of the presumption was only broadened in 1998, when *other* changes in circumstances, *in addition* to changed country conditions, could be used to rebut the presumption of future harm.[48] At the time it passed the CPC amendments, Congress simply had no reason to engage in regulatory or statutory gymnastics regarding whether forced sterilization would itself constitute the "change of circumstances" which would rebut the presumption established by that very harm. There is therefore nothing to deduce by Congress' failure to mention FGC in a similar amendment at the time.

2. Risk of Non-Identical Harm

Second, by fixating on whether Ms. A-T-'s past genital cutting was itself the changed circumstance which foreclosed a well-founded fear of future harm, the BIA assumed that FGC is the only harm she would face on account of her social group if returned to Mali.

The *A-T-* decision directly challenges the Eighth Circuit's finding in *Hassan*, that even if a woman did not risk being subjected to FGC a second time, she could be entitled to asylum upon the showing of other forms of persecution unless the government proved, by a preponderance of the evidence, that country conditions had changed such that this risk no longer existed.

---

[44] Matter of A-T-, 24 I. & N. Dec. 296, 301 (BIA 2007). Arguably, an applicant who is not statutorily barred from asylum and who has already suffered FGC but who fails to establish a well-founded fear of future harm can be granted humanitarian asylum due to the "severe and atrocious" nature of the persecution (FGC) she has already endured. Alternately, she can establish the likelihood of "other serious harm" which does not necessarily rise to the level of persecution and would not necessarily be inflicted on account of a protected ground. 8 CFR § 1208.13(b)(1)(iii).

[45] 24 I. & N. Dec. 464 (BIA 2008), discussed *infra* at VI.A.

[46] *See* In re Y-T-L-, 23 I. & N. Dec. at 605 (BIA 2003)

[47] *See* 8 C.F.R. § 1208.13 (1996).

[48] *See* 63 Fed. Reg. 31945 (proposed rule); 65 Fed. Reg. 76121 (1998) (final action); *see also* Qu v. Gonzales, 399 F.3d 1195, 1200-01 (9th Cir. 2005) (describing the amendment); In re Y-T-L-, 23 I. & N. Dec. 601, 604-05 (BIA. 2003) (same). On June 11, 1998, a proposed rule altering former 8 C.F.R. § 208.13 (asylum) and 8 C.F.R. § 208.16 (withholding) was published in the Federal Register at 63 FR 31945. On December 6, 2000 the rule was amended and published in the Federal Register at 65 Fed. Reg. 76121-01.

Instead, the BIA relied upon the Seventh Circuit, citing its *Oforji* decision, "… Even assuming *arguendo* that [Ms. A-T-] is a member of a particular social group who suffered past persecution, 'there is no chance that she would be personally [persecuted] again by the procedure.'"[49].

However, the benefit of the presumption is not limited to cases in which the future harm feared mirrors the past harm suffered. 8 C.F.R. § 1208.13(b)(1) provides that one is also entitled to the presumption of well-founded fear where harm would come "on the basis of the original claim."

It is illogical to find that a political dissident whose tongue was cut out could be found to have no future fear of harm on account of her political opinion, merely because she cannot again lose her tongue. Or that a man whose house is burned down on account of his tribal identity fears no future danger since that house has already been destroyed. So, too, goes the logic with FGC. Wrongly insisting that the regulations require repetition of identical harm in the future, the BIA fails to appreciate that the same characteristics which may have marked an individual for persecution in the past are presumed to mark her for continued and possibly different forms of harm in the future. The BIA did not recognize that the characteristics which marked Ms. A-T- for past FGC also mark her for other forms of gender-related harm in Mali, including forced marriage.

Not coincidentally, Ms. A-T-'s claim of forced marriage to her first cousin was summarily recast by the BIA as "arranged marriage" and dismissed as mere reluctance to uphold "family tradition" over "personal preference." The Board did not find nexus to a protected ground (Ms. A-T- had offered the social group of "young female members of the Bambara tribe who oppose arranged marriage"), and in any event did not find the forced marriage to be related to Ms. A-T-'s past persecution in the form of FGC.

C. FGC as Continuing Harm

1. *The BIA's Failure to Acknowledge FGC as Continuing Harm*

Eleven years after it acknowledged the ongoing effects of FGC in *Kasinga*, the BIA seems less sensitive to the practice's ongoing harms. In *Matter of A-T-*, the Board refused to find that past FGC constitutes ongoing harm. In so doing, it expressly rejected the Ninth Circuit's holding in *Mohammed v. Gonzales*[50], that FGC constitutes a permanent and ongoing act of persecution, for which the presumption of well-founded fear could not be rebutted.

Other circuits have yet to follow the Ninth Circuit's lead. The BIA characterized the Eighth Circuit's decision in *Hassan* as "implicitly rejecting the theory that FG[C] constitutes continuing harm such that the presumption of a well-founded fear of persecution can never be overcome."[51] However, the Eight Circuit did not render an explicit holding as to whether FGC constitutes continuing persecution. Instead, it only addressed burden-shifting upon a presumption of well-founded fear based on past FGC. In dicta, the court notes that Hassan should not be required to show risk of repeated FGC, but could assert a well-founded fear of other forms of persecution.

Outside the Ninth Circuit, the absence of affirmative circuit findings of past FGC to constitute ongoing harm makes the ruling in *Matter of A-T-* tremendously dangerous precedent regarding the outer limits of FGC as persecution. Instead of finding it to constitute ongoing harm, the Board instead compared FGC to "loss of a limb" – an injury which, though debilitating, apparently does not warrant refugee protection. Finding no threat of ongoing or future harm, the Board refused to find Ms. A-T- eligible for withholding of removal.

This analysis is disturbing, especially in light of international human rights norms finding the practice of FGC to amount to persecution, as well as the overwhelming evidence that forced genital cutting

[49] Matter of A-T-, 24 I. & N. Dec. 296, 299, *citing* Oforji v. Ashcroft, 354 F.3d 609, 615 (7th Cir. 2003). It should be noted that the BIA takes this quote out of context. The original sentence in the *Oforji* decision reads: "Oforji… had already undergone FGM before entering this country, thus there is no chance that she would be personally tortured again by the procedure when sent back to Nigeria." The Seventh Circuit was discussing not Ms. Oforji's asylum claim, which was denied primarily due to an adverse credibility finding, but her CAT claim. The court was understandably unmoved by Ms. Oforji's past FGC because a showing of past torture simply does not give rise to a presumption of future torture in a CAT claim, as the presumption permits in the asylum or withholding context. Therefore, the BIA's attempt to draw support from the *Oforji* decision is misleading – the Seventh Circuit was not addressing whether Ms. Oforji's past cutting was the change in circumstances which rebutted a presumption of future harm. There was no such argument under consideration in the Seventh Circuit's CAT analysis.

[50] 400 F.3d 785 (9th Cir. 2005).

[51] Hassan v. Gonzales, 484 F.3d 513 (8th Cir. 2007),

typically causes myriad medical and psychological damage to women throughout their lives.[52]

2. *FGC & Forced Sterilization - The BIA's Attempt to Distinguish Between "Ongoing Harms"*

Similarly troubling about the Board's analysis is its awkward attempt to distinguish FGC from forced sterilization / abortion – which it found to constitute ongoing harm in *In Re Y-T-L.*[53] Only four years earlier in *Y-T-L-*, the Board had considered whether asylum applicants who had suffered forced sterilization under China's CPC policies were eligible for asylum even though the harm they had suffered, by nature, generally could not be repeated. The BIA found that,

> The act of forced sterilization should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life…[54]

In so finding, the BIA deemed that individuals who had undergone forced sterilization suffered continuing persecution, despite the fact that, like FGC, the persecutory act would not likely be repeated in the future. Such an ongoing harm was sufficient to overcome any charge that the sterilization's occurrence constituted a fundamental change in circumstances under 8 CFR §1208.13(b)(1)(ii).

The BIA's findings about FGC in *Matter of A-T-* contravene the logic of *Y-T-L-* in that FGC is a continuing act of persecution that deprives a woman of her rights to bodily integrity, sexual autonomy, and freedom from avoidable reproductive complications. Moreover, though absent from the factual record in *A-T-*, there are recent findings by the WHO that FGC increases the risk of childbirth complications and infant mortality.[55] The practice is in every way, as persecutory – if not more – as forced sterilization under CPC policies.

3. *The BIA's Misrepresentation of Congressional Intent*

So now, with no logical distinction between the permanently persecutory nature of forced sterilization and FGC, the BIA held in *Matter of A-T-* that its reading of the regulations governing "changed circumstances" is compelled by statute. The BIA found that amendments made to IIRAIRA in 1996 established that, "persons who suffered [forced sterilization] have been singled out by Congress as having a basis for asylum in the 'refugee' definition of Section 101(a)(42) of the Act *on the strength of the past harm alone*."[56] The Board implies in *Matter of A-T-* that, in creating an explicit statutory provision that victims who had been subjected to forced sterilization or abortion under CPC measures, Congress intended to distinguish this harm as uniquely "ongoing" despite its one-time execution. [57] "While FGM is similar to forced sterilization in the sense that it is a harm that is normally performed only once but has ongoing physical and emotional effects," Board Member Filppu reasons, "Congress has not seen fit to recognize FGM (or any other specific kind of persecution) in similar fashion with special statutory provisions."[58]

This characterization of the statutory intent is disingenuous at best. In reality, the legislative history behind the INA §101(a)(42) amendment in 1996 clearly shows that the special provision for CPC-based persecution had nothing to do with either the severity or continuing nature of forced sterilization or abortion. Rather, the amendment to the INA was intended to remedy a problem which was emerging in forced sterilization cases around the country – the inability of Chinese asylum applicants to show the requisite nexus between the persecution they had suffered and a protected ground. Because of binding BIA precedent in *Matter of Chang*,[59] immigration judges around the country consistently characterized forced sterilizations in China as generalized population control policies – however distasteful – and not being motivated by any particular characteristics or political opinions possessed by the asylum applicant.

The Committee Reports on Immigration in the National Interest Act 1995 confirm that the proposed amendment to Section 601 of the Immigration and Nationality Act was aimed at resolving the "nexus"

---

[52] A recent study by the World Health Organization found that, in addition to detrimental consequences already known such as bleeding, abscesses, keloid scarring, pregnancy complications, and significant sexual and psychological distress, there is a high correlation between certain types of FGM and infant mortality. See "Female genital mutilation and obstetric outcome: WHO collaborative and prospective study in six African countries." *The Lancet*, 2006; 367:1835-1841

[53] 23 I. & N. Dec. 601 (BIA, 2003).

[54] 23 I. & N. Dec. 601, 607 (BIA, 2003).

[55] *ibid*.

[56] Matter of A-T-, 24 I. & N. Dec. 296, 300 (BIA 2007) (emphasis added).

[57] *See* IIRAIRA amendment to 8 U.S.C. § 1101(a)(42).

[58] Matter of A-T-, 24 I. & N. Dec. 296, 300 (BIA 2007).

[59] 20 I. & N. Dec. 38 (BIA 1989).

issue for victims of China's Coercive Population Control measures:

> The primary intent of section 522 is to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-*. These decisions, which are binding on all immigration judges and INS asylum and refugee officers, hold that a person who has been compelled to undergo an abortion or sterilization, or has been severely punished for refusal to submit to such a procedure, cannot be eligible on that basis for refugee or asylee status unless the alien was singled out for such treatment on account of factors such as religious belief or political opinion …
>
> The Committee believes that the BIA's rationale for these opinions that policies of coercive family planning are 'laws of general application' motivated by concerns over population growth, and thus are not 'persecutory' is unduly restrictive.[60]

When later presenting the Conference Report to the House of Representatives, Congressman Smith (D - NJ) explained that, "…section 601(a)(1) … will restore an important human rights policy that was in force from 1986 until 1994. It would simply provide that forced abortion, forced sterilization, and other forms of persecution for resistance to a coercive population control program are 'persecution on account of political opinion' within the meaning of U.S. refugee law."[61]

Curiously, the BIA itself had appreciated the legislative intent behind the CPC provisions in the *Y-T-L* decision only four years prior:

> In the long course of administrative rulings, Presidential directives, proposed regulations, and congressional action that has marked the consideration of asylum claims based on coerced sterilization, the profound and permanent nature of such harm has rarely, if ever, been called into question. The principal issue of contention, rather, was *whether such harm was on account of a ground protected under the Act*…. Congress has definitively answered that question…[62]

Even more curiously, the same Board Member responsible for *Matter of A-T-'s* distinction between Ms. A-T-'s FGC (not continuing harm) and forced sterilization (continuing harm), had in fact dissented in *Y-T-L*. Board Member Lauri Filppu had argued in *Y-T-L-* that, contrary to the majority's assertion, there was no statutory justification for finding forced sterilization or abortion to constitute the "permanent and continuing act of persecution."[63] This seems to contradict the decision he drafted in *Matter of A-T-*, which emphatically distinguishes forced sterilization as the only non-recurring, but continually harmful, act of persecution Congress has deemed an on-going harm.

Additionally, circuit courts have roundly acknowledged that the purpose of amending section 1101(a)(42) was to remedy the result of *Matter of Chang*.[64] The Ninth Circuit had already addressed and rejected the BIA's assertion of congressional purpose in *A-T-* to justify differential treatment in CPC and FGC cases. [65]

Moreover, there was no need to enact a statutory provision acknowledging FGC as a form of persecution with ongoing consequences. Congress was well-aware that the BIA itself had given asylum applicants this finding, in its 1996 *Kasinga* decision.

D. Inconsistency of Agency Decisions

In finding that the harm Ms. A-T- has faced on account of her past FGM is not ongoing, the BIA has contravened its own decisions. As recently as 2003 and 2005, the BIA held that the act of FGC cannot itself be the "change in circumstances" anticipated by 8 C.F.R.§1208.13(b)(1)(ii) which rebuts the presumption of well-founded fear of future harm in an asylum context. In at least two unpublished decisions, the BIA found this argument to be an unsoundly "narrow outlook."[66] It instead applied the "continuing

---

[60] 104 H. Rpt. 469. March 4, 1996. Immigration in the National Interest Act of 1995. Committee Reports. 104th Congress, 2nd Session (referring to Matter of Chang, 20 I. & N. Dec. 38 (BIA 1989); Matter of G-, 20 I. & N. 764 (BIA 1993)). *See also* Zheng v. INS, 44 F.3d 379 (5th Cir. 1995); Chen v. Carroll, 48 F.3d 1331 (4th Cir. 1995).

[61] 142 Cong Rec H 11054. (Congressional Record -- House. Wednesday, September 25, 1996. 104th Congress 2nd Session. Vol 142, No. 134.)

[62] In re Y-T-L-, 23 I. & N. Dec. 601, 607 (emphasis added).

[63] In re Y-T-L-, 23 I. & N. Dec. 601, 608.

[64] *See* Li v. Gonzales, 405 F.3d 171, 176 (4th Cir. 2005); *see, e.g.*, Lin v. Ashcroft, 385 F.3d 748, 752 (7th Cir. 2004); Chen v. Ashcroft, 381 F.3d 221, 224-25 (3d Cir. 2004); Li v. Ashcroft, 356 F.3d 1153, 1157 (9th Cir. 2004) (en banc).

[65] *See* Mohammed v. Gonzales, 400 F.3d 785, 800 n. 22.

[66] *See* Matter of __, 27 Immig. Rptr. B1-93 (BIA. May 23, 2003) and *In Re Anon* (BIA Nov. 7, 2005.) (on file with CGRS). CGRS is happy to provide advocates with redacted copies of these unpublished decisions as well as technical

harm" doctrine to past FGC due to the practice's "permanent and continuing nature."[67] In the 2003 decision, the BIA rejected the suggestion that "the fundamental 'change' in circumstances should be viewed solely from the perspective of whether this respondent [is] at risk of being forced to undergo [female genital mutilation] again."[68]

In the 2003 decision, the BIA expressly found forced female genital mutilation to be "a *permanent and continuing act of persecution* that has permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to potential medical problems [sic] relating to this removal."[69] Importantly, the BIA concluded that, "[g]iven the pervasive nature of [female genital mutilation] . . . *the presumption of a well-founded fear of persecution is not rebutted by simply averring that the respondent cannot have further [female genital mutilation] performed upon her*."[70]

In the BIA's 2005 decision, the Board approved an IJ's analogizing of its logic in *Y-T-L-* to cases of FGC. The IJ had found that, were the applicant not time-barred, her past FGC would have rendered her eligible for asylum. The BIA found this conclusion to be "fully consistent" with *Y-T-L-*, because, like forced sterilization, past FGC should not be construed as a change in circumstances rebutting the presumption of future harm.[71]

The fact that these were unpublished decisions does not affect the fact that they indicate inconsistent and arbitrary agency decisionmaking – and show that the rejection of the "continuing harm" of FGC in *Matter of A-T-* has no solid foundation in BIA jurisprudence. In fact, the decision constitutes an unexplained and troubling departure from the agency's prior determinations. The U.S. Supreme Court has noted that where an agency has held inconsistent interpretations of a relevant provision, those inconsistent readings are entitled to considerably less deference than a consistently-held agency view.[72]

VI. CASES SINCE *A-T-*

Matter of A-T- is currently on appeal in the Fourth Circuit, as *Traore v. Mukasey*.[73]. In the meantime, CGRS has been contacted about several decisions issued by immigration judges and asylum officers around the country, in the wake of the standing *A-T-* decision. Though some cases have continued to be granted, there seems to have been widespread misapplication of the *A-T-* decision to cases involving women who have already been subjected to FGC, even those who are not statutorily barred from asylum and should have been eligible for humanitarian relief. *A-T-* has also led to the government's moving to reopen and rescind cases in which asylum had *already* been granted to women who have suffered FGC in the past, rendering any of the grants discussed below potentially vulnerable to rescission. As of this moment, the only circuit court to have decided a past FGC claim since *A-T-* was issued is the Second Circuit, which rejected the BIA's regulatory interpretation in *A-T-* [74]

A. Grants of Asylum

Shortly after the *A-T-* decision was issued, an immigration judge in Oregon adjudicated a case remanded by the Ninth Circuit, in which an Ethiopian woman was applying for asylum based, *inter alia*, on her past FGC.[75] Evidence was presented regarding the applicant's past cutting and its ongoing physical and psychological ramifications, including intense pain during intercourse, excessive tearing during childbirth, and chronic PTSD. The IJ found that *Mohammed's* finding of FGC as constituting permanent and ongoing harm controlled in the Ninth Circuit, despite the BIA's rejection of the doctrine in *Matter of A-T-*. The IJ followed *Mohammed* and found that the government could not. argue that the applicant's past cutting was the very circumstance that rendered her ineligible for

assistance on individual cases. Please contact our office at http://cgrs.uchastings.edu/ for support.

[67] *See* Matter of __, 27 Immig. Rptr. B1-93 (BIA. May 23, 2003).

[68] *See* Matter of __, 27 Immig. Rptr. B1-93, B1-94 (BIA. May 23, 2003).

[69] Matter of __, 27 Immig. Rptr. B1-93, B1-94 (BIA. May 23, 2003) (emphasis added).

[70] Matter of __, 27 Immig. Rptr. B1-93, B1-95 (BIA. May 23, 2003) (emphasis added).

[71] In Re Anon (BIA Nov. 7, 2005.) (on file with CGRS).

[72] *See* Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, n.30 (1987), *citing* Watt v. Alaska, 451 U.S. 259, 273 (1981).

[73] Case No. 07-2080

[74] Bah v. Mukasey, 2008 U.S. App. LEXIS 12507 (2d Cir., Jun. 11, 2008), discussed *infra* at VI.A.

[75] A parent-child determination was made in this case, as well, as will be discussed *infra* in section X.A.

asylum, and that it had not offered any other evidence to rebut the presumption of future harm. [76]

In Baltimore, a woman had been granted asylum in the summer of 2007 on the basis of past FGC constituting ongoing harm. Immediately after the *A-T-* decision was published, the government moved to reopen the case to revoke the asylum grant. Fortunately for the applicant, by this time, the BIA had already issued the *S-A-K- and H-A-H-* decision confirming availability of humanitarian asylum. The immigration judge denied the government's motion to reopen, finding that the applicant remained eligible for asylum due to the severe and atrocious harm she had faced, as per *S-A-K- and H-A-H-*.[77]

In June, 2007, the New York Asylum Office granted the case of a Guinean woman who had been subjected to FGC at age five. Her claim involved both the ongoing consequences of her past cutting as well as the fact that, while she was overseas studying and had not consented to being married, her family had married her off to a man twice her age who already had two wives. The applicant fled to the U.S. upon learning of the marriage *in absentia*. She birthed a daughter in the U.S. and married the child's father, adding to her fears of her daughter's fate in Guinea as well as punishment she herself would face because she married without her family's permission. The social group argued was, "Guinean Fulani women who oppose and refuse to conform to repressive gender dictates of their culture." Counsel also presented a political opinion ground, asserting that the applicant believed that men should not dominate women and that both sexes have equal rights to marry freely, to have independent careers, and to reject traditional cultural practices like FGC.[78]

A Philadelphia case involved a woman from Guinea who had undergone FGC as a child. In late 2006, she gave birth to a daughter in the U.S., prompting her fear of her daughter's fate should they be returned to Guinea, where the child would inevitably be subjected to FGC. Counsel proposed a social group of "women who have endured the procedure and as a consequence oppose it being done on their daughters." The case was granted before the immigration judge.[79]

S-A-K and H-A-H-[80]*,A-T-*'s implicit acknowledgement that humanitarian asylum was still available for women subjected to FGC who were not otherwise ineligible for asylum was made explicit a few months after the *A-T-* decision was rendered, in the BIA decision of *Matter of S-A-K- and H-A-H.* A panel including two of the three *A-T-* judges explicitly answered the question of whether a mother and daughter from Somalia were entitled to humanitarian asylum on the basis of the severe and atrocious harm visited upon them when each was subjected to FGC. After a very deliberate accounting of facts showing severe persecution, e.g., age at time of cutting, lack of anesthesia, difficulty urinating afterwards, subsequent rape by husband upon re-cutting, having to be resewn multiple times, and almost having died during childbirth, the BIA granted humanitarian asylum as to mother and daughter.

Bah v. Mukasey: [81] In a recent decision, the Second Circuit granted the petitions for review of three Guinean women who had suffered past FGC. The BIA had held that the women's past FGC itself rebutted the presumption that they would face future threats to life or freedom. The Board thus found them ineligible for withholding of removal based on their past FGC.

Remanding the cases to the BIA, the Second Circuit rejected the BIA's decisions in the women's cases, as well as the decision in *Matter of A-T-*, on the basis that these decisions erroneously applied the regulation on the presumption that arises once past persecution on account of a protected ground has been established.

Specifically, the Second Circuit held that the BIA erred by:

(a) simply assuming that FGC could not be repeated rather than holding the government to

---

[76] CGRS File # 2994. The *Mohammed* decision is currently under siege in a separate challenge, in which the DHS seeks to apply *A-T-* in the Ninth Circuit by way of National Cable & Telecomm. Assn. v. Brand X Internet Servs., 545 U.S. 967 (2005). CGRS has filed an *amicus* brief in that case.

[77] CGRS File #5324.

[78] CGRS File #5398.

[79] CGRS File #4370.

[80] 24 I. & N. Dec. 464 (2008) *(h*umanitarian asylum preserved for women already subjected to FGC).

[81] 2008 U.S. App. LEXIS 12507 (2d Cir., Jun. 11, 2008). The case formally known as Bah v. Mukasey also includes the petitions of Mariama Diallo v. DHS and Haby Diallo v. DHS, which were consolidated for disposition by the Second Circuit. CGRS was invited by the court to appear as *amicus*; a copy of our brief is of course available upon request. As in Matter of A- T-, 24 I. & N. 296 (BIA 2007), the women's asylum applications had been deemed by the IJs and BIA as time-barred. As a result of the one-year bar, the women were ineligible for humanitarian asylum based on the severity of their past genital cutting.

its burden of proving that FGC would not be repeated in each woman's individual case;
(b) requiring that the identical form of harm (FGC) be repeatable when the regulations have no such requirement and no other BIA decisions have so held; and
(c) assuming that FGC was the only form of harm that the women would face on account of their social group membership, rather than requiring the government to prove that each woman would not face future threats to life or freedom on account of her social group membership.

The Second Circuit's decision explicitly rejecting *Matter of A-T-* should affect the Fourth Circuit's review of *Matter of A-T-*. It also renews hope for women seeking asylum within the Second Circuit, and potentially across the country, based on having suffered FGC in the past.

B. Denials of Asylum

Another case before a Philadelphia immigration judge concerned a woman who had suffered FGC and whose family was threatening to subject her US citizen daughter to FGC. The attorney reported that, even though the immigration judge said she was sympathetic to the client and disagreed with *Matter of A-T-* and *A-K-*, she nevertheless felt bound by the BIA and had no choice but to deny. It seems the applicant was also found time-barred from asylum. For discussion of the parent-child aspect of the case, see section X.B, *infra*. The case is currently on appeal at the BIA.[82]

A Guinean woman who had already been subjected to Type III FGC applied for asylum at the New York Asylum Office three weeks after the *A-T-* decision was rendered. Though evidence was presented regarding the applicant's past cutting and though counsel made strong argument that her client was at least eligible for humanitarian asylum despite the *A-T-* ruling, the asylum officer referred the case to the Immigration Court.[83]

Matter of M-B-.[84], *(unpublished).* A Guinean woman applied for asylum, withholding, and CAT on the basis of past FGC (inflicted twice during childhood, because first cutting was "not well done,"). Her appeal of the immigration judge's denials was dismissed by the BIA in November of 2007. The decision sustained the immigration judge's finding that asylum was statutorily unavailable to the applicant, due to her failure to meet the one-year filing deadline. Moving on to withholding, the BIA found that, though the applicant had been cut twice as a child, she had continued to live in Guinea through adulthood without threat of further cutting and thereby dismissed the possibility raised by counsel that applicant might face additional FGC should she be returned to Guinea. The BIA noted that the applicant herself never articulated any fear of future, additional cutting.

Further, though the BIA conceded that FGC is a brutal procedure which poses ongoing harms to a woman, it nonetheless rejected the argument that the presumption of future harm under 8 C.F.R. §1208.16(b)(i)(A) was unrebutted. Instead, as in *A-T-*, the BIA found that the infliction of FGC itself constituted the "changed circumstances" which overcame the presumption. The BIA noted that, though the severity of past harm undergone by the applicant ordinarily would render her eligible for humanitarian asylum, this form of relief was unavailable in light of her late filing. This case currently is on appeal in the Second Circuit.[85]

VII. BEST PRACTICES

A. One Year Bar

An applicant filing for asylum must do so within one year of his or her arrival in the U.S. Any applications filed after the one-year deadline will only be considered if changed or extraordinary circumstances related to the delay are found by the adjudicator, and if filing was made within a "reasonable time" after the occurrence of such circumstances. INA §208(a)(2)(D), 8 U.S.C. §1158(a)(2)(D).

Clearly, it is critical to avoid filing beyond the one-year filing deadline if at all possible. Aside from being held to the higher probability standard of withholding of removal should asylum relief be precluded, an

[82] CGRS File #5422

[83] This case was not formally entered into CGRS's database through the technical assistance route. It was discussed informally over personal email with a CGRS attorney.

[84] CGRS File #5301 (one-year bar preclusion from humanitarian asylum; denial of withholding and CAT).

[85] This case also involved a parent-child argument, as well as a claim for asylum based on political opinion. The former will be discussed below in section X.B. The latter will not be addressed in this article at all.

applicant found statutorily ineligible for asylum will not have the advantage of eligibility for humanitarian asylum based on the severity of her past cutting. Only within the Ninth Circuit, where *Mohammed* controls, would past FGM be seen as a continuing harm, obviating the need to resort to discretionary humanitarian asylum under 8 CFR §1208.13(b)(1).

1. Seek Exception Based on Changed or Extraordinary Circumstances

Where an applicant has not filed within one year of arrival in the US, it is advisable to seek exception from the bar on account of changed or extraordinary circumstances, or relevant change in country conditions or personal status.[86]

Changed circumstances of particular relevance to past-FGM cases might include new risk of re-infibulation upon reaching a certain age or upon learning of family's intent to subject the applicant to such a procedure prior to marriage. The degree to which country conditions regarding protection of women from FGM might suddenly and markedly deteriorate should also be well-documented.

Defending against the one-year bar by way of "extraordinary circumstances" might include submission of evidence documenting inability to timely file due to PTSD or other incapacitation. It should be noted that women who have suffered FGC frequently suffer PTSD or related psychological trauma. Often, a victim of past FGC suffers traumatization which impedes her ability to meet asylum filing requirements. Extensive medical or psychological evaluation of FGC-related condition should be submitted to support this claim. Further, where the applicant seems to be otherwise functional in her day to day existence (as evidenced by steady employment, child-rearing, community activity, completion of training courses, etc.), these evaluations should highlight the applicant's inability to take any action related to the source of trauma, that is, coming forth to present her experiences with genital cutting – explaining how this would necessarily impede her ability to file for asylum in a timely manner.

Also, physical incapacitation of any sort – FGC related, or otherwise – should be noted, especially where it tends to impact the applicant's ability to file for asylum. Again, the evaluator should state his or her professional opinion as to the nexus between the applicant's condition and her inability to file for asylum within one year of arrival.

In either case, it should be clearly argued why the applicant filed her I-589 at the earliest time reasonable.

2. Assert Alternate Forms of Harm Where Possible

Wherever possible, alternate, non-FGC claims should be asserted on behalf of a woman barred from asylum. As discussed earlier, there is no discretionary relief for severity of past harm or risk of "other serious harm" under the regulations governing withholding of removal. As circuits outside the Ninth Circuit have not yet held past FGC to constitute ongoing harm, it is critical to assert any alternate future harms where possible, in order to obtain withholding for a woman time-barred from asylum. Corollary harms faced by women fleeing communities where FGC is practiced often include domestic violence, forced marriage, rape, and other forms of sexual violence. It is important to fully investigate an applicant's fear of these and other forms of persecution. Such an alternative claim, properly corroborated with recent country conditions information, increases the chances that an asylum-barred applicant might meet the more stringent requirements for withholding of removal.

B. Past FGC as an On-Going Harm

While the Ninth Circuit explicitly held FGC to constitute on-going harm, certain other circuits have indicated a reluctance to reach the same judgment. As discussed earlier, the Seventh and Eighth Circuits have both shied away from finding FGC to pose continual persecution. Other circuits have not yet weighed in on the theory of FGC as continuing harm.

In order to support a claim that past FGC does in fact present ongoing persecution, it is necessary to build a strong factual record that reflects all physical and psychological consequences suffered by an asylum applicant. Doing so can be a delicate matter: particular sensitivity should be exercised. It is critical to first obtain clear documentation of the applicant's past FGC – hopefully with the assistance of a sensitive medical professional who can assess upon physical examination what degree of FGC was inflicted. It is also important to gather any facts indicating subsequent physical complications recorded by medical providers – painful intercourse, menstruation, pregnancy, childbirth, etc. These physical consequences should be explored with the asylum applicant. In addition, a thorough accounting of the emotional and psychological effects of her FGC experience should be documented in her personal declaration and, wherever possible, through psychological evaluation.

[86] INA §208(a)(2)(D), 8 U.S.C. §1158(a)(2)(D).

The record should also be well-supported by medical and psychiatric literature illustrating the myriad harmful consequences of FGC and its lingering effects. Review of these publications will also help an advocate understand the areas to explore when speaking with the asylum applicant about what she continues to suffer as a result of her past FGC.

C. Past FGC and Future FGC-Related Harm

Wherever possible, it is important to identify future harms related to FGC, even for women who have already suffered the rite. For example, an applicant may be viewed by her community as being "incompletely" cut from childhood and thus risks subjections to additional cutting in her home country. Or, depending on local custom, an applicant may have a specific risk of future re-infibulation pending marriage or childbirth in her home country. It is critical to explore with an applicant whether she faces risk of additional cutting even though she has already suffered FGC. Country conditions information should be used to support findings regarding tribal or regional re-infibulation customs, where relevant.

D. Past FGC and Other Future Harm

As discussed above in the context of the one-year bar, applicants who have already suffered FGC and who are applying for asylum outside the Ninth Circuit should clearly identify any additional harms they suffer. We have noticed recurring correlations between FGC and other gender-based violence such as forced marriage, domestic violence, and other sexual abuse. Because FGC is part of a broader system of subjugation of women, it is quite likely that an applicant who has undergone FGC risks other gender-based harm in her home country based on the same characteristics or social group traits which had marked her for FGC in the past. Thorough factual investigation of an applicant's fears of return, as well as full country conditions corroboration, supported by expert testimony, is critical to present the ways in which she remains at risk for other harms on account of grounds related to the social group, political opinion, etc. motivating her past FGC.

E. Humanitarian Asylum

As discussed previously,[87] in the wake of *Matter of A-T-* and its various misinterpretations around the country, the BIA issued a clarifying decision in the *Matter of S-A-K- and H-A-H-*, confirming that humanitarian asylum was indeed still available to women who had suffered FGC and who had filed for asylum within one year of arrival.

To capitalize on this critical form of relief, one might explore both the "severe and atrocious" nature of past harm and the "other serious harm," though successful establishment of the former is likely easier and more effective. To do so, be sure to include medical documentation of the applicant's past cutting which describes the degree of FGC inflicted and any related scarring or damage to the reproductive organs. Supplement this documentation with clear accounting (both in her declaration and in oral testimony) from the applicant about what, if anything, she remembers of her cutting experience – and any physical or emotional consequences she has suffered as a result. Finally, obtain as much country conditions information about the type of cutting practiced in the applicant's tribe, community, or country as is possible to illustrate the severe nature of the FGC she suffered. Expert witness testimony should not be overlooked.

F. Nexus to Social Group

Effective social group construction is critical in all cases, and particularly so where a woman has already suffered FGC but wishes to argue that she is still at risk of future, related harm. First, successful social groups posited in FGC claims have generally consisted of characteristics such as gender, nationality, and ethnicity. For example, the Ninth Circuit found in *Mohammed* that the immutable trait of being female was a motivating factor in the subjection to FGM. Given the country conditions information pertaining to women in Somalia, it found further that the social group could be constructed in terms of gender plus a broader trait of nationality, or more narrowly with clan and tribal affiliation. The Ninth Circuit thus accepted two social group constructions in *Mohammed*: "women of the Benadiri clan who oppose the practice of FGM," and, simply, "Somali females." Similarly, in *Hassan*, the Eighth Circuit accepted the simple group construction of "Somali women."

The BIA, in *Kasinga*, had acknowledged a more specific construction: "women of Tchamba-Kunsuntu tribe who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice" to be a proper social group whose common characteristics were shared by Ms. Kassindja, and on account of which she feared persecution. Where these same characteristics make a woman vulnerable for other forms of harm aside from FGC, this should be argued clearly in terms of her well-founded fear. It is critical to articulate the individual applicant's risk of forced marriage, rape, domestic violence, etc. – all of which are arguably related to the reasons she was originally targeted for FGC.

[87] Ssection VI.A., *supra*,

Finally, it is unclear whether a woman's opposition to FGC is a helpful part of the social group to be named. In all truth, most applicants who have been cut or who fear being cut would be singled out for FGC not at all on account of their opposition to the practice, but because they were/are uncut women from a tribe or community in which FGC is commonly practiced. Opposition in most cases is not a motivating factor for those who wield the knife.

However, in terms of well-founded fear of future harm, a woman's opposition to the practice of FGC might very well be part of the reason her community will target her for harm – cutting or otherwise. She may face heightened retribution in the form of physical abuse and other violence. Or, should she maintain her opposition and somehow resist FGC upon her return, she might face severe ostracism. Country conditions research may show that ostracism in the applicant's homeland increases likelihood of rape, attack with impunity, inability to find lodging or health care, and other grave harms amounting to persecution.

VIII. *MATTER OF A-K-*: PARENT-CHILD FGC CLAIMS

A. Theories in Parent-Child FGC Claims

There are two basic theories in parent-child FGC claims. The first is that the forcible FGC of the child against the parent's will causes the parent such severe mental anguish that it constitutes persecution. Though the harms to the parent may be indirect, they are grave and include witnessing the child's pain and suffering (both in the short and long term), the possible death of the child from the procedure, the feeling of having failed as a parent and protector, having personal knowledge of the lifelong suffering caused by FGC for mothers who have undergone the practice themselves (akin to reliving their own experiences), and harm to the parent-child relationship. The forcible FGC of the child against the parent's will necessarily entail a major interference in the parent-child relationship, undermining the parent's right to make decisions about his or her child,[88] as well as the child's trust in the parent, and may irreparably harm the relationship. The decision in *Matter of A-K-* undermines this theory.

The second theory is that the harms the parent would suffer as a result of opposition to FGC and attempts to protect the child from it, such as severe ostracism or discrimination, rise to the level of persecution. Less controversial than the first, the second theory follows the quintessential asylum assertion that one will face persecution because of one's beliefs. This theory has not been undermined by *Matter of A-K-*, and whether the harm the parent fears rises to the level of persecution will depend on the facts of the case. For the purposes of this article, the discussion of parent-child FGC claims will focus on the first, more controversial theory.

The circuit courts are split on the treatment of the first theory.[89] Nonetheless, it is supported by two well-established principles in asylum law: a.) that persecution encompasses psychological harm and b.) that persecution of one's beloved family member can constitute persecution as to oneself.

With respect to the first principle, numerous federal circuits – including the First, Second, Third, and Ninth Circuits – as well as the BIA - have ruled that a finding of persecution may rest on a showing of psychological harm.[90] The United Nations High Commissioner for Refugees (UNHCR)[91] and the Asylum Office[92] also recognize that mental or

---

[88] The Supreme Court has consistently held that "the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57 (2000).

[89] *See* section VIII.B., *infra*.

[90] *See e.g.*, Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993) (noting that conduct that is "abhorrent to…an individual's deepest beliefs" can constitute persecution); Makhoul v. Aschroft, 387 F.3d 75, 80 (1st Cir. 2004) ("[A] finding of past persecution might rest on a showing of psychological harm."); Knezevic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004) (noting, *inter alia*, that persecution may come in the form of threats, harassment, or mental, emotional, and psychological harm); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004) ("Persecution may be emotional or psychological, as well as physical."); Beskovic v. Gonzales, 467 F.3d 223 (2d Cir. 2006). *See also* Matter of Chen, 20 I. & N. Dec.16 (BIA 1989) (granting humanitarian asylum based on frequent shaming, harassment, and humiliation); *c.f.* Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007) (ruling that psychological harm alone cannot establish persecution).

[91] *See* UNHCR, *Handbook on Criteria for Determining Refuge Status* at ¶56, HCR/OP/4/Eng/REV.1 (Geneva, Jan. 1979) (recommending that adjudicators consider the feelings and opinions of an applicant in evaluating whether acts, threats, or harm constitute persecution). The Supreme Court recognizes the UNHCR Handbook as guiding authority for interpreting asylum law. *See* INS v. Caroza-Fonseca, 480 U.S. 421, 437-39 n. 22 (1987).

[92] *Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*, Asylum Officer Basic Training Course, Immigration Officer Academy (2002) at 24, available at: http://www.rmscdenver.org/legal_aobtc2.html.[last accessed 08/19/2008] (instructing Asylum Officers to consider the

psychological harm can constitute persecution. Thus the mental suffering experienced by a parent when a daughter is forced to undergo FGC is the type of harm contemplated as persecution by the federal courts, the BIA, the UNHCR, and the Asylum Office. With regard to the second principle, it is also well established in asylum jurisprudence that persecution as to a beloved family member may constitute persecution as to self. This is true notwithstanding the fact that the harm to the "direct" victim may be physical, while the harm to the "indirect" victim may be psychological. This principle has been repeatedly followed by federal courts.[93] In fact, in 1997, the former INS issued a memorandum acknowledging that harm to a family member can be persecution to self.[94]

The UNHCR and international refugee case law support granting refugee status to a parent who fears the forcible FGC of his or her child against the parent's beliefs. According to the UNHCR, "a woman can be considered a refugee if she or her daughter/daughters fear being compelled to undergo FG[C] against their will; or she fears persecution for refusing to undergo or allow her daughters to undergo the practice."[95] Furthermore, parents in Canada, the United Kingdom, and Australia have been granted refugee status based on fear of their daughters being subjected to FGC.[96] U.S. jurisprudence, which shows greater reluctance to protect parents in this situation, is discussed below.[97]i

CAT Claims Based on Mental Agony to the Parent

Evidence of mental agony to the parent caused by the child's FGC may also support a claim under the CAT. The definition of torture includes either physical or *mental suffering*,[98] and under the U.S. criminal statute implementing the CAT as well as the regulations, the definition of "severe mental pain or suffering" encompasses the knowledge that another person will be subjected to "severe physical pain or suffering."[99] Moreover, U.S. courts have recognized the severe mental anguish that results from witnessing the torture of a relative.[100] CAT claims based on the parent's mental suffering caused by the child's FGC

applicant's particular psychological state in determining whether psychological harm comprises persecution to that particular applicant.).

[93] *See*, *e.g.*, Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 1998) (noting the applicant's constant state of fear and anxiety as a result of attacks and threats on her husband and son, and finding that the related economic and emotional trauma compelled a finding of persecution); Salazar-Paucar v. INS, 281 F.3d 1069 (9th Cir. 2002) (finding past persecution based on cumulative effect of beating of applicant's family members, murder of his political counterparts, and threats); Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006) (finding past persecution where several of applicant's family members were killed though applicant himself suffered no physical attack); Ahmadsah v. Ashcroft, 396 F.3d 917, 920 (8th Cir. 2005) (finding that death threat and murder of applicant's sister established past persecution); Matter of Chen, 20 I. & N. Dec. at 16 (granting humanitarian asylum, in part, based on harm to applicant's father); In re C-Y-Z, 21 I. & N. Dec. 915 (BIA 1997) (ruling that an applicant whose spouse was forced to undergo an abortion or forced sterilization procedure established past persecution).

[94] The memorandum states: "[a]n individual may suffer harm from the knowledge that another individual is harmed, particularly if that other individual is a family member. The harm may manifest itself as emotional pain from knowing that a loved-one has been harmed. The harm may be intensified if ... the applicant witnessed the harm to the family member." Joseph Langlois, Memorandum, *Persecution of Family Members*, INS Office of International Affairs (June 30, 1997).

[95] Heaven Crawley, *Women as Asylum Seekers – A Legal Handbook*, 71 Immigration Law Practitioners' Association and Refugee Action (1997).

[96] *See* Marcelle Rice, *Protecting Parents*: *Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, Immigr. Briefings, (Nov. 2004) at 9-10.

[97] Section VIII.B., *infra.*

[98] Torture can be based purely on mental suffering. *See* Niang v. Gonzales, 492 F.3d 505, 516 (Williams, J., dissenting); *see also* 8 C.F.R. §208.18(a)(1) (torture is "defined as any act by which severe pain or suffering, whether mental *or physical*, is intentionally inflicted on a person" for particular reasons "by or at the instigation of or with the consent or acquiescence of a public officials or other person acting in an official capacity.") (emphasis added). the intentional infliction of severe physical *or mental* pain or suffering) (emphasis added); 8 C.F.R. §208.18(a)(4) (prolonged mental pain or suffering can constitute torture).

[99] *See* 18 U.S.C. §2340(2)(D) (2004) (defining "severe mental pain or suffering" to include "prolonged mental harm caused by or resulting from[…] "the threat that another person will imminently be subjected to death [or] severe physical pain or suffering[.]"); 8 C.F.R. §1208.18(a)(4)(iv) (same).

[100] *See* Marcelle Rice, *Protecting Parents: Why Mothers and Fathers who Oppose Female Genital Cutting Qualify for Asylum*, Immigration Briefings, (Nov. 2004) at p. 10, discussing court decisions granting damages under the Alien Torts Act and the Torture Victims Protection Act to plaintiffs who had witnessed torturous acts to their family members.

present a challenge, however, because the regulations require that the torture be intentionally inflicted.[101]

Whether the intent element can be established in a parent-child CAT claim depends largely on whether the circuit court in which the case arises requires a showing of specific or general intent to inflict torture. To establish general intent, one might argue, for example, that the incredible agony experienced by the parent upon the child's FGC is a foreseeable consequence of forcibly cutting the child against the parent's will. The parent's suffering is particularly predictable in cases of mothers who have themselves undergone FGC and have firsthand knowledge of the myriad harms their daughters can expect to suffer.

The intent element hamstrings the viability of parent-child CAT claims in jurisdictions requiring specific intent. However, in cases of a parent's vocal opposition to the practice, there may be an argument that FGC is inflicted on the child in order to punish the parent for repudiating prescribed gender roles and social norms. Depending on the country conditions evidence presented, the element of specific intent may be fulfilled.

B. Overview of Circuit Court Decisions Issued Prior to *In re A-K-*:

The Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have issued divergent, published decisions on the theory that the child's FGC constitutes persecution to the parent. Only one federal court has considered the theory that ostracism for opposing FGC establishes persecution.

Some of these circuits have misconstrued parent-child FGC claims as claims for "derivative asylum." Under the INA, an individual granted asylum can confer derivative status on a spouse or child,[102] but the statute does not provide for a child to confer status on a parent. The categorization of parent-child claims as "derivative" is based on an erroneous conception that the parent does not suffer harm that is personal to herself, but rather, tries to derive relief through her daughter's claim. A more accurate analysis focuses on the parent's own experience of opposing FGC while facing two equally grim prospects of either being unable to prevent its infliction on her daughter – causing the parent grave distress - or being shunned by society for her attempts to do so. Both consequences may rise to the level of persecution, thereby entitling a parent to asylum in his or her own right.

1.Seventh Circuit – Hostile to Parent-Child Claims

The Seventh Circuit, in a series of decisions, has taken a forceful, albeit questionable, position against the theory that the child's FGC constitutes persecution to the parent.

Nwaokolo v. Ashcroft, *Positive First Steps:* In *Nwaokolo v. Aschcroft*,[103] the first Seventh Circuit decision on parent-child FGC claims, the court appeared to be open to the theory. Ms. Nwaokolo, a Nigerian woman whose applications for relief and whose three Motions to Reopen had been denied previously, filed a fourth one to apply for protection under the CAT based on her fear that she and her then four year old U.S. citizen daughter would be subjected to FGC if forced to return to Nigeria. The BIA denied Ms. Nwaokolo's motions. She filed a petition for review and requested a stay of removal pending the decision on her petition.

The court took judicial notice of country conditions information indicating the high prevalence rate of FGC throughout Nigeria, and found that the BIA had not properly considered the threat of FGC to Ms. Nwaokolo's youngest daughter. Finding that Ms.

---

[101] "Any act by which severe pain or suffering, whether mental or physical is *intentionally inflicted on a person*[.]" 8 CFR §208.18(a)(1). Whether the intent element is satisfied in this type of claim hinges on whether courts apply a specific intent standard versus a general intent – or foreseeable consequences of one's actions - standard. The 2d Circuit recently held that the CAT requires that the intent be specific. *See* Pierre v. Gonzales, 502 F.3d 109 (2d Cir. 2007). Meanwhile, the 8th Circuit has held that the intent requirement is satisfied if "prolonged mental pain or suffering either is purposefully inflicted or is the foreseeable consequence of a deliberate act." *See* Habtemicael v. Aschcroft, 370 F.3d 774, 782 (8th Cir. 2004). Recently, the 3d Circuit, after initially supporting the foreseeable consequences standard (Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003)) and later backtracking and requiring a specific intent (Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005)), recently issued a decision that implicitly recognizes the foreseeable consequences standard (Lavira v. Attorney General, 478 F.3d 158 (3d Cir. 2007)). While the 9th Circuit has not yet ruled on a parent's eligibility for protection under the CAT when he or she fears his or her child's FGC, its decision in Azanor v. Ashcroft, 364 F.3d 1013 (9th Cir. 2004) indicates its support for the theory and thus for the foreseeable consequences standard of intent.

[102] Under INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A): "a spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."

[103] Nwaokolo v. INS, 314 F.3d 303 (7th Cir. 2002).

Nwaokolo had a better than negligible chance of success on the merits, the standard for a stay in the Seventh Circuit, the court granted the stay of removal, indicating some support for the parent-child theory, and ordered further briefing on the merits of the underlying CAT claim. Importantly, the court recognized that Ms. Nwaokolo's then four year-old daughter would "have no choice" but to return to Nigeria with her mother, though the child was a U.S. citizen and was legally entitled to remain in the U.S.[104] While Ms. Nwaokolo herself had not yet undergone FGC and feared the practice for her herself in addition to her daughter, this factor does not entirely explain the court's decision. Rather the Seventh Circuit's discussion of the BIA's errors focuses almost entirely on its failure to consider the threat of FGC to Ms. Nwaokolo's daughter should Ms. Nwaokolo be forced to return to Nigeria.

Oforji v. Aschcroft, *Backtracking: Characterizing Parent-Child Claims as Derivative and Denying Relief:* Just one year later, in *Oforji v. Ashcroft*,[105] the Seventh Circuit took a very different position, holding that "an alien parent who has no legal standing to remain in the U.S. may not establish a derivative claim for asylum by pointing to potential hardship to the alien's U.S. citizen child in the event of the alien's deportation." [106] The court characterized the parent-child claim as "derivative" and found no basis in law for a derivative CAT claim. Additionally, the court held that Ms. Oforji had failed to establish that she would be tortured in Nigeria.[107]

The Seventh Circuit found no reason that the daughters could not stay with their father, ignoring the fact that he was not legally in the U.S. and thus could not ensure their ability to remain. The court concluded that hardship to a child that would result from his or her parents' deportation could only be considered when the child faces "constructive deportation." Citing to a suspension of deportation case where it had found that a non-citizen child would have been deported along with his parents and thus hardship to the child should have been considered by the agency, the court limited claims of "constructive deportation" to the suspension of deportation and cancellation of removal contexts.[108] The court then noted that hardship to U.S citizen children is a consideration also limited to suspension of deportation[109] and cancellation of removal cases, distinguishable from the asylum context.

Limiting the doctrine of constructive deportation to the suspension of deportation/cancellation of removal context is unsound: the question of whether a child will be constructively deported should depend on the facts of the underlying case, not the type of relief being sought. U.S. and international policies in support of family unity, rather than the form of relief pending, should dictate when and whether to assume that a child will be constructively deported along with her parents.

The court distinguished Ms. Oforji's case from *Nwaokolo*, where it had assumed that the child would follow her mother, on the basis that Ms. Nwaokolo was eligible for cancellation of removal, unlike Ms. Oforji. This distinction is dubious. *Ms. Nwaokolo had applied for protection under the CAT, not cancellation of removal*, and the court granted her a stay under the parent-child FGC theory. Moreover, the daughters in *Nwaokol*o were U.S. citizens and hence had the same right to remain in the U.S. as the daughters in *Oforji*; yet unlike *Oforji*, the Seventh Circuit had assumed that Ms. Nwaokolo's daughter would return to Nigeria with her.

Because the court focused only on the harm to the child, which it declined to consider outside of the cancellation context, it failed to address the harm to Ms. Oforji that her daughters' FGC would cause. In addition, the court denied Ms. Oforji's claim because she had already been victimized by FGC and hence could not "personally" be tortured by it again.[110] This aspect of the decision is flawed as it reads elements that do not exist into the CAT – that torture must be physical and that the harmful act must be inflicted directly on the applicant's person. Both of these requirements contravene the federal regulations on the CAT, which recognize both mental and physical suffering, and under which torture can be established based on knowledge of another person's severe pain or suffering.[111] However, as discussed previously,[112] whether the intent element of the CAT can be established in a parent-child claim will depend on the

---

[104] Nwaokolo v. INS, 314 F.3d 303, 309 (7th Cir. 2002).

[105] Ofori v. Ashcroft, 354 F.3d 609 (7th Cir. 2003).

[106] Ofori v. Ashcroft, 354 F.3d 609, 618 (7th Cir. 2003).

[107] *See* section III.C.3, *supra*.

[108] Salameda v. INS, 70 F.3d 447 (7th Cir. 1995).

[109] Formerly available under INA §244(a), hardship to the alien himself, as well as hardship to the alien's U.S. citizen or lawful permanent resident spouse, parent, or children are relevant factors in suspension of deportation cases.

[110] Ofori v. Ashcroft, 354 F.3d 609, 615 (7th Cir. 2003).

[111] 8 C.F. R. §208.18(a).

[112] Section VIII.A., *supr*a.

particular circuit court's definition of intent, as well as the country conditions evidence presented.

Olowo v. Ashcroft,* Expanding the Reach of *Oforji: Following *Oforji*, in *Olowo v. Ashcroft,*[113] Ms. Olowo applied for asylum and withholding of removal based on her fear that her two young daughters, lawful permanent residents, would be subjected to FGC in Nigeria. Ms. Olowo herself had undergone FGC at the age of twelve. The Seventh Circuit characterized the claim as derivative and reiterated its position in *Oforji* that derivative asylum only applies where the child faces constructive deportation along with the parent. The court found that because Ms. Olowo's daughters and husband were lawful permanent residents, the girls could remain in the U.S. with their father and so the claim failed. In *Oforji*, the court had attempted to limit constructive deportation to the cancellation of removal/suspension of deportation contexts, whereas the in *Olowo* the court's perspective on constructive deportation was determined by the facts of the case, not the type of relief sought. The court, in *Olowo*, found that because one parent could remain in the U.S., the child would not face constructive deportation, implying that a child who has no parent in the U.S. with whom to stay would be constructively deported.

While the court's approach to constructive deportation marked a positive development following *Oforji*, its treatment of claims based on harm to family members signaled a further retreat for parent-child FGC cases. The court, in *Olowo*, ruled that a well-founded fear of persecution "does not encompass any consideration of persecution that may be suffered by others – *even family members*."[114] The court was correct that to establish a well-founded fear of persecution Ms. Olowo would have had to show persecution to herself, but its failure to consider harm to family members when determining persecution to the applicant runs counter to established precedent from the Seventh Circuit, as well as other circuit courts.[115]

The court did not stop at denying Ms. Olowo's claim; rather, it went so far as to order the clerk to inform the county child welfare department that Ms. Olowo intended to take her daughters to Nigeria, despite her knowledge that FGC would be inflicted on them. *Olowo* effectively terminates parent-child FGC claims in the Seventh Circuit that are based on the theory that the child's FGC constitutes persecution to the parent.

2. Sixth Circuit – Jurisprudence of Protection

The most positive decision to date on parent-child FGC claims is the Sixth Circuit's *Abay v. Ashcroft,*[116]in which the Court found Ms. Abay eligible for asylum based on her fear of FGC being inflicted on her daughter. Ms. Abay, an Ethiopian woman who had been subjected to FGC as a child, and her daughter, Amare, filed for asylum on the basis that Amare would either be forcibly cut in Ethiopia, or would face extreme ostracism for rejecting the custom. Rather than characterizing Ms. Abay's claim as derivative, the Sixth Circuit understood that Ms. Abay claimed asylum "in her own right," based on the harm *to Ms. Abay* that the female genital cutting of Amare would cause.[117]

The court first considered Amare's claim for asylum and determined that she had a well-founded fear of FGC, or of facing societal ostracism rising to the level of persecution for refusing to comply with the practice.[118] This aspect of the decision supports the theory that harms to the parent because of his or her resistance to the child's FGC can establish persecution.

Next the court considered Ms. Abay's claim for asylum and found authority to grant her protection in cases finding persecution based on harm to family members, as well as IJ and BIA grants in parent-child FGC cases. The Sixth Circuit determined that there was a "governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm."[119] It recognized that for Ms. Abay, who had undergone FGC herself and intimately understood the consequences of the practice, "being forced to witness the pain and suffering of her daughter" caused by FGC

[113] Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004).

[114] Olowo v. Ashcroft, 368 F.3d 692, 701 (7th Cir. 2004) (emphasis added).

[115] *See e.g.*, Tamas-Mercea v. Reno, 222 F.3d 417, 423-24 (7th Cir. 2000) (finding no persecution to the applicant based on the facts of the case, indicating support for the theory that harm to a family member can never establish persecution to self); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 1998); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1045-46 (9th Cir. 2007); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006).

[116] 368 F.3d 634 (6th Cir. 2004).

[117] Abay v. Ashcroft, 368 F.3d 634, 641 (6th Cir. 2004).

[118] Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004).

[119] Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004).

would be persecution and granted her asylum on that basis.[120]

Amare was not a U.S. citizen and thus theoretically would have had to return to Ethiopia with her mother, unlike the U.S. citizen daughters in *Oforji* and *Olowo*. However, once the court granted Amare asylum, she was entitled to remain in the U.S. The court could have ruled that because Amare was entitled to stay in the U.S. as an asylee she would not be constructively deported along with her mother. Instead, by determining that Ms. Abay was a refugee *after* it had found Amare eligible for asylum, the court implicitly recognized that children are dependent on their parents and will follow them, regardless of legal status and legal right to remain in the U.S.

3. Fourth Circuit – Departing from Established Principles

In June 2007, the Fourth Circuit issued a decision in *Niang v. Gonzales*,[121] upholding the BIA's denial of withholding of removal to Ms. Mame Fatou Niang, a Senegalese mother who had suffered FGC as a child, and who feared that FGC would be forced on her young U.S. citizen daughter if returned to Senegal. The IJ held that Ms. Niang's application for asylum was time barred. He then denied her withholding of removal claim, which he characterized as a claim based solely on her fear for her daughter's safety, not her own. The BIA upheld both aspects of the decision.

On appeal before the Fourth Circuit, Ms. Niang argued that she should qualify for withholding of removal either because of the psychological harm that her daughter's FGC would cause her or as a derivative of her daughter – based on the persecution her daughter would suffer in Senegal. She did not challenge the BIA's one-year-bar determination. The court rejected both claims and announced a new, *per se* rule that psychological harm without "accompanying physical harm" cannot establish persecution.[122] This ruling contravenes precedent from numerous circuit courts and the BIA, which hold that persecution determinations must be made on a case-by-case basis [123] and that persecution need not be physical in nature.[124]

Once the court held that persecution could not be based on non-physical harm, the profound anguish that Ms. Niang would suffer upon her daughter's FGC could not constitute persecution. The court's ruling that persecution must be physical in nature applies equally to asylum and withholding of removal claims, despite the fact that Ms. Niang's claim was for withholding of removal only. The Fourth Circuit also rejected the "derivative" claim, finding no statutory basis to grant derivative withholding of removal.

Niang dealt a major blow to parent-child FGC claims in the Fourth Circuit, because unless a parent can demonstrate physical harm in addition to psychological harm, he or she cannot base a claim for protection on the fear that his or her child would face FGC, or that he or she would be ostracized for trying to protect the child.[125]

4. The Ninth and Eighth Circuits – Seemingly Open to Parent-Child FGC Claims

---

[120] Abay v. Ashcroft, 368 F.3d 634, 642 (6th Cir. 2004).

[121] 492 F.3d 505 (4th Cir. 2007)

[122] Niang v. Gonzales, 492 F.3d 505, 512 (4th Cir. 2007).

[123] *See* Menghesha v. Gonzales, 450 F.3d 142 (4th Cir. 2006) (using a fact specific inquiry to reverse the IJ's finding of no persecution); Manzoor v. U.S. Dept. of Justice, 254 F.3d 342, 346 (1st Cir. 2001) (citing Aguilar-Solis v. INS, 168 F.3d 565, 570 (1st Cir. 1999) ("Courts make case-by-case determinations of what constitutes a well-founded fear of persecution within . . . 'broad margins.'"); Hong Yan Huang v. Gonzales, Slip Copy, 2007 WL 1314487 (2d Cir 2007) ("The difference between harassment and persecution is 'necessarily one of degree that must be decided on a case-by-case basis.'") (citing Ivanishvili v. U.S. Dept. of Justice, 433 F.3d 332, 341 (2d Cir. 2006)); Singh v. INS, 94 F.3d 1353, 1359 (9th Cir. 1996) ("[W]hether discrimination, harassment, or violence . . . is sufficiently offensive to constitute persecution . . . must be decided on a case-by-case basis.").

[124] *See* Chen v. INS, 195 F.3d 198 (4th Cir. 1999) (finding that economic deprivation can constitute persecution under the Act if it rises to the level of 'deliberative imposition of substantial economic disadvantage' (citing Borca v. INS, 77 F.3d 210, 215-216 (7th Cir. 1996)); Li v. Gonzales, 405 F.3d 171, 179 at footnote 5 (4th Cir. 2005) (stating that, "from our discussion of persecution via economic penalties**,** it is obvious that persecution does not always involve physical force or restraint"). *See also* Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993) (noting that conduct that is "abhorrent to…an individual's deepest beliefs" can constitute persecution); Makhoul v. Aschroft, 387 F.3d 75, 80 (1st Cir. 2004) ("[A] finding of past persecution might rest on a showing of psychological harm."); Knezevic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004) (noting, *inter alia*, that persecution may come in the form of threats, harassment, or mental, emotional, and psychological harm); Mashiri v. Ashcroft, 383 F.3d 1112, 1120 (9th Cir. 2004) ("Persecution may be emotional or psychological, as well as physical.").

[125] A parent in the Fourth Circuit could still base a claim for protection on the harm that he or she would face for opposing FGC – provided that the harm would not be purely psychological.

a. **Ninth Circuit**

The Ninth Circuit, while yet to rule on the merits of an asylum or CAT claim based on the parent-child theory, has recognized its validity in both *Azanor v. Ashcroft*[126]and *Abebe v. Gonzales*.[127]

Azanor v. Ashcroft: After being denied asylum on other grounds in her first case, Ms. Azanor filed a Motion to Reopen based on her fear that her U.S. citizen daughter would be subjected to FGC in Nigeria if they were forced to return. The BIA denied the motion, finding it untimely for the asylum case and denying it as to the CAT claim based on Ms. Azanor's failure to show that she would be tortured while in the custody of a government official.

On appeal, the Ninth Circuit held that the BIA had abused its discretion to the extent that it required that the torture be conducted while in the custody of a public official.[128] The DHS argued that, notwithstanding the abuse of discretion, the BIA's error was not material because the Seventh Circuit had already analyzed and rejected the merits of such a claim in *Oforji* and because Ms. Azanor's daughter could remain in the U.S. The Ninth Circuit found the error to be material and remanded to the BIA to consider Ms. Azanor's CAT claim under the correct legal standard. Its remand signifies the court's implicit acceptance of the parent-child theory and of the fact that Ms. Azanor's U.S. citizen daughter would return to Nigeria with her mother and risk subjection to FGC.

Abebe v. Gonzales: The year after issuing its decision in *Azanor*, the Ninth Circuit again signaled its support for the parent-child FGC theory in *Abebe v. Gonzales*. Mr. Sisay Mengistu and Ms. Almaz Abebe, Ethiopian parents of a U.S. citizen daughter, requested asylum before an IJ based, *inter alia*, on their fear that their daughter would be forcibly subjected to FGC in Ethiopia. Ruling that the imposition of FGC on their daughter was not a reasonable possibility, the IJ denied asylum. The BIA summarily affirmed the decision and the Ninth Circuit upheld the BIA's determination. The couple then filed a petition for rehearing *en banc* of the Ninth Circuit decision denying their petition.

An *en banc* panel granted the petition, ruled that the couple had a well-founded fear that their daughter would be subjected to FGC in Ethiopia, vacated the portion of the IJ's decision to the contrary, and remanded the case to the BIA to consider the parents' eligibility for asylum on this basis, on which neither the IJ nor the BIA had ruled. This decision, which was issued *after Oforji* and *Olowo*, indicates the Ninth Circuit's support for the parent-child persecution theory.[129] Critically, as in *Abay* and unlike *Oforji* and *Olowo*, the court understood that the applicants' U.S. citizen daughter would necessarily follow her parents to Ethiopia if they were forced to return, regardless of her own legal ability to stay in the US.

b. Eighth Circuit

The Eighth Circuit's May 2007 decision in *Hassan v. Gonzales*[130] also indicates support for parent-child FGC claims. Ms. Hafza Hassan, a Somali citizen, applied for asylum based on fear of persecution because of her inter-clan marriage. The IJ rejected this claim, but granted asylum based on a *sua sponte* determination that Ms. Hassan's U.S. citizen daughters would be subjected to FGC in Somalia. The government appealed the IJ's ruling. The BIA remanded the case to the IJ for development of the record and factual findings with respect to the parent-child claim.

On remand and following a change of venue, Ms. Hassan filed a new application for asylum based, *inter alia*, on her past FGC and her fear that her U.S. citizen daughter would be forced to undergo the practice in Somalia. The IJ rejected her claim regarding her daughter's FGC, finding that the U.S. citizen daughter could remain in the U.S. with her father who was an asylee. The BIA affirmed and Ms. Hassan appealed to the Eighth Circuit.

By the time the case was heard, the father's asylum status had been revoked and he had been ordered removed. The court found that Ms. Hassan's past FGC should entitle her to a grant of asylum and it remanded to the BIA to consider the merits of Ms. Hassan's fear of her daughter's FGC.[131]

---

[126] Azanor v. Aschcroft, 364 F.3d 1013 (9th Cir. 2004).

[127] Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005) (en banc).

[128] The Court found that the BIA's "terse" rejection of the CAT claim did not "disclose whether it relied on the erroneous state custody requirement" and it remanded to the agency to evaluate the CAT claim under the correct legal standard. *See* Azanor v. Ashcroft, 364 F.3d 1013, 1021 (9th Cir. 2004).

[129] Judge Tallman, dissenting, disapproved of the court's remand which he worried "implicitly assumes that parents of United States citizen children are nonetheless entitled to claim derivative asylum relief based on the possibility that their citizen child would be subjected to FG[C]." *See* Abebe v. Ashcroft, 432 F.3d 1037, 1048 (9th Cir. 2005).

[130] 484 F.3d 513 (8th Cir. 2007).

[131] Hassan v. Gonzales, 484 F.3d 513, 518-519 (8th Cir. 2007).

The court's remand is a significant statement of the state of the law on parent-child claims in the Eighth Circuit. Furthermore, as in *Abay*, *Abebe*, and *Azanor*, the Eighth Circuit accepted as a given that Ms. Hassan's daughter, though a U.S. citizen, would realistically be forced to return to Somalia with her parents.

5. *The Fifth and Eleventh Circuits – Unpublished, Unfavorable Decisions*

The Fifth and Eleventh Circuits have issued unpublished denials of parent-child FGC claims. While carrying no precedential weight, the decisions may indicate how these circuits would rule on the issue.

a. Fifth Circuit

In the Fifth Circuit's decision, *Osigwe v. Ashcroft*,[132]the court upheld the BIA's denial of asylum, withholding of removal, and CAT to a couple who feared their daughter's FGC in Nigeria. Providing no analysis whatsoever, the court found the Osigwes "ineligible for asylum under the general asylum provisions," as well as for protection under the CAT.[133] The only authority cited for this aspect of the decision is *Jukic v. INS*,[134] a 1994 case of a Croatian man who feared persecution for having evaded a draft notice. *Jukic* is based neither on persecution to a family member, nor on the argument that mental anguish constitutes persecution. The petitioner in that case had failed to meet his burden of proving a well-founded fear of persecution and instead had asserted only a general allegation of fear. Whether the Fifth Circuit denied the Osigwes' claim for similarly failing to present evidence that their daughter would be subjected to FGC in Nigeria is unclear.

Osigwe was issued prior to both *Oforji* and *Abay*, and thus did not treat those decisions. The fact that the *Osigwe* decision is both unpublished and provides no reasoning makes it difficult to predict where the Fifth Circuit stands on this type of claim.

b. Eleventh Circuit

In *Axmed v. Gonzales*,[135] the Eleventh Circuit upheld the BIA's denial of a Somali woman's Motion to Reopen to apply for CAT relief based on her fear that her U.S. citizen daughter would suffer FGC in Somalia. Ms. Axmed's asylum application had been denied based on an adverse credibility finding. The Eleventh Circuit's decision rested on a procedural issue - failure to timely file - as well as the merits itself –failure to establish a prima facie case for relief under the CAT.

The court, which had not previously considered a parent-child FGC claim, relied on other circuits to reach its decision. Citing to *Oforji* and *Azanor* for the proposition that a parent who is ineligible for protection in her own right cannot base a claim on the potential harm a U.S. citizen child would suffer in the parent's country of removal, the court denied relief.

However, the court completely mis-cited *Azanor*. In *Azanor*, the Ninth Circuit did not reach the merits of the parent-child issue and instead remanded the mother's CAT claim to the BIA to consider the proper legal standard. While the Ninth Circuit cited to *Oforji*, it was only recanting the government's argument, which the court explicitly declined to address. *Axmed* provides a window into the Eleventh Circuit's position on parent-child FGC claims, despite its unpublished nature and misuse of *Azanor*, because the decision cites to *Oforji*, but fails to consider or even mention the more favorable *Abay* decision, which had been issued over a year prior to *Axmed*.

C. BIA decisions on parent-child FGC claims prior to *A-K-*

Prior to the *A-K-* decision, the BIA had taken a much more favorable approach to parent-child FGC claims.

In an unpublished decision in 2001, *Matter of Dibba*,[136] the BIA granted a Gambian mother's motion to reopen based on her fear that her U.S. citizen daughter would be subjected to FGC if they were forced to return to the Gambia. The mother argued that the mental suffering she would experience as a result of her daughter's FGC would rise to the level of persecution. Critically, the BIA found that the mother need not "prove she would take her child with her as part of her burden…if she has custody of the child…normally a mother would not be expected to leave her child in the U.S. in order to avoid

[132] 77 Fed.Appx. 235 (5th Cir. 2003).

[133] Osigwe v. Ashcroft, 77 Fed.Appx. 235, 235-236 (5th Cir. 2003).

[134] Jukic v. INS, 40 F.3d 747, 749 (5th Cir. 1994).

[135] Axmed v. Gonzales, 145 Fed. Appx. 669 (11th Cir. 2005).

[136] *See* Matter of Dibba, No. A73 541 857 (BIA Nov. 23, 2001) (unpublished).

persecution."[137] The BIA held that Ms. Dibba had established a *prima facie* claim for asylum and granted her motion, evidencing its support for the theory that female genital cutting performed on a child against her parent's wishes establishes persecution to the parent.

The BIA again granted a motion to reopen on the same theory in an unpublished decision in 2004, this time to a Nigerian mother who feared that her U.S. citizen daughter would be forced to undergo FGC.[138] Once more, the BIA found that the mother had demonstrated a *prima facie* claim for asylum and withholding of removal. As in *Dibba*, the BIA did not question that a U.S. citizen daughter would face constructive deportation.

IX. *Matter of A-K-* Decision – Factual and Procedural History

The BIA's decision in *A-K-* is a retreat from the aforementioned unpublished BIA decisions favoring a grant of protection when the applicant's child risks being subjected to FGC in the applicant's home country.

A. The Facts of the Case

Mr. A-K- is a Senegalese citizen, a member of the Fulani tribe, and the father of two U.S. citizen daughters. He applied for withholding of removal and protection under the CAT in removal proceedings based on the theory that if he were forced to return to Senegal, his daughters would be subjected to FGC against his will, or he would be persecuted for opposing the practice. Mr. A-K- did not apply for asylum.[139] At the merits hearing, Mr. A-K- and his wife, who was not in removal proceedings at the time,[140] both testified that they opposed FGC and would not want their daughters to be cut, but that if they were removed to Senegal, their families and the Fulani tribe would "take whatever steps were necessary to ensure" their daughters' FGC.[141] However, Mr. A-K- testified that he would not be beaten for his resistance to FGC and *that he did not fear persecution "to himself,"* though he might face "humiliation" by tribal leaders because of his opposition to the custom.[142]

The immigration judge granted Mr. A-K- withholding of removal based on both theories and denied the CAT claim as moot. The DHS appealed the immigration judge's decision. On appeal, Mr. A-K- argued that his case should be remanded to the immigration judge for consideration of his eligibility for asylum, as well as CAT relief.

B. The BIA's decision

The BIA reversed the immigration judge's decision both on factual and legal grounds. It first considered and rejected the parent-child claim stating that no court had found a parent eligible for asylum based on the fear that his or her U.S. citizen child would be exposed to FGC in the parent's home country. The BIA identified *Oforji*, where the daughter at risk of FGC was a U.S. citizen, and *Abay*, where the daughter herself was removable, as the two lines of relevant cases on the issue. Next, the Board determined that Mr. A-K-'s case came under the *Oforji* framework because the daughters in *A-K-* were U.S. citizens and could remain in the U.S. with their mother, who was not in removal proceedings, as could the U.S. citizen daughter in *Oforji*.

The BIA found that even if the daughters returned to Senegal with their father, their FGC was not probable because FGC was practiced only by particular ethnic groups in certain parts of the country, and because the government had made significant efforts to combat the practice. Thus the Court assumed that even if FGC were practiced in Mr. A-K-'s region, his family could safely relocate. Throughout its discussion of the likelihood that the daughters would be subjected to FGC, the BIA distinguished the case from *Abay*, where the practice had been determined to be "nearly universal" in Ethiopia, conveying the importance of the facts to the BIA's decision in *In re A-K-*.

The BIA also rejected the second theory in the case – that Mr. A-K- would suffer persecution because of his opposition to FGC – based on the facts. Implicit in its rejection of this claim was the BIA's determination that the girls would not return to Senegal with their father, rendering his opposition to their FGC irrelevant. Also central to the BIA's denial was Mr. A-

---

[137] Matter of Dibba, No. A73 541 857 (BIA Nov. 23, 2001) (unpublished).

[138] *See* Matter of Anon (CGRS Case #2974).

[139] Apparently the respondent and the Immigration Judge believed that there was a one year bar issue and thus limited the application to withholding of removal and protection under the CAT.

[140] CGRS does not know whether Mr. A-K-'s wife was placed in proceedings subsequent to testifying in support of her husband's claim.

[141] *See* Matter of A-K-, 24 I. & N. Dec. 275, 279 (BIA 2007).

[142] *See* Matter of A-K-, 24 I. & N. Dec. 275, 280 (BIA 2007).

K-'s repeated testimony that he did not fear *persecution* because of his opposition to FGC and that he would not be beaten and would at worst be humiliated for his anti-FGC beliefs. Consequently, the BIA held that Mr. A-K- would not face persecution for his resistance to FGC.

The BIA also reversed on legal grounds. It mischaracterized the claim as "derivative," rather than understanding that Mr. A-K- *himself* would be persecuted by his daughters' cutting, and ruled that there is no statutory basis for derivative withholding of removal or for child-to-parent derivative asylum. In its discussion, the BIA questioned the theory that persecution of a family member can be persecution to oneself absent evidence of intent to harm the applicant through the persecution of his family member.

Citing *Oforji*, the BIA denied Mr. A-K-'s request for a remand of the CAT claim, finding no fear of torture *"to himself"* and no legal basis for a "derivative" CAT claim.[143] Since there had been no asylum claim before the court, the BIA did not rule on asylum eligibility. The BIA itself recognized this – expounding that the respondent filed only for withholding of removal and CAT relief, and thus waived his right to request asylum.[144] Despite this, the headnote in the BIA decision mistakenly presents the decision as holding in part that "an alien may not establish eligibility for asylum or withholding of removal based solely on fear that his or her daughter will be harmed by being forced to undergo female genital mutilation upon returning to the alien's home country."

C. Analysis of *Matter of A-K-*

The BIA's decision in *A-K-* is based primarily on its findings of fact, but it also rests on dubious legal grounds and it sanctions an indefensible child welfare policy that contravenes principles of international law.

1. Decision Limited to Factual Findings

The BIA's decision in *A-K-* depends mainly on its conclusions that: a) upon return to Senegal the daughters would not be subjected to FGC (if they even returned) because the practice is not common and the family could easily relocate to avoid it, and b) the applicant father would face humiliation - at worst – rather than persecution, for his resistance to their FGC. Its analysis is based chiefly on these key facts, leading the Board to "decline to find that [the applicant] could establish eligibility for withholding of removal *under the circumstances presented in this case*."[145]

2. Inconsistent with Earlier Decisions

Matter of A-K- is inconsistent with previous unpublished BIA decisions explicitly recognizing that a parent's fear of FGC being inflicted on her U.S. citizen child may constitute a well-founded fear persecution *to the parent* and granting Motions to Reopen on that basis.[146] The BIA's decision also contradicts the assumption in these prior decisions that a child will follow her custodial parent, regardless of the child's citizenship status.[147] According to the Supreme Court, when an agency takes inconsistent positions – as the BIA has done in parent-child FGC claims - its decisions are entitled to reduced deference.[148]

3 Child's Citizenship Status Not Relevant

The BIA states that no court has granted protection to a parent based on her fear of FGC being performed on her U.S. citizen child and distinguishes *In re A-K-* from *Abay*, in part for that reason. However, the child's citizenship should not be a determinative factor. While the child's citizenship is statutorily relevant to cancellation of removal claims, it is irrelevant to the parent's asylum claim because undocumented and citizen daughters alike could remain in the U.S. to avoid FGC. An undocumented daughter who feared FGC upon removal would be eligible for asylum under *Kasinga* and would thus be entitled to remain in the U.S. like a citizen daughter.

Moreover, a U.S. citizen child with no one to care for her other than her parents who are facing removal would be forced to return with them, despite her legal entitlement to remain in the U.S. Even when an alternate caregiver is physically available, the decision of whether to separate from one's children and rely on others to raise them is an extremely personal one, which should not be left to the mercy of the BIA or the federal courts. The relevant question, therefore, is not the child's citizenship status, but whether the child has family with whom to remain in the U.S., and whether

---

[143] Matter of A-K-, 24 I. & N. Dec. 275, 280 (BIA 2007).

[144] Matter of A-K-, 24 I. & N. Dec. 275, 281 (BIA 2007).

[145] *See A-K-* 277-78

[146] *See* section VIII.C., *supra*.

[147] *See*.Matter of Dibba, No. A73 541 857 (BIA Nov. 23, 2001) (unpublished); Matter of Anon., CRGS Case #2974.

[148] *See* section V.D., *supra*.

the child would return with her parents regardless of ability to stay.

The BIA's cavalier attitude that parents can simply turn their children over to the custody of the state rebuffs child welfare policy and international law regarding family unity and the best interests of the child.[149]

4. Mischaracterization of Claim as Derivative

The BIA's characterization of parent-child FGC claims as "derivative" is erroneous and misleading. Derivative asylum is granted where an asylee (i.e. person granted asylum) confers status on his or her spouse or children by virtue of the family relationship, *regardless* of past persecution or a well-founded fear of persecution to the derivative family member. However, in the parent-child FGC context, the parent is not asking for asylum based merely on harm risked by the child. Instead, the parent requests asylum based on the persecution (mental agony) that he or she would personally suffer upon the child's FGC, especially in light of his/her deep opposition to the practice or firsthand experience of its harm and consequences. This principle that harm to family members causes significant harm to oneself is hardly revolutionary, as the former INS recognized the viability of an asylum claim based on harm to family members as early as 1997 and several federal court decisions have affirmed this concept.[150]

The characterization of Mr. A-K-'s claim as derivative essentially ends the BIA's inquiry because as it concludes, there is no derivative withholding of removal and no child-to-parent derivative asylum. Had the BIA properly considered Mr. A-K-'s claim – based on persecution to himself – it likely would have denied protection based on the evidence (which the BIA felt did not establish that the girls would undergo FGC), but at least its decision would have properly assessed Mr. A-K-'s independent eligibility for protection.

The BIA also cautions against a grant of "automatic" asylum when a family member is harmed, which is akin to derivative asylum. However, rather than requesting an automatic grant of asylum, in parent-child claims, the parent aims to show that the harm he or she would personally experience because of the child's FGC rises to the level of persecution. The parent also seeks to prove that his or her harm would be on account of a protected ground, that the government is unable or unwilling to protect against FGC, and that FGC is countrywide. Conversely, automatic asylum implies that at the moment the parent shows harm to his or her child, asylum eligibility will have been established.

5. Discussion of Persecution of Family as Persecution of Self

The BIA attempts to undermine the theory that persecution to family can be persecution to self. However, the cases to which the BIA cites are inapposite, and while it questions this theory, the BIA never outright rejects it. All but one of the cases cited by the BIA concern whether persecutory acts to family members establish the applicant's own well-founded fear of persecution. In other words, did persecution to family evidence a reasonable possibility that the applicant himself would be targeted? This question is irrelevant in the parent-child FGC context, where the act of persecution – FGC – is one and the same to child and parent.

In the parent-child context, whether or not a well-founded fear has been established depends on the evidence regarding FGC in the parent's country of origin (how common it is, whether the government protects females from it, etc), whereas in the cases cited by the BIA, the past persecutory act to the family is used to establish that a *separate* future persecutory act awaits the applicant upon return. The relevant family persecution cases are those that treat whether an act of *past persecution* to a family member establishes past persecution to the applicant, and for which there is support.[151] *Tamas-Mercea*[152] is the only case cited to in the *A-K-* which is actually on point in this regard. Importantly, however, that decision is limited to the particular facts of the case, which the court found did not establish persecution of the applicant. *Tamas-Mercea* specifically declined to find that harm to family can never be the basis for a finding of persecution to an applicant.[153]

Furthermore, *A-K-* does not hold that harm of a loved one can never establish persecution of an applicant. The BIA expounds that harm to a family member may constitute persecution to an applicant when the persecutory act performed on the family member is specifically intended to harm the

[149] *See* Marcelle Rice, *Protecting Parents: Why Mothers and Fathers who Oppose Female Genital Cutting Qualify for Asylum*, Immigration Briefings (Nov. 2004) at 12-13.

[150] *See* section VIII.A., *supra*.

[151] Discussed in section VIII.A., *supra.*

[152] Tamas-Mercea v. Reno, 222 F.3d 417 (7th Cir. 2000).

[153] It is particularly curious that the BIA cited to *Tamas-Mercea* rather than *Olowo* because *Olowo* goes further than *Tamas-Mercea* and explicitly rejects persecution to family members as persecution to self.

applicant.[154] This supposition contradicts both BIA and federal precedent. Asylum does not entail a specific intent showing, nor does it require that a persecutor's actions be intended to harm. The BIA recognized in *Matter of Kasinga* that a persecutor can have a benevolent intent. [155] Similarly, in *Pitcherskaia v. INS*,[156]the Ninth Circuit ruled that the intent of the persecutor is irrelevant. What matters is that the persecutor is motivated to act, at least in part, by one of the protected grounds.[157]

6. Abay *Not Questioned or Undermined*

Most importantly, despite the BIA's denial of Mr. A-K-'s claim and its questioning the theory of family persecution, the Board *never voices disagreement with Abay or rejects its premise* that a parent can establish eligibility for asylum based on his or her fear of FGC being forcibly inflicted on a daughter. The BIA's treatment of *Abay* throughout the decision is simply factual, distinguishing it from *A-K-* on the basis that FGC is very common in Ethiopia unlike Senegal, and that the undocumented daughter in *Abay* would be required to return to Ethiopia with her mother, unlike the girls in *A-K-*. Therefore, it is arguable that the BIA did not reject the *theory* that a parent can establish persecution based on the mental agony caused by his or her child's FGC, but merely rejected its application when U.S. citizen children are involved (which for the reasons mentioned in section IX.C.3. is unsound) or where FGC prevalence rates do not establish threats to life or freedom.

7. BIA's Use of Niang v. Gonzales

The BIA discusses the Fourth Circuit's decision in *Niang v. Gonzales*, which held that persecution cannot be based on a finding of psychological harm alone. While it did not formally rule on the issue, the BIA found that "a similar result is required in the instant case."[158] As discussed in section VIII.B.3., *supra*, the *Niang* decision stands in opposition to BIA and federal court jurisprudence [and international human rights norms] on the meaning of persecution. The BIA's favorable treatment of this aspect of the *Niang* decision flouts BIA and federal court rulings, leaving room to challenge *A-K-* outside the Fourth Circuit. Note, however, that this theory arguably contradicts the argument that the BIA did not reject *Abay*'s underlying premise, so attorneys will need to strategize about which of these arguments to raise.

8. Erroneous Treatment of the CAT Claim

Citing *Oforji* for the proposition that torture must be inflicted directly on the applicant, the BIA denied Mr. A-K-'s request for remand on his CAT claim. The BIA misapplied the regulations regarding relief under the CAT (as did the Seventh Circuit in *Oforji*), which clearly recognize that harm inflicted upon another person may establish torture to oneself and that torture includes mental suffering.[159] As a result, it failed to conduct complete analysis of the claim.

X. Asylum Office, Immigration Court, and BIA Decisions in Parent Child Claims Following *Matter of A-K-*

CGRS is aware of the results in several parent-child FGC cases at the Asylum Office, Immigration Court, and BIA following *Matter of A-K-*. These results vary greatly, from adjudicators ruling there is no basis upon which to grant a parent-child case to those distinguishing cases from *A-K-* and granting protection. Key to the grants, however, are factors such as the attorney's ability to distinguish the facts in his/her case from those in *A-K-*, the existence of an alternate basis for the claim (e.g., forced marriage), or the avoidance of the one-year-bar obstacle.

CGRS does not comment on the social groups presented in the following cases. Attorneys should note, however, that careful formulation of the social group and careful consideration of the nexus is critical in these, as in all other claims. When formulating the social group, advocates should consider the reasons the applicant would be targeted for harm or the characteristics the applicant possesses that would motivate the harm. CGRS can assist attorneys in crafting social groups and considering nexus questions.

A. Grants following *A-K-*

[154] *See* Matter of A-K, 24 I. & N. Dec. 275, 278 (BIA 2007).

[155] *See* Matter of Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996).

[156] *See* Pitcherskaia v. INS, 118 F.3d 641, 646-47 (9th Cir. 1997).

[157] *See* INS v. Elias-Zacarias, 502 U.S. 478, 482-83 (1992); INA §208(B)(i) (placing burden on applicant to show that race, religion, nationality, membership in a particular social group, or political opinion "was or will be at least one central reason" for the persecution).

[158] Matter of A-K-, 24 I. & N. Dec. 275, 277 (BIA 2007).

[159] 8 C.F.R. §208.18(a).

A woman from Mali filed for asylum based on her fear that her two U.S. citizen daughters would be subjected to FGC in Mali. The woman had herself undergone FGC as a child and greatly opposed the practice for her daughters. However, her husband, who regularly abused the applicant during their marriage, wanted his daughters to be cut and threatened to send them to Mali for FGC. His parents in Mali also demanded that the girls undergo FGC. The attorneys were able to distinguish the case from *A-K-* due to the high prevalence of FGC in Mali, as well as the fact that leaving the daughters with their father in the U.S. would not ensure their safety. The case was granted by the New York Asylum Office.[160]

A Guinean woman requested asylum based on her past FGC - which caused her enduring harm, forced marriage, giving birth to a child out of wedlock, and fear of FGC being inflicted on her U.S. citizen daughter. The attorney argued, *inter alia*, that *A-K-* should not apply to the case because her client had applied for asylum, unlike the father in *A-K-* who had applied only for withholding of removal and CAT protection. She also distinguished the case from *A-K-* based on the applicant mother's past FGC and the likelihood that she would be re-traumatized by her daughter's cutting, as well as the exorbitant FGC prevalence rate in Guinea. The New York Asylum Office granted the case.[161]

A Guinean woman applied for asylum based on her FGC as a child and her fear that her daughter would be cut if they were forced to return to Guinea. The Philadelphia Asylum Office referred her case to Immigration Court. An immigration judge ruled that the mother was a member of the social group of "women who have endured [FGC] and as a consequence oppose it being done to their daughter." The judge granted the woman asylum based on her well-founded fear of her daughter's FGC, which the IJ found would constitute persecution to the mother.[162]

An immigration judge granted asylum and withholding of removal to an Ethiopian woman who had been subjected to FGC as a child and suffered numerous ongoing harms as a result, and who feared that her daughter would be forced to undergo genital cutting in Ethiopia. The judge granted on all bases of the claim.[163] With respect to the parent-child claim, he ruled that the woman had a well founded fear of persecution in the form of her daughter's genital cutting or the myriad harms she would face for opposing it. The judge noted the significant legal and factual differences between *A-K-* and the applicant's claim, including, *inter alia*, the fact that FGC is prevalent in Ethiopia and that the daughter had no relatives with whom to remain in the U.S. because both parents were in removal proceedings. The judge granted the parent-child claim on the basis of the mother's social group membership – "parents of Ethiopian females who oppose genital cutting and are from ethnic groups that practice it"- and political opinion - "opposition to FGC." He also granted humanitarian asylum on the parent-child claim, ruling that the mother had suffered past persecution (FGC) and that either her daughter's FGC or the ostracism and discrimination the mother would suffer for resisting it constitute "other serious harm." Finally, the IJ granted withholding of removal based both on the presumption arising from the past persecution, as well as the independent probability of future threats to the mother's life or freedom – in the form of the daughter's FGC or severe ostracism and discrimination for the mother's rejection of it.[164]

B. Denials following *A-K-*

An immigration judge denied asylum to a Guinean woman who suffered past FGC and who feared that her daughters would be subjected to the practice if they were forced to return to Guinea. Despite recognizing numerous distinguishing factors between the woman's case and *A-K-*, the judge felt she had no choice but to deny under *A-K-*, despite her disagreement with this decision. Also see the IJ's treatment of the past FGC claim under *A-T-*, in section VI.B., above. This case is currently on appeal to the BIA.[165]

An immigration judge denied asylum to a Guinean woman who feared that her youngest daughter, a U.S. citizen would suffer FGC should they be forced to return to Guinea. The woman and her two eldest daughters had all been subjected to FGC while in Guinea. The judge denied her request for protection based on *A-K-*.[166]

The BIA denied withholding of removal and protection under the CAT to a Guinean woman who suffered FGC as a child and who feared her daughter would be forcibly cut back in Guinea. The Board found that the woman's post traumatic stress disorder

[160] CGRS Case #5129.

[161] CGRS Case #5398.

[162] CGRS Case #4730.

[163] *See* section IV., *supra*, for information about the past FGC aspect of the claim.

[164] CGRS Case #2994.

[165] CGRS Case # 5422.

[166] CGRS Case #5360.

did not excuse her late filing and thus applied the one year bar. As a result, the BIA found her ineligible for humanitarian asylum. The Board also ruled that she was ineligible for withholding of removal under *A-T-* based on her past FGC, and under *A-K-* based on her fear of her daughter's FGC. The decision is currently on appeal before the Second Circuit.[167]

In *In re Seynabou Toure*,[168]: A Senegalese woman filed a motion to reopen based on her fear of FGC to both herself and her U.S. citizen daughters upon removal. The BIA denied the motion, ruling that it was untimely and that under *A-K--*, the woman was ineligible for asylum based solely on her fear of her daughters being subjected to FGC.

C. Motion to Reconsider Asylum Grant Due to Decision in *Matter of A-K-*

A husband and wife from Mali applied for asylum based on their fear that their U.S. citizen daughter would be forced to undergo FGC should the family have to return to Mali. The mother had herself suffered FGC in her youth. An immigration judge located within the 6th Circuit denied the case. Prior to issuing *A-K-*, the BIA reversed the immigration judge's decision, holding that under the applicable circuit jurisprudence, *Abay v. Ashcroft*, the parents were eligible for asylum. Following the BIA's decision in *A-K-*, the Department of Homeland Security filed a Motion to Reconsider the asylum grant, arguing that *A-K-* warranted reversal and that the U.S. citizenship of the daughter distinguished the case from *Abay*. The BIA denied the motion, ruling that *A-K-* did not "fundamentally alter the basis" of its earlier decision granting asylum under *Abay*. In so ruling, the BIA found that *Abay* applied, despite the U.S. citizenship of the daughter. (CGRS # 3532)

XI. Best Practices When Litigating Parent-Child FGC Claims Following Matter of *A-K-*

A. In general

As the aforementioned denials illustrate, some adjudicators are taking a hard line in parent-child claims because of *A-K-*. As a result, attorneys are advised to exercise extreme caution in affirmatively filing for asylum under this theory, especially when the parent's fear of the child being subjected to FGC is the sole basis of the claim. However, the risks involved in filing affirmatively must also be weighed against the danger of not filing and later being placed in removal proceedings and barred from asylum for failure to file within one year of arrival. Attorneys are strongly encouraged to consult CGRS on parent-child FGC cases.

B. Make Your Record

Making one's record is fundamental to all asylum claims. However, following *In re A-K-*, the key to a successful parent-child FGC claim is to establish a strong record – both to persuade adjudicators that your claim differs from *A-K-* and to prepare for federal litigation. Outside of the Sixth Circuit, federal court intervention will likely be necessary and attorneys should make the strongest record possible.

- Establish the likelihood that the child will be forced to undergo FGC in the parent's country of removal. *Provide country conditions documentation and an expert whenever possible* to show the frequency of the practice and its countrywide occurrence, whether the parent's ethnic group practices FGC, whether the parent's female relatives have been subjected to FGC, sources of pressure to perform FGC, the parent's inability to protect the child from it, and the government's failure to protect against it.
- Present a mental health expert to develop the theory that the child's FGC would cause the parent profound mental anguish and exacerbate any current mental distress or disorder
- Prove that the child has no suitable adult caretaker with whom to remain in the U.S. – establishing constructive deportation (include evidence of the child's age and dependency on the parent)
- Submit evidence of the closeness of the parent-child relationship to further underscore factors such as: a) the harm that separation would cause, b) the parent's desire to protect the child from FGC, c) the pain that he/she would experience if the child's genitalia were cut, and d) the damage that the parent-child relationship might suffer as a result of the parent's inability to prevent FGC

C. Distinguish the Facts of Your Case from *Matter of A-K-*

The *A-K-* decision is primarily factually based and thus the key to a successful claim is for attorneys to distinguish their facts from those in *A-K-*. Most important to a successful claim will be an attorney's ability to show that the minor child in the case would face constructive deportation, that the child's FGC is likely to occur in the country of removal, and where applicable, that the parent would be persecuted for

[167] CGRS Case #5301.

[168] 2007 WL 4707340 (BIA 2007) (unpublished).

attempting to protect his/her child from the custom. Recalling that the BIA never actually rejected the reasoning or conclusion in *Abay* and merely distinguished it from *A-K-*, the BIA's pronouncement that there is no derivative withholding of removal and rejecting Mr. A-K-'s claim should be understood as a decision that the facts of Mr. A-K-'s claim (mainly those that differ from the facts in *Abay*) fail to establish eligibility for withholding of removal.

D. Argue that the Claim is Not Derivative, But is Based on Harm the Parent Will Suffer

Claims considered to be derivative may come under the scope of *Oforji* (due to its persuasive authority and the BIA's reliance on it in *A-K-*) and *A-K-*. On the other hand, claims analyzed based on the harms directly experienced by the parent should be analyzed under *Abay*. Therefore, attorneys must convince adjudicators that their cases come under *Abay's* compass, not *Oforji's*, and may do so by arguing that *Oforji* was wrongly decided for reasons discussed previously.[169]I Attorneys should focus on the harms directly to the parent that the child's FGC would cause, including the erosion of the child's ability to trust her parent, which the Seventh Circuit recognized in *Nwaokolo*,[170]and the undermining of the parent's right to make decisions about his or her child, a right recognized and protected by the Supreme Court.[171]

Attorneys should argue that the child's citizenship should not determine whether the case is analyzed under *Oforji* or *Abay* for the reasons discussed..[172]

E. Argue that Matter of *A-K-* Only Addressed Eligibility for Derivative Withholding and Child-to-Parent Derivative Asylum, and Thus Does Not Control in Your Case

The BIA's characterization of Mr. A-K-'s claim as derivative ended its analysis of the claim that the FGC of his daughters would be persecutory to Mr. A-K-. The court found no authority for derivative withholding or CAT and for derivative child-to-parent asylum. Because the BIA analyzed the case from a derivative lens, it failed to address whether the harm to the father was sufficient to rise to the level of persecution. Though the BIA questioned whether harm to family not inflicted for the explicit purpose of harming the applicant could constitute persecution to the applicant, it did not explicitly rule on that question, except to reject the notion that harm to family should be "automatically" considered persecution to the applicant.

F. Argue that the Child's Citizenship is Irrelevant to the Validity of the Claim

Attorneys should be prepared to respond to the BIA's supposition in *A-K-* that no authority exists for granting protection to the parent when the child is a U.S. citizen who can remain in the U.S. to avoid persecution. As discussed in section IX.C.3., *supra*, the citizenship of the child is a meaningless distinction because non-citizen girls facing FGC upon removal would similarly be legally entitled to remain in the U.S. under *Kasinga*. In CGRS Case #3532,[173] the BIA held that *Abay* controlled *despite* the U.S. citizenship of the applicants' daughter.

Moreover, the legal right of a child to remain in the U.S. (because of citizenship or a grant of asylum) does not determine whether she would remain in practice. Whether a child would be constructively deported along with her parent depends instead on numerous personal factors that must be analyzed on a case-by-case basis.

Attorneys can argue that *A-K-* is inconsistent with the BIA's previous position that children will follow their custodial parent (*Matter of Dibba*). Recent Eighth and Ninth Circuit decisions assume that citizen children will follow their parents. *See* sections VIII.B.,4, VIII.C., *supra*. There are also numerous policy arguments that support not separating families, such as child welfare policy and international human rights norms.[174]

G. Argue in the Alternative that the Parent Would be Persecuted for Opposing FGC

Where applicable, attorneys should argue that the parent's opposition to FGC and attempts to protect his or her child from it would result in direct harm to the parent rising to the level of persecution. Such harm might entail ostracism, threats, or even physical harm in extreme cases. In *Abay*, the Sixth Circuit found that

---

[169]Ssection VIII.B.1,, *supra*.

[170] Nwaokolo v. INS, 314 F.3d 303, 309. (7th Cir. 2002).

[171] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[172]Section IX.C.3., *supra*.

[173] Discussed in section X.C., *supra.*

[174] *See* Marcelle Rice, *Protecting Parents: Why Mothers and Fathers who Oppose Female Genital Cutting Qualify for Asylum*, Immigration Briefings (Nov. 2004) at 12-13.*Protecting Parents* at 12-13, for a detailed discussion on policy arguments favoring family unity.

either the FGC of the minor child *or* the ostracism that she would face for not being cut – her inability to marry and her rejection from society – constituted persecution. *Experts, as well as country conditions documentation, are vital to making this showing.* Assuming the evidence establishes harm to the parent, attorneys can argue that the persecution is on account of either political opinion (opposition to FGC or feminism) or social group membership.

H. Nexus

Establishing nexus in cases based on the parent's opposition to FGC is straightforward: the parent is targeted for ostracism, discrimination, and other types of harm (economic, physical, etc) because of his/her resistance to the custom of FGC.

Nexus is more difficult to establish in claims based on harms that the child's FGC causes the parent, where arguably, FGC is performed regardless of the parent's religion, social group membership, or political opinion, for example. However, nexus can be shown when the applicant comes from a society where FGC is a critical thread in the social fabric and where the rite would be forced on the child by members of society, despite the parent's known opposition to it. In those societies, one could argue that the parent's rejection of social mores and his/her failure to perform FGC – which is considered to be a primary parental responsibility – is what motivates societal members to intervene and enforce the custom. The social group might be: *parents of Somali females who oppose genital cutting and are from ethnic groups that practice it*. Were the parent to fulfill his/her duty of ensuring the child's FGC and thus preserving societal gender roles, community members would not need to interfere. In the Ninth Circuit, attorneys need only establish that one of the statutorily protected grounds is the 'but for cause' of the persecution.[175] Attorneys can thus argue, for example, that being the parent of a daughter from a culture where FGC is mandatory practice is the 'but for' reason for the persecution.

I. One-Year Bar

The possibility of humanitarian asylum still exists in this type of scenario under the "other serious harm theory," when the parent can establish past persecution (ie the mother's past FGC) and meets the one-year bar deadline. Under 8 C.F.R. §1208.13(b)(1)(iii), a victim of past persecution who would face other serious harm upon removal may be eligible for humanitarian relief. Adjudicators who are reluctant to recognize the parent-child persecution theory may be more open to finding that the child's FGC constitutes other serious harm. This is particularly the case when the claim is brought by a mother who has herself suffered FGC and personally understands the horrors that FGC would inflict on her daughter. Both the Fifth and Fourth Circuits have noted the appropriateness of granting humanitarian protection to mothers in this scenario.[176]

J. Advice Specific to Particular Circuits

Outside the Fourth and Seventh Circuits, attorneys should argue that *A-K-* is entitled to little deference because of its inconsistency with earlier BIA decisions granting protection in such cases and because the BIA mischaracterized the case as derivative, failed to consider the psychological harm that Mr. A-K- would experience upon his daughters' FGC, and cited to inapposite cases on family persecution. Attorneys can argue that *A-K-* relied in part on the Fourth Circuit's holding in *Niang v. Gonzales* - requiring a physical aspect to persecution - and thus does not apply in circuits recognizing that non physical harm can constitute persecution. *See* section VIII.B.3, *supra*.

1. Sixth Circuit

Abay still controls in the Sixth Circuit. Thus the theory that a parent may be eligible for asylum based his or her child's FGC, or the ostracism the parent would face for attempting to protect the child from it survives *A-K-*. One note of caution in the Sixth Circuit is that the court's decision was based in part on the BIA's determination in *Matter of Dibba*. Since in *A-K-* the BIA essentially retracts its position in *Dibba*, the Sixth Circuit could conceivably revisit *Abay* at some point. Attorneys within the Sixth Circuit should also be aware that the has DHS argued (in several different contexts) and the BIA has found in several cases that under *Brand X*,[177] prior circuit court decisions are not controlling due to intervening BIA precedent. The BIA has held, for example, that the Ninth Circuit's decision in *Mohammed* was superseded by *A-T-* under *Brand X*. Attorneys should be prepared to respond to why *Brand X* does not apply in the *Abay, A-K-* context.

---

[175] *See* Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005).

[176] *See* Osigwe, 77 Fed.Appx. 235, 235-36 (5th Cir. 2003); Niang, v. Gonzales, 492 F.3d 505, 509 n.4 (4th Cir. 2007).

[177] National Cable and Telecommunication Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

2. Seventh Circuit

The Seventh Circuit has taken a hostile position to parent-child FGC claims and in *Olowo* the Court completely rejected the theory that persecution to family can establish persecution to self. It is very risky for a parent of a U.S. citizen daughter to bring such a claim in this circuit, where the parent's Petition for Review would with near certainty be denied and where he or she would risk being reported to child welfare authorities under *Olowo*. However, because each of the Seventh Circuit's decisions focuses only on persecution to the parent caused by the child's FGC, claims based on harms to the parent for opposing the child's FGC – ostracism and the like - may still be viable, providing attorneys can establish the constructive deportation of the child, which in the Seventh Circuit is challenging.

3. Fourth Circuit

Bringing either a parent-child FGC claim or a claim based on ostracism of the parent for opposing the child's FGC would be exceedingly difficult to win in the Fourth Circuit as a result of the holding in *Niang* that non physical harm does not establish persecution. After *Niang*, the only possibility in a claim based on FGC of the child is to show that the harm to the parent involves a physical aspect, e.g., that there is a physical manifestation of the psychological harm. Similarly, for the opposition type of claim, the harm to the parent would need to include a physical aspect – e.g., physical harm in addition to ostracism.

4. Fifth Circuit

A-K- is currently on appeal in the Fifth Circuit. Follow the results in that case for the best information on how to proceed in this circuit.

5. Eleventh Circuit

The court's unpublished decision in *Axmed* indicates a reluctance to accept the parent-child theory. Given this circuit's unfavorable asylum jurisprudence, the BIA's decision in *A-K-*, and the Eleventh Circuit's unpublished decision, attorneys should be wary of bringing affirmative parent-child FGC claims in this circuit.

XII. CONCLUSION

While it may be premature to predict, the immediate impact of the BIA's decisions in *Matter of A-T-* and *Matter of A-K-* appears to be widespread, resulting in denials across the country by the Asylum Office, immigration judges, and the BIA. Cases are now pending in the Second, Fourth, Fifth, Sixth, and Ninth Circuits on one or both of these types of claims. Attorneys are advised to carefully consider the advantages and disadvantages involved in affirmatively filing past FGC and parent-child FGC claims outside of the few circuits with positive jurisprudence, including the effect of the one-year bar on the claims of individuals later placed in removal proceedings.

Those attorneys who pursue such claims (whether affirmatively or defensively) must be vigilant in preparing them for federal litigation from the commencement of representation by making thorough records, seeking advice from CGRS, and raising and preserving arguments at every stage of litigation. Attorneys in circuits with positive jurisprudence are advised to prepare for the government's argument that under the Supreme Court's *Brand X* decision, *A-T-* or *A-K-* control.

As cases work their way through the federal courts, we are left with two decisions that represent a significant departure from previous advances made on behalf of refugee women and from prior BIA decisions granting protection in both past FGC and parent-child claims. These decisions also make for bad policy. *A-T-* marks a refusal to recognize women's rights as human rights and leads to the untenable result that women who fear FGC deserve protection, whereas women who have already been subjected to the practice -- and who continue to suffer its consequences and related harms -- do not. Meanwhile, *A-K-* leaves parents with a Hobson's choice: either leave their daughters behind in the U.S. or take them back to the parents' country of origin to be subjected to FGC.

CGRS remains concerned about the trajectory of FGC-related jurisprudence. We continue to offer our technical assistance and resources to all advocates working on these cases. Further, we urge attorneys representing asylum-seekers in FGC-related claims to share information about case decisions and appeals with us, so that we continue to track developments, tailor national advocacy efforts, and issue updated advisories.

****

Lisa Frydman is Managing Attorney at the Center for Gender and Refugee Studies, University of California Hastings College of the Law, San Francisco, CA. She would like to thank her co-author, Kim Thuy Seelinger, and CGRS Director Karen Musalo, for their valuable feedback.

Kim Thuy Seelinger is a CGRS attorney and Kazan, McClain, Lyons, Greenwood & Harley Foundation teaching fellow with the University of California, Hastings College of Law Refugee and Human Rights Clinic. She would like to thank her co-author Lisa Frydman for being such a supportive and thoughtful co-author. She would also like to thank CGRS Karen Musalo for her valuable insights and feedback.