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Dinithi Sathya Bulathwela

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Female Genital Mutilation and the Question of Future Persecution When Seeking Asylum in the United States

By: Dinithi Sathya Bulathwela¹

Female Genital Mutilation

Female Genital Mutilation (FGM) is a dangerous and potentially life-threatening practice in which portions of the female genitalia are cut away.² FGM causes infections, problems urinating, complications in childbirth, and an increased risk of newborn deaths.³ This practice is recognized internationally as a violation of the human rights of girls and women.⁴ The procedure is typically thought of as a one-time act, raising the question as to whether an asylum seeker who has already undergone FGM faces the risk of future persecution on the same ground. This article will examine a few cases where United States (U.S.) courts have dealt with this issue and show how the legal standard in U.S. law yields uncertainty for asylum seekers.

Legal Framework

Under the Immigration and Nationality Act, an individual seeking asylum in the U.S. must prove past persecution or a well-founded fear of future persecution on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁵ If an asylum seeker suffered persecution in the past, it creates a rebuttable presumption of future persecution, which then becomes the government's burden to overcome.⁶ The U.S. recognizes FGM as a basis for granting asylum.⁷

FGM as Future Persecution

Some asylum seekers have argued that their daughters might suffer FGM upon returning to their home countries. This argument was unsuccessful before the Board of Immigration Appeals (BIA) in both *Barry v. Gonzales*⁸ and *Nwaokolo v. I.N.S.*⁹ In *Barry*, the asylum seeker had undergone FGM in Guinea before coming to the U.S., and it was undisputed that her daughter would likely undergo FGM if returned to Guinea. But the BIA denied her claim for asylum on procedural grounds without discussing the threat to her daughter, and the Fourth

¹ Dinithi Sathya Bulathwela is an attorney admitted to the Sri Lanka Bar. She is a 2023 Master of Laws (L.L.M.) graduate of Penn State Law. During her L.L.M she focused on Immigration, International, Foreign, and Comparative Law. Her current work analyzes the granting of asylum to victims of female genital mutilation under U.S. Asylum and Refugee Law. [LinkedIn Profile](#).

² *Fauziya Kassindja: Female Genital Mutilation and Immigration Abuse*, PBS: SPEAK TRUTH TO POWER, <https://www.pbs.org/speaktruthtopower/fauziya.html> (last visited April 15, 2023).

³ *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 31, 2023) <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

⁴ *Id.*

⁵ 8 U.S.C. §1101(a)(42)(A). The protected ground most often at issue in asylum cases where FGM is the persecution feared is "membership in a particular social group." See, e.g., *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

⁶ 8 CFR § 208.13(b)(1). The U.S. government has the responsibility to rebut the presumption by proving one of two things: (1) there has been a fundamental change in circumstances in the applicant's home country, and the applicant no longer has a well-founded fear of future persecution or (2) the applicant could avoid future persecution by relocating to another part of the country. 8 CFR § 208.13(b)(1)(i)(A)-(B).

⁷ The Board of Immigration Appeals first held that FGM qualifies as persecution on account of membership in a particular social group in *In re Fauziya Kasinga*, 21 I. & N. Dec. at 358.

⁸ 445 F.3d 741 (4th Cir. 2006).

⁹ 314 F.3d 303 (7th Cir. 2002).

Circuit affirmed.¹⁰ The BIA's denial in *Nwaokolo* was similarly based on procedural grounds.¹¹ However, when the Seventh Circuit reviewed the decision, it demonstrated a willingness to accept this argument as a basis for withholding of removal and remanded to the BIA to consider the threat to the daughter.¹²

FGM may qualify as future persecution even if the asylum seeker has already undergone the procedure. In *In re A-T-*, the respondent had undergone FGM and sought asylum on the basis that if she was returned to her home country, her future daughter could undergo FGM.¹³ But she had no child and was not pregnant at the time. The BIA denied her asylum, stating that FGM is a one-time procedure that fundamentally changes a person's circumstances, thereby overcoming the rebuttable presumption of future persecution.¹⁴ The Attorney General (AG) vacated the BIA's decision and remanded the case, holding that the BIA's conclusion was based on a false premise because FGM can be repeated.¹⁵ Furthermore, the BIA was wrong to focus on whether the future harm feared by the respondent would take the identical form as her past harm. If the respondent could show past persecution on account of a protected ground, which was membership in a particular social group in *A-T-*'s case, she would then be entitled to the mandatory presumption of future persecution on the same ground.¹⁶

Conclusion

The U.S. recognizes FGM as persecution for the purpose of granting asylum, but whether it qualifies as future persecution is subject to the merits of each case. As a result, the outcomes in U.S. courts are varied. If an applicant can establish past persecution on account of a protected ground, she may be successful in proving future persecution. However, this is no guarantee since the government may rebut the presumption. Thus, this legal standard is a source of uncertainty for asylum seekers.

¹⁰ The BIA concluded that the FGM evidence should have been presented during the initial deportation proceedings to have a successful asylum claim. *Barry*, 445 F.3d at 747.

¹¹ *Nwaokolo*, 314 F.3d at 305.

¹² The Seventh Circuit found it "arguable" that the BIA had abused its discretion in "fail[ing] to consider the threat that [the young daughter] will be subjected to FGM as a direct consequence of the decision to remove her mother" and stayed the removal proceedings until the question could be reviewed. *Id.* at 308.

¹³ 24 I. & N. Dec. 296 (BIA 2007), vacated by *Matter of A-T-*, 24 I. & N. Dec. 617 (U.S. Atty. Gen. 2008).

¹⁴ 24 I. & N. Dec. 296, 299; see also 8 CFR § 208.13(b)(1)(i)(A).

¹⁵ 24 I. & N. Dec. 617, 622 (U.S. Atty. Gen. 2008).

¹⁶ *Id.* at 622-23.