Granting Political Asylum to Potential Victims of Female Circumcision

Gregory A. Kelson
Institute for Women and Children's Policy

Follow this and additional works at: https://repository.law.umich.edu/mjgl

Part of the Human Rights Law Commons, Immigration Law Commons, and the Law and Gender Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjgl/vol3/iss1/7
GRANTING POLITICAL ASYLUM TO POTENTIAL VICTIMS OF FEMALE CIRCUMCISION

Gregory A. Kelson

I was very happy; I thought it would be fun. The day before, I had my hands and feet dyed with henna. . . . It was like a party. The next morning, the local midwife arrived with another woman. They told me to lie on the floor. They twisted my arms so that I couldn't move and pinned my legs to the ground after pulling them wide apart. The midwife rubbed a little alcohol on my genitals, then she cut me with a razor. My mother, my aunts, the neighbours, they were all there. I screamed with pain. I was given a glass of lemonade and put to bed. Then they rolled the pieces of flesh that had been cut off in salt, wrapped them in cloth and tied it on to my arm. I kept it on me like that for a week, to protect me from evil.¹

INTRODUCTION

The practice of female circumcision² can be traced back as far as

² There has been a dispute about whether the correct term should be “female circumcision” or “female genital mutilation.” The term “female circumcision” is a medically inaccurate term itself, but “female genital mutilation” implies a deliberate intent to mutilate the female genital area, which . . . is not the case, or to
the Egyptian Pharaohs. Female circumcision involves removal of the clitoris in one of three types of operations. These operations are usually performed by a practitioner who has no medical training, under less than sterile conditions, and with no anesthesia.

The three types of operations are circumcision, clitoridectomy, and infibulation. In a circumcision, the practitioner removes the prepuce, or tip, of the clitoris. In a clitoridectomy, the practitioner detaches the clitoris and labia minora (small lips of the vagina) but preserves the labia majora (large lips of the vagina) and the vulva. In an infibulation, the practitioner removes the clitoris, labia minora, and labia majora. The vulva is then sutured together with catgut or thorns, leaving an opening small enough for the passage of urine and menstrual fluid.

imply that it has no positive aspects, when in actuality "it may positively contribute to a tribal group's identity."

Gregory A. Kelson, Female Circumcision in the Modern Age: Saving Our Children from Tradition 3 (1994) (unpublished manuscript, on file with author) (citing Robyn C. Smith, Female Circumcision: Bringing Women's Perspectives into the International Debate, 65 S. Cal. L. Rev. 2449, 2450 n.7 (1992)). However, many feminists argue that "female genital mutilation" is the proper term because "female circumcision" relates too closely to "male circumcision."

I believe that the term "female genital mutilation" is a negative term and implies that these women are being punished. When I use the term "female circumcision," I am using a generic name to refer to a group of three procedures, not to one procedure, like male circumcision. Therefore, in this article, I will use the term "female circumcision."

3. "Although documentation and statistical information are difficult to find, it is believed that female circumcision has been practiced for nearly 2500 years, prior to either Islam or Christianity." Alison T. Slack, Female Circumcision: A Critical Appraisal, 10 Hum. Rts. Q. 437, 443 (1988).

The practice of female circumcision continues today. The World Health Organization (WHO) estimates that between 100 and 114 million women and girls worldwide have undergone female circumcision. This estimate may be understated because it does not include the number of females who die each year from circumcision. Ritual Performed on 100 Million, CLEVELAND PLAIN DEALER, May 9, 1995, at 8E; Allan Thompson, Mutilating Girls' Genitals Illegal, Copps Says, Toronto Star, Oct. 4, 1994, at A10.

4. Smith, supra note 2, at 2450.
6. Smith, supra note 2, at 2450.
7. Smith, supra note 2, at 2450.
8. Smith, supra note 2, at 2450.
9. Smith, supra note 2, at 2450.
10. Smith, supra note 2, at 2450. For a more detailed description of these procedures, including accompanying ceremonies, see Smith, supra note 2, at 2460–66; Mary
Many Western countries consider female circumcision a form of torture. The United Nations Convention on the Rights of the Child also condemns the torture of children, although it does not specifically mention


Dr. Nahid Toubia of the Columbia University School of Public Health recently reclassified the three procedures as four, dividing infibulation into two forms, either "modified" or "total." Nahid Toubia, M.D., Female Circumcision as a Public Health Issue, 331 NEW ENG. J. MED. 712, 712 (1994).

11. The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by . . . or with the consent [of] . . . [a] person acting in an official capacity." CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, OPENED FOR SIGNATURE MAR. 9, 1984, PART I, ART. 1, PARA. 1, 23 I.L.M. 1027 (1984) [hereinafter Torture Convention]. As of December 31, 1993, there were 79 state parties to the Convention, including the United States. See UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1993 180 (UNITED NATIONS 1994).

Although the Torture Convention does not specifically mention female circumcision as a form of torture, various countries have stated that it is a form of torture. E.g., Robert M. Press, An Ancient African Custom Comes under Fire, CHRISTIAN SCIENCE MONITOR, Dec. 30, 1994, at 6 ("'Female genital mutilation is the most widespread form of torture in the world,' according to an editorial in the first issue of the newsletter, published by the National Committee on Traditional Practices of Ethiopia (NCTPE)."), 3,600 Female Circumcisions a Day in Egypt, AGENCE FRANÇAISE PRESSE, Jan. 23, 1995 (quoting a statement by the Egyptian Organisation of Human Rights that female circumcision is "a violation of the first clause of the treaty forbidding torture signed by Egypt."); Judy Mann, Torturing Girls Is Not a Cultural Right, WASH. POST, Feb. 23, 1994, at E13 ("Tradition or not, female genital mutilation is the ritual torture of girls. The United Kingdom has criminalized it, and the United States should make it clear that it's a serious crime if it occurs here.").

Western countries' view of female circumcision as torture conflicts with many non-Western countries' view of female circumcision as tradition. In Africa, many tribal groups insist that traditional rituals, such as female circumcision, be preserved in order to maintain tribal group identity. Smith, supra note 2, at 2452–53. To Westerners, these tribal groups subject their women to torture. The conflicts in Western and non-Western views of female circumcision often clash when non-Western women migrate to Western countries where female circumcision is outlawed and these women want to keep their traditional practices. Mann, supra, at E13. To fulfill tradition, these women must bypass Western law, either by taking their children back to their home country for circumcision or pooling their resources and bringing a practitioner to their new country. Mann, supra, at E13. A conflict may also occur when non-Western women move to Western countries and reject the tradition of female circumcision, but their family members still insist that female circumcision be performed on their daughters. For an example, see infra note 33 and accompanying text.
female circumcision. Furthermore, many also consider this practice to be child abuse. Several countries have enacted statutes or have legislation pending which explicitly or implicitly outlaws female circumcision.

12. Article 19 of the Convention states:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.


13. For example, U.S. Representative Patricia Schroeder (D-Colo.) argues that female circumcision is child abuse:

[Parents cannot endanger the lives or physical and mental well-being of their children simply to raise them within the confines of their own culture. Although parents have a fundamental right to raise and educate their children (guaranteed under the due-process clauses of the Fifth and Fourteenth Amendments), a long history of case law has established that the government can intervene if there is a compelling reason to do so.]


It is generally recognized that female genital mutilation is not required by any religious doctrine. Thus, the cases I have cited are not entirely to the point. They do, however, suggest how the courts would treat a charge of child abuse in a case of female genital mutilation.

Schroeder, supra, at 740 (footnote omitted).

Other countries that classify female circumcision as child abuse include the United Kingdom, Canada, and France. Loretta M. Kopelman, Female Circumcision/Genital Mutilation and Ethical Relativism: Focus on Violence, 20 SECOND OPINION 54, 54 (1994).

14. In Great Britain it is illegal:

(a) to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person; or
(b) to aid, abet, counsel or procure the performance by another person of any of those acts on that other person’s own body.


In France, Article 312 of the Penal Code has been interpreted to outlaw female circumcision. Under Article 312

> any person who willfully wounds or strikes a child under fifteen years of age, or willfully deprives him of food and care to the point of endangering the health of such child or willfully subjects him to any other violence or assault, negligent violence excluded, shall be punished by jailing from one to five years and fine of 50,000 to 500,000 francs.

... 

If the perpetrator is the father or mother, whether legitimate, illegitimate or adopted, or a legitimate ascendant, or any other person entrusted with authority, custody or care of the child, the punishments shall be ... [imprisonment from two to five years], provided that no disease or work incapacity of more than twenty days has resulted, and provided there was neither premeditation nor lying in wait. In all other cases the punishment is solitary confinement.

If the violence and deprivations have resulted in mutilation, amputation or loss of the use of a limb, in blindness, loss of an eye or in other permanent disability, or if they have caused unintentional death, the punishment shall be hard labor for a limited time and if the perpetrator is a person mentioned in the preceding paragraph, the punishment shall be hard labor for life.


In the United States, Rep. Patricia Schroeder introduced the Federal Prohibition of Female Genital Mutilation Act of 1993 on October 7, 1993 (H.R. 3247). This proposed legislation

> makes the practice of FGM [female genital mutilation] on a minor subject to criminal penalties. Likewise, it establishes penalties for physicians who discriminate against women who have already experienced FGM. Finally, the bill authorizes the Department of Health and Human Services to inform immigrant communities from countries that traditionally practice FGM of the health risks of FGM and the legal liabilities involved.


The bill was still in committee at the close of the 103d Congress. Rep. Schroeder reintroduced the bill into the 104th Congress on February 14, 1995, as
These views regarding female circumcision are important to recognize because the question of whether female circumcision is torture or detrimental to women has important implications for asylum law issues. In many Western countries, the issue of whether women should be granted political asylum based on persecutions related only to their gender, such as female circumcision, is currently being debated. David Neal provides a strong argument favoring a woman's need to be protected from gender-based persecution:

In countries with strong cultural or religious propensities for discrimination against women, discrimination can readily escalate into persecution once women fail to comply with their assigned subordinate status. While the third world is not alone in failing to accord women sufficient protections, the social relations of many third world nations are still dominated by religious, tribal, or societal customs which accommodate, if not sanction, the persecution of women.

However, many Western countries reject arguments for granting political asylum due to gender-based persecution. For example, currently the United States refuses to recognize that asylum should be granted to women faced with gender-related persecution. The "Federal Prohibition of Female Genital Mutilation Act of 1995" (H.R. 941, 104th Cong., 1995). As of November 14, 1995, the bill had 55 co-sponsors. The bill, at the time of this writing, is pending in the House Commerce and Judiciary Committees. 141 Cong. Rec. H1751 (February 14, 1995). The bill has now been introduced into the Senate by Sen. Harry Reid (D-Nev.). S. 1030, 104th Cong., 1st Sess. (1995). The bill has four co-sponsors and is currently pending in the Senate Judiciary Committee. 141 Cong. Rec. S9910 (July 13, 1995).


17. Only Canada has granted asylum because of gender-based persecution. See infra notes 48-65 and accompanying text.

18. The Office of International Affairs of the U.S. Department of Justice recently issued a memorandum to U.S. asylum officers that provides guidelines for gender-based persecution claims. Phyllis Coven, Considerations for Asylum Officers Adjudicating Asylum Claims for Women (May 26, 1995) (memo to INS Asylum Officer Corps) (on file with author). However, since the guidelines have not yet withstood a court test, their legal impact is unclear. The memorandum does not require asylum officers to follow the guidelines, but rather attempts to enhance asylum officers' sensitivity to gender-related issues. Additionally, the memorandum is not binding
on the Board of Immigration Appeals or the federal courts because it does not, for example, amend the Code of Federal Regulations. Although the memorandum is not as comprehensive as the Canadian Guidelines issued in 1993, see infra note 58, it lays a groundwork for asylum officers and immigration judges to recognize persecutions related to gender, such as female circumcision.

In the United States, the current basis for granting political asylum is a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. 8 C.F.R. § 208.13(b) (1995). Generally, courts have ruled that an applicant for asylum must show the following:

1. A likelihood of persecution; i.e., a threat to life or freedom.
2. Persecution by the government or by a group which the government is unable to control.
3. Persecution resulting from the petitioner’s political beliefs.
4. The petitioner is not a danger or a security risk to the United States.

Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284 (9th Cir. 1984). An applicant does not need to prove that the persecution actually will occur upon return to his or her country. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). In Cardoza-Fonseca, the Court stated:

We do not consider it at all anomalous that out of the entire class of “refugees,” those who can show a clear probability of persecution are entitled to mandatory suspension of deportation and eligible for discretionary asylum, while those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum.

Cardoza-Fonseca, 480 U.S. at 444 (emphasis in original).

Many human rights advocates, myself included, are stressing the need to add gender as a basis for granting political asylum. As Linda Cipriani argues, adding gender would

protect women from institutionalized misogyny in which the government carries out, sanctions, or ignores oppression of or violence against women because they are women. The most notorious example of such persecution is probably Islam with its strict rules regarding the status and behavior of women. However, similar conditions exist in India under the Hindu religion, in Africa under tribal laws, and in Latin America under the tradition of machismo. Clearly these practices reflect cultural or religious traditions that outsiders often cannot understand. Nevertheless, if a government forces these traditions upon a woman who rejects them, this may amount to persecution.

Cipriani, supra note 15, at 513. To date, U.S. courts have rejected this argument. For example, in Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993), the Third Circuit denied asylum to a woman who left Iran in 1978, even though she argued that “she would be persecuted for expressing feminist views or refusing to wear a veil if she were forced to return.” Jill Lawrence, Gender Persecution New Reason for Asylum; Human Rights: Women Face Bride-Burning, Genital Mutilation, Forced Abortions and Politically Motivated Rape, But Nations Have Been Slow to Grant Refuge, L.A. TIMES, Mar. 27, 1994, at A14. See also discussion of Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993), infra notes 77–88 and accompanying text. In another case, the Fifth Circuit affirmed the Immigration and Naturalization Service’s decision to deport a woman
The issue of whether to grant political asylum based on gender-related persecution is closely linked to the question of whether female circumcision or other forms of gender-related persecution should be grounds for granting political asylum. If female circumcision provides a basis for granting political asylum, countries must then decide whether asylum should be granted to a mother, her child, or both. One country has found that female circumcision is grounds for granting political asylum. Canada recently granted refugee status to a mother and her two children based on the fear that the daughter would be subject to circumcision if the family were forced to return to Somalia.

Part I of this article examines two cases. In one case, a United States immigration court allowed female circumcision as a defense to deportation. In another case, the Canadian Immigration and Refugee Board granted political asylum after recognizing female circumcision as a form of persecution. Part II assesses the extent of protections currently provided for potential victims of female circumcision under U.S. asylum law and analyzes the factors that a court should consider when making asylum determinations. Part III recommends that gender should be added to the enumerated grounds for persecution under U.S. asylum law. This section provides a hypothetical that demonstrates how claims of asylum based on female circumcision should be analyzed as gender-based persecution.

---

19. Although this article specifically deals with female circumcision as a basis for granting asylum to women, there are other forms of gender-related persecution that also warrant the granting of asylum (i.e., rape, violence, forced sterilization, etc.).

20. In this article, I will use the term “political asylum” when referring to both Canadian and U.S. law.

21. See infra notes 48–65 and accompanying text.


I. Oluloro and Farah: Two Examples of Female Circumcision in Immigration Hearings

In this section, I will analyze two recent North American cases which raised the issue of female circumcision in an immigration context. In the first case, Lydia Oluloro of Portland, Oregon, avoided deportation to Nigeria based on the defense of female circumcision. In the second case, the Canadian Immigration and Refugee Board granted political asylum to Khadra Hassan Farah of Somalia and her children to prevent the daughter’s circumcision.24

The cases are similar because both women were trying to protect their daughters from circumcision should they be deported to their home countries. In the Oluloro case, Ms. Oluloro requested a suspension of deportation,25 withholding of deportation,26 and voluntary departure.27 Ms. Farah, on the other hand, petitioned the Immigration


25. Under the Immigration and Nationality Act, § 244(a)(1), the Attorney General can suspend the deportation of an alien who

is deportable under any law of the United States . . . has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]


26. Under the Immigration and Nationality Act § 243(h)

[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.


27. The Immigration and Nationality Act, § 244(e) states that

[t]he Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

and Refugee Board to grant political asylum for herself and her children. Comparing and contrasting these cases provides a background for the hypothetical discussed in Part III.

A. The Case of Lydia Oluloro

In February 1993, Lydia Oluloro faced deportation to Nigeria. As a defense to deportation, she argued that her daughters would be subject to female circumcision in Nigeria. This was the first immigration case to use female circumcision as a defense.

Lydia Oluloro is a Nigerian national who came to the United States on a one-year nonimmigrant visa that authorized her to remain in the country until March 27, 1987. She has two daughters, ages four and six at the time of the trial, who are American citizens by birth.

---

28. The Canadian Immigration Act states that

(1) Subject to this Act and the regulations, any immigrant including a Convention refugee, a member of the family class and an independent immigrant may be granted landing if the immigrant is able to establish to the satisfaction of an immigration officer that he meets the selection standards established by the regulations for the purpose of determining whether or not an immigrant will be able to become successfully established in Canada.

(2) Any Convention refugee and any person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted, may be granted admission subject to such regulations as may be established with respect thereto and notwithstanding any other regulations made under this Act.

Immigration Act, R.S.C., ch. 1-2, § 6(2) (1985) (Can.).

29. In re Lydia Omowunmi Oluloro, A72-147-491 (U.S. Immigr. Ct. Mar. 23, 1994) (unpublished oral opinion) (on file with author). Ms. Oluloro was charged under § 241(a)(1)(B) of the Immigration and Nationality Act, which states that an alien is deportable if he or she "entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States...." 8 U.S.C. § 1251(a)(1)(B) (1992). Ms. Oluloro violated this provision by remaining in the United States on a nonimmigrant visa longer than authorized.

30. In re Lydia Omowunmi Oluloro, A72-147-491 (Trial Memorandum) (on file with author) [hereinafter Oluloro Memorandum]. Ms. Oluloro also argued that she faced harm from her ex-husband's family because she "dishonored" them by divorcing him. Oluloro Memorandum, supra, at 1.

Ms. Oluloro is a member of the Yoruba tribe of Nigeria, which requires that all females be circumcised. After the birth of one of her daughters, one of Ms. Oluloro's sisters inquired whether the girl had been circumcised. Ms. Oluloro responded, "no, they don't do it in America here." Ms. Oluloro reported that her sister then said, "if we come home, they are going to do it for her no matter what.

If Ms. Oluloro was deported to Nigeria she would be faced with the following two choices: leaving the children in the custody of her abusive ex-husband, or taking the girls with her to Nigeria. In preparation for Ms. Oluloro's deportation hearing, her lawyer, Tilman Hasche, asked her if the girls would be subject to circumcision upon

---

32. Tilman Hasche, Ms. Oluloro's attorney, in the Oluloro Memorandum, stated that

[i]n Nigeria, circumcision is rooted in the belief that men and women have androgynous natures and that this duality must be ritually exercised by removing the body parts that properly correspond to the opposite sex. Thus, by cutting off the male's foreskin, the "female" part of his anatomy—homologous to the hymen—is removed, and he becomes fully male. Similarly, by reducing or excising the clitoris—considered homologous to the man's penis—the female becomes fully female.

Oluloro Memorandum, supra note 30, at 5 (citations omitted). Ms. Oluloro underwent a clitoridectomy when she was a young girl. Oluloro Memorandum, supra note 30, at 7–8.


34. Gregory, supra note 34, at 45–46. A paralegal who worked on the Oluloro case said that Ms. Oluloro was told by her family that the girls would be circumcised in Nigeria because "we don't want any American whores running around to embarrass the family." Stuart Wasserman & Maria Puente, Female Genital Mutilation under Scrutiny at Hearing, USA Today, Feb. 11, 1994, at 3A.

35. In divorce papers filed in 1993, Ms. Oluloro accused her ex-husband of spousal rape and of beating her and the children. Gregory, supra note 33; Timothy Egan, An Ancient Ritual and a Mother's Asylum Plea, N.Y. Times, Mar. 4, 1994, at A25. Judge Kendall Warren, in his opinion, describes one such incident:

At one point they had a fight in which she described that Emanuel had borrowed money from her family to pay for the wedding, and when she attempted to send some money back to the family in repayment of the debt, he became extremely angry and violent and threatened her with a knife and stabbed her with a screwdriver. Her nightgown was torn and she indicated that he forced her to have sex with him, and so she called the police and he was arrested.

Oluloro, A72-147-491 at 7.

36. Given these options, Ms. Oluloro stated: "I will take my kids if I am forced to go . . . . They are my life, my best friends." Egan, supra note 35, at A25.

37. Mr. Hasche is a partner at the law firm of Parker, Bush & Lane in Portland, Oregon. Dimitra Kessenides, Finding the Right Strategy to Stop a Deportation, American Lawyer, June 1994, at 35.
their return to Nigeria. When she answered "yes," Mr. Hasche suggested that they request the court to suspend the deportation order because of this threat of circumcision. In his trial memorandum, Mr. Hasche argued that Ms. Oluloro and the girls would suffer "extreme hardship" if Ms. Oluloro were deported to Nigeria.

38. "What stuck in my mind was a series of black and white photos of a young black girl [undergoing the procedure] ... and the expressions on this little girl's face," Hasche recalls. Kessenides, supra note 37, at 35. "That memory prompted [Hasche] to ask Oluloro if she had undergone a circumcision and, if she returned to Nigeria, whether the procedure would be forced on her daughters: The answer in both cases was yes." Kessenides, supra note 37, at 35.

At Ms. Oluloro's deportation hearing, the extent to which Ms. Oluloro opposed her daughters' circumcision was disputed. Oluloro, A72-147-491 at 12. Emmanuel Oluloro, Lydia's ex-husband, testified that Ms. Oluloro once suggested bringing the daughters back to Nigeria to have the circumcisions performed on them. Gregory, supra note 33, at 46. However, Ms. Oluloro denied this allegation. Gregory, supra note 33, at 46. "I don't want [the girls] to get cut because these girls are American girls. They are not like African girls. It would be a horrible thing for them." Egan, supra note 35, at A25. Ms. Oluloro also said that she would lose her independence if she returned to Nigeria. "If I go back to Nigeria, I am not independent. No job. No husband. I would be returned to my father's house. And I would have no say." Court Allows Nigerian Family to Stay in U.S., ST. PETERSBURG TiMas, Mar. 24, 1994, at 18A.

39. Kessenides, supra note 37, at 35.

40. In the trial memorandum, Mr. Hasche argued that the court should consider the effects of deporting Ms. Oluloro on her children. He wrote:

Some of the factors to be considered in determining whether the effects of the parent's deportation are sufficiently deleterious are medical problems, the age of the child and the effect on the child's education, separation from other family members in the United States, and the difficulty of adjusting to a new country.

Oluloro Memorandum, supra note 30, at 10 (citing Wang v. INS, 622 F.2d 1341, 1348 n.7 (9th Cir. 1980), rev'd on other grounds, 450 U.S. 139 (1981)). Mr. Hasche also noted that Ms. Oluloro's deportation would be an "extreme hardship" to her daughters as well as herself:

Any number of factors make up the extreme hardship on the girls if they are forced to relocate to Nigeria in order to remain by their mother. There are the problems of assimilation to Nigerian society, Yoruba culture, and a whole different family structure; ignorance of the language(s) spoken; different roles and expectations for women; lower standard of living; diminished educational opportunities; exposure to unusual diseases; lower standard of medical care; etc. etc. etc. ALL OF THESE PALE, HOWEVER, IN THE FACE OF THE VERY SIGNIFICANT RISK THAT SHADE AND LARA WILL BE SUBJECTED TO GENITAL MUTILATION.

Oluloro Memorandum, supra note 30, at 12 (emphasis in original). By using the "extreme hardship" argument, "Hasche attacked [female circumcision] as inhumane,
On March 23, 1994, Immigration Judge Kendall Warren rendered his oral decision. The judge noted that Ms. Oluloro barely met the statutory requirements for obtaining United States residency, and that it would be difficult for her to prove that she would suffer extreme hardship if she were deported to Nigeria. Despite this, the court concluded that deporting Ms. Oluloro would create an extreme hardship to her daughters because she "established a strong likelihood that her daughters will be subjected to [female circumcision] if she returns to Nigeria." The opinion found that female circumcision "is cruel and serves no known medical purposes."

Ultimately, the court found that Ms. Oluloro was entitled to suspension of deportation because she established "seven years' continuous physical presence" in the United States, displayed "good moral character," and because deportation would create "extreme hardship on her United States citizen children." Therefore, Judge Warren blocked the deportation order and allowed Ms. Oluloro to remain in the United States.

41. Oluloro, A72-147-491.
42. Judge Warren found that Ms. Oluloro has adapted well to the community and has been gainfully employed, but her age and health do not appear to be factors which would be a cause of extreme hardship if she returned to Nigeria. There is no indication of exceptional service to the community. If the inquiry stopped here, it is doubtful she could establish extreme hardship. Oluloro, A72-147-491 at 16.
43. Oluloro, A72-147-491 at 17. The court also noted that it would be difficult for the girls to adjust to Nigerian culture because "sanitation facilities, medical and educational institutions, etc., are not possibly of the same quality in Nigeria as they are in the United States." Oluloro, A72-147-491 at 16. Additionally, the court recognized that separating the girls from their father, who would remain a U.S. resident, was another hardship. Oluloro, A72-147-491 at 16.
44. Oluloro, A72-147-491 at 16. Judge Warren went on to say that female circumcision is obviously a deeply-ingrained cultural tradition going back over 1,000 years at least. Though some of the evidence suggests that it was originated by men as a means of subjugating women, the evidence does seem clear that it is almost always enforced by tribal women. Regardless of the origins and motives of this practice, however, the court finds that it is cruel, painful, and dangerous.
45. Oluloro, A72-147-491 at 17. For the statutory requirement for withholding deportation, see supra note 26.
States. This decision was hailed by many feminist groups. Unfortunately, because the ruling dealt with a deportation order, its precedential value for arguing that female circumcision is grounds for political asylum is limited.

B. The Case of Khadra Hassan Farah

Canada is the first country in the world to grant political asylum because of female circumcision. Khadra Hassan Farah is a Somali

46. The Immigration and Naturalization Service declined to appeal the ruling. Oluloro, A72-147-491 at 20. This ruling makes Ms. Oluloro a permanent U.S. resident. Oluloro, A72-147-491 at 20.

47. "This is a victory and a sign that women's rights are being taken seriously on the question of asylum," said Jane Ordway, associate director for public education at the New York-based International Women's Health Coalition. Women: Ruling on Nigerian Mother's Deportation Cheered, Inter Press Service, Mar. 23, 1994, available in LEXIS, ASIAPC Library, INPRES File.

In contrast, the Nigerian government has officially denounced the ruling, saying that Ms. Oluloro's fears of her daughters being circumcised are unfounded. "Mrs. Oluloro need not have entertained any fear in returning to Nigeria with her children as her safety and that of her children are guaranteed." Zubair M. Kazaure, Forced Circumcision Is Alien to Nigeria, N.Y. Times, Apr. 9, 1994, at A20 (Letter to the Editor from the Nigerian Ambassador to the United States).

48. Another woman in Portland, Oregon, Eunice DeShields, is also facing deportation to Nigeria. In re Eunice DeShields, A27-927-777 (U.S. Immigr. Ct. Jan. 28, 1994) (unpublished opinion denying motion to reopen) (on file with author). Like Ms. Oluloro, Ms. DeShields argues that her daughter, Princess, will be subject to female circumcision if she is forced to return to Nigeria. However, unlike Ms. Oluloro, Ms. DeShields is petitioning for asylum.

Her attorney, Alexa Forte, argues that Ms. DeShields "will be forced to either witness her own daughter's mutilation against her will or be forced to experience the severe psychological trauma of being unable to protect her daughter from the genital mutilation." Colleen O'Connor, Mutilation Custom, CHI. TiM., June 27, 1994, § 1, at 7. Oluloro is not expected to have much precedential value because different standards apply to political asylum cases. As an asylum petitioner, Ms. DeShields must establish that she herself will be persecuted once she returns to Nigeria, which she has not done satisfactorily. Her case is currently pending before the Board of Immigration Appeals. Telephone Interview with Alexa L. Forte, attorney for Ms. DeShields (Dec. 5, 1994).

49. See In re Khadra Hassan Farah (Immigration and Refugee Board (Refugee Division) May 10, 1994) at 2 (unpublished opinion) (on file with author). The copy of the decision sent to me by the Immigration and Refugee Board deleted the names of Khadra, her children, and her ex-husband, along with other minor information from the opinion. Khadra's name and that of her daughter, Hodan, were reported in Canadian and U.S. newspapers. E.g., Jacquie Miller, Stopping the Torture: Refugee Board Lets Somali Stay, Sparing Her Daughter Mutilation Ritual, OTTAWA CITIZEN, July 15, 1994, at A1. Her son and ex-husband's names were not reported.
national living in Canada.\textsuperscript{50} In 1989, she and her husband moved to the United States.\textsuperscript{51} In March 1991, she left her husband and went to Canada with her two children seeking political asylum.\textsuperscript{52} Ms. Farah argued before the Canadian Immigration and Refugee Board (IRB) that her ten-year-old daughter, Hodan, would be subject to female circumcision if she were deported to Somalia.\textsuperscript{53} As evidence, she testified about her own circumcision at the age of eight.\textsuperscript{54} Ms. Farah also testified that, if she were deported to Somalia, she would surrender Hodan for adoption in Canada rather than subject her to the torture of circumcision.\textsuperscript{55}

On May 10, 1994, a two-member panel of the IRB rendered its decision.\textsuperscript{56} The panel found that Hodan’s “right to personal security would be grossly infringed” if Ms. Farah was forced to return to Somalia.\textsuperscript{57} To support its decision, the panel cited the IRB

\begin{quote}
\textsuperscript{50} Farah, Immigration and Refugee Board (May 10, 1994) at 1.
\textsuperscript{51} Farah, Immigration and Refugee Board (May 10, 1994) at 2.
\textsuperscript{52} Ms. Farah testified that her marriage was very abusive:

\begin{quote}
[t]here were frequent arguments about her desire to be more independent. After three years of marriage she asked for a divorce but her parents were opposed to it and her husband began to verbally and physically abuse her. She testified that he drank excessively and repeatedly beat her and their daughter . . . .
\end{quote}

Farah, Immigration and Refugee Board (May 10, 1994) at 2. The opinion also noted that Ms. Farah had three siblings and two cousins who were already granted political asylum in Canada and living in Toronto. Farah, Immigration and Refugee Board (May 10, 1994).
\textsuperscript{53} Farah, Immigration and Refugee Board (May 10, 1994) at 2.
\textsuperscript{54} Ms. Farah underwent infibulation, the most severe of the three circumcision operations. See Farah, Immigration and Refugee Board (May 10, 1994) at 9–10.
\textsuperscript{55} Ms. Farah testified that she feared losing custody of her daughter if she was deported. Since Ms. Farah was divorced from her husband, under Islamic law, her husband would have complete custody of their children and could prevent them from maintaining contact with their mother. See Farah, Immigration and Refugee Board (May 10, 1994) at 3. Ms. Farah’s ex-husband had previously abducted their oldest son and prevented him from contacting her, and therefore Ms. Farah had a realistic fear that if her husband obtained custody of Hodan, he would prevent contact between them as well. Farah, Immigration and Refugee Board (May 10, 1994) at 2. Ms. Farah testified that if she lost custody of Hodan, “she would be powerless to prevent the custom of female genital mutilation . . . widely practised in Somalia.” Farah, Immigration and Refugee Board (May 10, 1994) at 3.
\textsuperscript{56} See Farah, Immigration and Refugee Board (May 10, 1994).
\textsuperscript{57} The panel also said that they were “satisfied that the authorities in Somalia will not protect [Hodan] from the physical and emotional ravages of FGM, given the evidence of its widespread practice in that country.” Farah, Immigration and Refugee Board (May 10, 1994) at 11.
Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution\(^5\) and the United Nations Convention on the Rights of the Child.\(^5\) The panel concluded that, according to the principles contained in these documents, Hodan was subject to persecution based on her membership in “two particular social groups, namely, women and minors.”\(^6\) The panel said that Hodan’s “gender is clearly an ‘innate or unchangeable characteristic,’ and the fact that she is below the age of majority is also, for the foreseeable future, something she cannot change.”\(^6\) Thus, Hodan qualified as a member

58. The Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution \(\text{[hereinafter Gender Guidelines]}\) were issued by the Chairperson of the Canadian Immigration and Refugee Board, Nurjehan Mawani, on March 9, 1993, pursuant to § 65(3) of the Canadian Immigration Act. \(\text{News Release} \) \(\text{(Canadian Immigration and Refugee Board) (Mar. 9, 1993)}}\) \(\text{(on file with author). The guidelines were established to give board members direction when deciding cases involving gender-based persecution claims. \(\text{News Release, supra, at 2. The guidelines are not binding on members of the board when deciding these cases, but it is expected that members will explain any departure from the guidelines in rendering their decisions. \(\text{News Release, supra, at 2. The guidelines were developed to provide consistency in dealing with gender-based persecution cases, as noted in the following general proposition:}}\)

Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.

\(\text{News Release, supra, at 2 (emphasis in original).}}\)

Since the release of the guidelines, 350 gender-related claims have been identified. Of those claims, 150 have been finalized, and 70% of those finalized resulted in the granting of refugee status. \(\text{First Anniversary of Guidelines on Women Refugee Claimants, News Release, (Canadian Immigration and Refugee Board) (Mar. 9, 1994)}}\) \(\text{(on file with author). Under the Gender Guidelines, Canada granted political asylum to 195 women in 1994 because of gender-based persecution. \(\text{Canada Accepts Refugees on Basis of Sex, Reuters World Service, Mar. 9, 1995, available in LEXIS, NEWS Library, REUWLD File.}}\)

59. Child Convention, \(\text{supra} \) \(\text{note 12. The Convention was adopted, without a vote, by the U.N. General Assembly on November 20, 1989. Since then over 177 countries, including Canada, have signed or ratified this Convention. The United States has recently signed the Convention. \(\text{United States Signs the Convention on the Rights of the Child; A Giant Step Towards Ratifying International Treaty to Ensure the Basic Rights of Children, PR Newswire, Feb. 16, 1995 available in LEXIS, NEWS Library, BUSDTL File.}}\)

60. \(\text{Farah, Immigration and Refugee Board (May 10, 1994) at 11.}}\)

of both social groups\(^\text{62}\) and was eligible for asylum.\(^\text{63}\)

The *Farah* decision created a lot of controversy because some Canadians feared that the ruling would cause a flood of refugees seeking

---

62. *Ward* further clarifies this point:

The meaning assigned to “particular social group” in the [Immigration] Act should take into account the general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in Mayers [v. Canada (Minister of Employment and Immigration), 97 D.L.R.4th 729 (1992)], Cheung [v. Canada (Minister of Employment and Immigration), 102 D.L.R.4th 214 (1993)], and Matter of Acosta, [19 I. & N. Dec. 211 (BIA 1985)], provide a good working rule to achieve this result. They identify three possible categories:

1. groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.


63. *Farah*, Immigration and Refugee Board (May 10, 1994) at 11. The IRB also granted political asylum to Ms. Farah as a member of a particular social group, namely women. The IRB found that “[a]s a divorced mother under the jurisdiction of Sharia law [Ms. Farah’s] rights as a parent and her right to personal security are not upheld as the international human rights instruments require.” *Farah*, Immigration and Refugee Board (May 10, 1994) at 7. Additionally, the IRB granted political asylum to Ms. Farah’s son, determining that his “being forcibly removed from the care and nurture of his mother” by his father under Sharia law constituted persecution. *Farah*, Immigration and Refugee Board (May 10, 1994) at 11. The panel further determined that Ms. Farah’s ex-husband “would exercise his prerogative under Sharia law to take custody of his son and deny him access to his mother, the only custodial parent with whom he has formed an enduring bond.” *Farah*, Immigration and Refugee Board (May 10, 1994) at 11. Citing Articles 3, 9, and 12 of the Child Convention, the panel found that the “best interests of the child” (in this case, the son) would not be considered by his father because of his violent nature. The panel, citing *Ward*, found that based on the son’s “innate or unchangeable characteristic” and the fact that he was below the age of majority (he was seven at the time of the hearing), his particular social group was “minors.” *Farah*, Immigration and Refugee Board (May 10, 1994) at 12–13.
asylum in Canada to escape female circumcision. Many also questioned the cost of the hearing and whether Ms. Farah or women granted asylum in the future would be productive citizens in Canada.

The Oluloro case in the United States and the Farah case in Canada highlight the need to protect women and girls from involuntary female circumcision. Both women are now living comfortably in their respective countries of refuge with no further worry that their daughters will be circumcised. However, since only Canada has recognized that female circumcision is a form of persecution, the United States and other Western countries must follow Canada's lead in establishing this recognition to ensure that their political asylum laws adequately protect women.

II. Female Circumcision as a Form of Persecution

Individuals applying for political asylum in the United States must prove that they have a well-founded fear of persecution. One problem with this requirement is that no standard legal definition of "persecution" exists in the United States.

64. However, Nurjehan Mawani, chairperson of the IRB, said that she did not expect a flood of claims because of the Farah decision:

Refugee determination is always on a case-by-case basis . . . I expect we may see a few more cases, but certainly no floodgates. If you look at the overall worldwide situation, only 5 percent of world refugees are able to claim refugee status in the West, and of these the proportion of women is abysmally small. Women do not have the same mobility as men.


65. It was reported in 1992 that Canada spent $50,000 "to process and take care of" a refugee claimant. Daniel Stoffman, The High Costs of Our Refugee System, TORONTO STAR, Sept. 21, 1992, at A19. The actual cost of the Farah case is not known.

66. A letter to the editor printed in the Ottawa Citizen commented that Ms. Farah "in all likelihood" was on government assistance and living in subsidized housing, estimated at $20,000. "The two children attend school ($7,500 per child = $15,000). There are the health-care costs and free dental care for the children and emergency dental care for [Ms. Farah] ($2,000 per person national average for health care in Canada)." Julie Vondra, Potential Immigrants over 18 Should Be Evaluated for Their Economic Benefits, OTTAWA CITIZEN, July 29, 1994, at A10.

67. 8 C.F.R. § 208.13(b) (1995).

68. "Congress did not define persecution in the [Immigration and Nationality Act], nor did the United Nations in the international conventions and protocols that provided the backdrop for congressional asylum legislation and which have thus informed the judiciary's interpretation of § 208." Balazoski v. INS, 932 F.2d 638, 641-42 (7th Cir. 1991).
Nations High Commissioner for Refugees' (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* notes that "[t]here is no universally accepted definition of 'persecution,' and various attempts to formulate such a definition have met with little success."

United States courts have defined persecution in several ways. First, the Seventh Circuit has defined persecution as "punishment for political, religious, or other reasons that our country does not recognize as legitimate." Second, the United States Board of Immigration Appeals (BIA) has attempted to clarify the definition of persecution, stating that it includes 1) "harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome," and 2) "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control."

The UNHCR also defines persecution. The UNHCR's handbook infers that persecution is "a threat to life or freedom on account of race, religion, nationality, political opinion or membership [in] a particular social group." According to the UNHCR,

an applicant [for asylum] may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds."

Since persecution is such a vague term, it is important to examine how the threat of female circumcision qualifies as a form of persecution. In this section, I will demonstrate how the UNHCR's definition

---


70. Osaghae v. USINS, 942 F.2d 1160, 1163 (7th Cir. 1991). See also Zalega v. INS, 916 F.2d 1257, 1260 (7th Cir. 1990) (defining persecution as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.").


of persecution should be applied to determine U.S. standards. Part A of this section asserts that potential victims of female circumcision are persecuted on the basis of their membership in a "particular social group," namely females. Part B of this section advocates that potential victims of female circumcision have a "well-founded fear of persecution."

Currently, female circumcision does not qualify as a form of persecution under U.S. political asylum law. However, under this application, a court can examine the cumulative effects of female circumcision on a woman's well-founded fear of persecution. If a woman has undergone circumcision, courts should consider this as "past persecution." If this woman fears that her daughter is a potential victim of female circumcision, courts should rule that the combination of these factors establishes a well-founded fear of persecution.

A. Particular Social Group

To prove that potential victims of female circumcision are members of a particular social group under U.S. law, one must first define what constitutes a "particular social group." Under U.S. asylum law, no consistent definition of a "particular social group" exists. The Ninth Circuit has stated that "group membership itself subjects the alien to a reasonable possibility of persecution, so that he or she will be able to satisfy the objective component of the well-founded fear standard simply by proving membership in the targeted group." However, the Third Circuit examined the definition of "particular social group" in Fatin v. INS and indicated that an applicant must prove both membership in a particular social group and that the applicant has a well-founded fear of persecution based on that membership. Parastoo Fatin is an Iranian national who came to the United States on December 31, 1978, on a nonimmigrant student visa. Ms. Fatin applied for political asylum in May 1984, while attending Spring Garden College in Philadelphia. In her petition, she stated that she feared

76. 8 C.F.R. § 208.13(b)(2) (1995).
77. Kotasz v. INS, 31 F.3d 847, 852 (9th Cir. 1994).
78. 12 F.3d 1233 (3d Cir. 1993).
79. This was approximately two weeks before the last Shah of Iran went into exile. Fatin, 12 F.3d at 1235.
80. Fatin, 12 F.3d at 1235.
persecution by the new government of Iran. At her asylum hearing, she argued that she should be granted political asylum because she was a feminist. Ms. Fatin testified:

As a feminist I mean that I believe in equal rights for women. I believe a woman as a human being can do and should be able to do what they want to do. And over there in . . . Iran at the time being a woman is a second class citizen, doesn’t have any right to herself . . .

Ultimately, the immigration judge denied Ms. Fatin’s request for political asylum, finding that “although [Ms. Fatin] would be subject to the same discriminatory treatment as all other women in Iran, there was ‘no indication that there is a likelihood that the Iranian government would be particularly interested in this individual and that they would persecute her.’”

Ms. Fatin subsequently appealed to the BIA. In her appeal, she argued that she feared persecution “on account of her membership of a particular social group[.]” Ms. Fatin argued that her “particular social group” was “the social group of the upper class of Iranian women who supported the Shah of Iran, a group of educated free-thinking individuals.” The BIA dismissed her appeal, finding that “there was no evidence that she would be ‘singled out’ for persecution.”

Ms. Fatin then appealed the BIA’s decision to the Third Circuit. In its opinion, the court stated that an alien must establish the follow-
ing elements to qualify for asylum based on persecution for membership in a particular social group:

(1) identify a group that constitutes a “particular social group,”
(2) establish that he or she is a member of that group, and
(3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.88

The court found that Ms. Fatin did meet the burden of showing that she was a member of a particular social group, namely, Iranian women who are feminists. However, the court also found that the members of the group who feared persecution were more limited. It concluded that the group qualifying for asylum

does not include all Iranian women who hold feminist views . . . it is limited to those Iranian women who find those laws so abhorrent that they “refuse to conform”—even though . . . “the routine penalty” for noncompliance is “74 lashes, a year’s imprisonment, and in many cases brutal rapes and death.”89

Therefore, the court denied Ms. Fatin’s petition because, although she was a member of a particular social group, she did not show a “well-founded fear of persecution” resulting from her membership in this group.90

In another immigration proceeding, In re Acosta,91 the BIA applied the doctrine of ejusdem generis, literally meaning “of the same kind,” to the definition of “membership in a particular social group.”92 The Board concluded that persecution based on membership in a particular social group

is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience . . . The particular kind of group characteristic that will qualify under this construction

---

88. Fatin, 12 F.3d at 1240.
89. Fatin, 12 F.3d at 1241 (citations omitted).
90. Fatin, 12 F.3d at 1242.
remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities of consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.\textsuperscript{3}

The UNHCR interprets the particular social group requirement differently. According to its definition, a "‘particular social group’ normally comprises persons of similar background, habits or social status."\textsuperscript{4} Although membership in a particular social group may not be sufficient grounds for asylum, “[t]here may . . . be special circumstances where mere membership can be a sufficient ground to fear persecution.”\textsuperscript{5} This definition is not binding on U.S. courts, but “[t]he Supreme Court has stated that while the Handbook does not ‘ha[ve] the force of law or in any way bind[] the INS,’ it nevertheless ‘provides significant guidance in construing the Protocol, to which Congress sought to conform.’”\textsuperscript{6}

The standards of the UNHCR, Acosta, and Fatin should be applied to determine whether women subject to female circumcision can be considered members of a particular social group. Based on these standards, any woman who is a member of a tribe that practices female circumcision can be considered a member of a particular social group, “potential victims of female circumcision.” This particular social group is comprised of women and girls from cultures who, because of tradition, are subject to female circumcision. Any young girls who are faced with this procedure upon return to their mothers’ home countries are a member of this social group. Additionally, mothers who have been circumcised and who are trying to prevent the circumcision of their daughters can be classified as another group, “women opposed to

\textsuperscript{3} Acosta, 19 I & N Dec. at 233–34.
\textsuperscript{4} HANDBOOK, supra note 69, at ¶ 77.
\textsuperscript{5} HANDBOOK, supra note 69, at ¶ 79.
\textsuperscript{6} Garcia v. INS, 7 F.3d 1320, 1325 (7th Cir. 1993) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987)).
female circumcision.” Ms. DeShields, for example, would qualify as a member of this group.

United States courts have not recognized either “potential victims of female circumcision” or “women opposed to female circumcision” as groups in which mere membership is sufficient proof of a fear of persecution. The group “potential victims of female circumcision” will usually consist of young females. The group “women opposed to female circumcision” normally includes previously circumcised women. To change current asylum law it is vital that judges recognize that these women are members of a particular social group and that this group has an implicit fear of persecution. Such recognition can help create a broader judicial awareness that people who are facing certain gender-based persecution, such as female circumcision, should be granted asylum under U.S. law.

B. Well-Founded Fear

The Refugee Act of 1980 defines a refugee as

any person who is outside any country of such person’s nationality or . . . is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

However, no standard definition of a “well-founded fear” of persecution exists in the United States. The Supreme Court has emphasized “that this standard involves . . . both objective and subjective evidence and is determined on a case-by-case basis.” One way this standard can be interpreted is evidenced by a 1990 Seventh Circuit case. In Bogdzia v. INS, the court assessed the “well-founded fear” standard and held that an alien “must present specific facts through objective evidence to

100. Bogdzia, 1990 WL 125907 at **2.
prove either past persecution or good reason to fear future persecution.”

It also noted a BIA determination that “an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution.” Applying this standard, the Seventh Circuit found that a Polish national had not shown a well-founded fear of persecution and upheld deportation and voluntary departure.

Applying the Bogdzia principles to the facts of the Oluloro case demonstrates how the threat of female circumcision meets the well-founded fear requirement for political asylum. Ms. Oluloro feared that her two daughters would be subject to female circumcision if she were deported to Nigeria and took them with her. This fear was based on two facts: 1) tribal custom and tradition requiring circumcision; and 2) information from her family, specifically her older sister, that her daughters would be circumcised even without her knowledge or consent. Thus, Ms. Oluloro’s daughters had a well-founded fear of future persecution, fulfilling the test of § 208.13(b).

---

101. Bogdzia, 1990 WL 125907 at **2 (citing Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984)).

102. Bogdzia, 1990 WL 125907 at **2 (citing In re Mogharrabi, Interim Decision 3028, at 9 (BIA 1987)). The court noted that the BIA adopted this definition from the Fifth Circuit. Bogdzia, 1990 WL 125907 at **2.

103. Bogdzia, 1990 WL 125907 at **3. The court concluded that a well-founded fear of persecution was not established. First, it found that Ms. Bogdzia had not established that her father’s imprisonment and torture in Poland as a member of Solidarity would subject her to the same treatment upon her return. Second, it determined that, since she only marched in one demonstration for political reform in the United States, she did not adequately demonstrate a well-founded fear of persecution. Third, it found that she failed to show any connection between newspaper articles detailing the torture and detention of Polish citizens and the threat of torture to her or her family. Fourth, in denying a remand to the BIA based on In re Chen, Interim Decision 3104, at 3 (BIA 1989) (“past persecution can be a basis for a persecution claim”), the court noted that “nothing in the record indicates that the BIA did not consider past persecution as sufficient to establish the statutory qualification for political asylum.” Bogdzia, 1990 WL 125907 at **3.

104. See supra text accompanying notes 32-33.

105. “The applicant may qualify as a refugee either because he has suffered actual past persecution or because he has a well-founded fear of future persecution.” 8 C.F.R. § 208.13(b) (1995) (emphasis added).
III. RECOMMENDATIONS FOR CHANGING UNITED STATES ASYLUM LAW: POINTS TO CONSIDER

The Canadian Immigration and Refugee Board (IRB) Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution outlines four critical questions that "most gender-related refugee claims brought forward by women raise."

These questions can provide a guide to determining how United States law should apply to cases similar to that of Lydia Oluloro. The four questions are:

1. To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or combination, of the five enumerated grounds of the Convention refugee definition?
2. Under what circumstances does sexual violence, or a threat thereof, or other prejudicial treatment towards women constitute persecution as that term is jurisprudentially understood?
3. What are the key evidentiary elements which decision-makers have to look to when considering a gender-related claim?
4. What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about?

The Canadian IRB's Gender Guidelines can assist United States immigration judges in assessing whether potential victims of female circumcision should be granted asylum. The following hypothetical

106. Gender Guidelines, supra note 58, at 1.
110. When the Gender Guidelines were released on March 9, 1993, it marked the first time that any Western country set a standard for reviewing the claims of gender-
case demonstrates how immigration judges can utilize these guidelines. In this case, a woman, who is a Nigerian national, and her daughter face deportation. You are the immigration judge assigned to hear the case. The woman argues that her daughter will be circumcised if they are deported to Nigeria and provides evidence that she underwent a clitoridectomy when she was nine years old. Furthermore, the woman asserts that she and her daughter will be persecuted as members of a particular social group. For the mother, her social group is “women opposed to female circumcision.” For the daughter, her social group is “potential victims of female circumcision.” Based on these facts, how would you decide whether to grant political asylum?

The Gender Guidelines set out six points that must be considered in evaluating this type of claim:

1. Assess the particular circumstances which have given rise to the claimant’s fear of persecution.
2. Assess the general condition in the claimant’s country of origin.
3. Determine the seriousness of the treatment which the claimant fears.
4. Ascertain whether the claimant’s fear of persecution is for any one, or a combination, of the grounds enumerated in the Convention refugee definition.
5. Is adequate state protection available to the claimant?
6. Determine whether, under all the circumstances including the possibility of an internal flight alternative, the claimant’s fear of persecution is well-founded.


111. I am using an example from Nigeria because I am more familiar with the customs of Nigeria than with those of any of the other countries that practice female circumcision.

Therefore, as the immigration judge, you should analyze the facts of this case under each of these six points.

_A. Assess the Particular Circumstances Which Have Given Rise to the Claimant's Fear of Persecution_

To analyze this first point, the _Gender Guidelines_ require that four other factors be considered:

Is the form of harm feared by the claimant one that is directed at or experienced predominantly by women:

1. because of reasons pertaining to kinship?
2. as a result of severe discrimination against women?
3. on grounds of religious precepts, social mores, legal or cultural norms?
4. because of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection?\(^\text{113}\)

Under the facts of this case, the evidence before you regarding female circumcision implicates each of these four factors.

First, regarding kinship, the practice of female circumcision is about 2500 years old\(^\text{114}\) and has been handed down through the generations by women tribal members.\(^\text{115}\) Within families, older women insist that the procedure be performed on younger ones.\(^\text{116}\) A daughter usually

\[^{113}\_\text{Gender Guidelines, supra note 58, at 10.}\]
\[^{114}\_\text{Slack, supra note 3, at 409.}\]
\[^{115}\_\text{"In Nigeria, the practice of female circumcision has persisted for numerous reasons, 'not the least of which is the insistence by elderly females in the various communities that the tradition must be continued.'" Note, What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision, 106 Harv. L. Rev. 1944, 1949 (1993) (quoting Harriet Lawrence, Excising a Harmful Tradition, Guardian, June 11, 1992, at 9) [hereinafter Culture].}\]
\[^{116}\_\text{For example, when Fathia Milad ... decided not to circumcise her two youngest daughters, "my husband said okay, but my mother said: 'This is wrong. All of us were circumcised. It will not be good for them.'"}\]
has no choice about whether to be circumcised since the procedure is often done as early as infancy.\footnote{E.g.,}  

Second, female circumcision discriminates against women because it is done primarily to preserve a woman's virginity until marriage and to control her sexual drive after marriage.\footnote{\textit{Culture}, supra note 115, at 1944 (quoting Harriet Lawrence, \textit{Excising a Harmful Tradition}, \textit{GUARDIAN}, June 11, 1992, at 9 (description of an infant girl being circumcised)).} Tribes do not place a similar emphasis on protecting the virginity of their male members.\footnote{\textit{Culture}, supra note 115, at 1952. Male circumcision is not utilized to control male sexuality, even though Fran Hosken has noted that "[i]t must be pointed out that the 'need' for sexual control of males is very much greater; rape and sexual assault are increasing all over the world; male excision certainly would take care of that. Furthermore, male excision would quite eliminate the 'need' for female excision." \textit{Culture}, supra note 115, at 1952 n.63 (quoting Fran P. Hosken, \textit{The Hosken Report: Genital and Sexual Mutilation of Females} 36 (3d ed. 1982)).}

Third, the practice of female circumcision continues because of religious, social, and cultural norms. In many countries, men consider it unthinkable to marry an uncircumcised woman.\footnote{"When she is old enough, her parents will be offered the appropriate 'bride price,' and she will marry a man who will expect that she has been circumcised in accordance with this deeply entrenched tradition." \textit{Culture}, supra note 115, at 1944 (describing the "coming of age" of a little girl in Lagos, Nigeria).} Furthermore, in

\begin{quote}
"This girl I won't circumcise," said [Aida] Ibrahim, pointing to her 8-year-old daughter Meriam and provoking a medley of disapproval. "You have to do it," said Oum Hazen. "What's wrong? She's getting old now," piped up Attiate Mohammed. "You're soft toward your daughter," chided Ahmed. "Of course" it hurts, said Oum Hazen. "It's something normal. It's just an hour and it's finished."
\end{quote}

\begin{quote}
Caryle Murphy, \textit{"Mother, This Isn't Fair of You": In Egypt, Female Circumcision Is an Unyielding Tradition}, \textit{WASH. POST}, Aug. 28, 1994, at A19.
\end{quote}
many societies, circumcised women are more accepted than their uncircumcised sisters.\textsuperscript{121} Also, proponents of female circumcision often claim that their religion requires females to be circumcised.\textsuperscript{122}

Fourth, the practice of female circumcision often involves violence from which a woman cannot escape. Usually a woman does not voluntarily submit to female circumcision.\textsuperscript{123} Typically, a girl is restrained by other females while a midwife or barber performs the operation.\textsuperscript{124} Although Nigerian constitutional provisions could be interpreted to

marriage, and seclusion of the women from the men. Because seclusion is not possible in a nomadic society, female circumcision is seen as a way of protecting women's chastity in the presence of any man and of reducing a woman's sexual desires." Smith, supra note 2, at 2471 (footnotes omitted).

\textsuperscript{121} "For many women and young girls, circumcision satisfies \textit{[a]} deep-seated need 'to belong' and ensures that they will not be ostracized." \textit{Culture}, supra note 115, at 1949 (citation omitted).


\textsuperscript{123} For example, the following illustration demonstrates that female circumcision is often an involuntary procedure: "An older woman tugs forcefully on the arm of a teenage girl trying to escape her. 'I don't want to die,' the young girl shouts as she struggles to free herself. 'I want to live.'" \textit{Press}, supra note 11, at 6.

\textsuperscript{124} Robyn Smith gives the following example of one operation:

\begin{quote}
A cowhide is spread on the ground and leaves of the mugumo are spread on it. Each girl sits on a hide, while female relatives and friends form a circle, several rows thick, around all of the girls. No males are allowed near.

The sponsors, sitting behind, [hold] their legs interwoven with those of the initiates, so as to brace the initiates' legs and keep them separated. The initiates [lean] back against their sponsors, who [hold] them by the shoulders . . . [the girls' faces] turned to the sky . . . [T]he female operator . . . armed with a small Kikuyu razor . . . [w]ith a deft stroke [hacks] off . . . the tip of the clitoris, and a bright patch of red immediately [appears], as the sponsors [hold] the [girl] more tightly. The labia minora of each girl [is] also trimmed . . .

The girls must not show any emotion "or even . . . blink." They must fearlessly withstand the ordeal, which may function both to represent a destruction of the childhood and to teach restraint in using adult privileges.

Smith, supra note 2, at 2464-65 (footnotes omitted).\end{quote}
prohibit female circumcision, evidence indicates that the Nigerian government cannot or will not guarantee women protection against this practice. Based on all of this evidence, female circumcision clearly meets the four enumerated factors listed above. Therefore, as the judge, you should determine that a real fear of persecution exists.

B. Assess the General Conditions in the Claimant’s Country of Origin

To analyze the second point, the Gender Guidelines require that the following three factors be considered:

1. Is the social and political position of women in that country such that it engenders the degree of discrimination likely to amount to persecution?
2. Are there oppressive laws and regulations imposed specifically upon women or certain women? How severe are the penalties for non-compliance?
3. Do the state authorities inflict, condone or tolerate violence, including sexual or domestic violence? Do non-state groups or individuals use sexual violence against women as a means of punishing or reinforcing their dominance over other groups?

In Nigeria, female circumcision is sufficiently pervasive to provide a basis for granting political asylum under this point.

125. Chapter IV of the Constitution of Nigeria states that “[e]very person has a right to life, and no one shall be deprived intentionally of his life . . . .” Nig. Const. ch. IV, para. 32(1). It further states, “[e]very individual is entitled to respect for the dignity of his person, and accordingly—no person shall be subjected to torture or to inhuman or degrading treatment . . . .” Nig. Const. ch. IV, para. 39(1)(a).

126. This generally occurs because tribal law and custom is legally recognized by most African states, and this law and custom supports female circumcision. Cipriani, supra note 15, at 524 (citing Eschel M. Rhodie, Discrimination in the Constitutions of the World 134 (1984)). In Nigeria, tradition, “not the least of which is the” insistence of elderly females, is the major mandate to continue female circumcision. Culture, supra note 115, at 1949. Therefore, people “argued that the abolition of [female circumcision] would result in the abolition of an entire institution, the abolition of a tribal law, and the end to a substantial aspect of Gikuyu morality.” Slack, supra note 3, at 463.

127. Gender Guidelines, supra note 58, at 10.
1. Is the Social and Political Position of Women in That Country Such That It Engenders the Degree of Discrimination Likely to Amount to Persecution?

Women are considered second-class citizens in Nigeria. Many tribal customs dictate that a woman cannot own property in her own right or hold a job. As Lydia Oluloro’s attorney argued:

Nigerian law and society still permit child marriage and polygamy; discriminate against women with respect to divorce, inheritance, widowhood rights, and reproductive rights; and tolerate domestic violence against women.

Refusing to submit to female circumcision is not a realistic option in many tribes. This occurs because tribal women themselves are often the biggest proponents of circumcision. Also, men expect their future wives to be circumcised.

128. In an interview after her deportation trial, Lydia Oluloro said that if her daughters had undergone circumcision in Nigeria, “their husbands would have been able to control their bodies like my husband controlled mine. Women have no say in Nigeria.” Colleen O’Connor, *Mutilation Custom*, Chi. Trib., June 27, 1994, at A7.

129. According to a 1993 State Department report,

> [t]hough women are not legally barred from owning land, under customary land tenure systems only men own land, and women gain access to land through marriage. In addition, under law a woman may not inherit her husband’s property unless she can prove that she contributed to the acquisition of the property. Many customary practices do not even recognize a woman’s right to inherit her husband’s property, and many widows are rendered destitute when their in-laws take virtually all of the deceased “husband’s property,” often leaving the woman with barely the clothes she is wearing.


130. *In re Lydia Omowunmi Oluloro*, A72-147-491, at 4 (Respondent’s Summation at Close of Trial) (on file with author). “Polygamy is widely practiced among all Nigerian ethnic groups in both Christian and Islamic communities.” 1993 DEP’T OF STATE REPORT, supra note 129, at § 5, para. 2. In addition, “[t]here are credible reports that poor families often sell their daughters into marriage as a means of supplementing their incomes. There are also reports that many young girls are forced into marriage as soon as they reach puberty, regardless of age, to prevent ‘indecent’ associated with premarital sex.” 1993 DEP’T OF STATE REPORT, supra note 129, at § 5, para. 7.

131. See infra note 137.


133. *Culture*, supra note 115, at 1944.
Because the status of women is not equal to that of men, our applicant would have a difficult time speaking out against the practice of female circumcision. You must conclude here that discrimination against women meets the standard for persecution. Women are "expected" to take traditional roles and like it.

2. Are there Oppressive Laws and Regulations Imposed Specifically Upon Women or Certain Women? How Severe Are the Penalties for Non-Compliance?

Under Nigerian civil law, female circumcision can be interpreted to be illegal. However, tribal law and custom remain the dominant factors in determining whether a woman is circumcised. The social effects of failing to undergo circumcision can be very damaging to both the female and her family. For example, a circumcised female can command a higher bridal dowry for her family than can an uncircumcised female. Nigerian society also treats a circumcised female with more respect than uncircumcised females.

Women are also not free to choose whether they will be circumcised. Alison Slack notes that when parents decide to have their daughters circumcised, the decision is, in their opinion, in the best interest of the child. "They believe that it is both their duty and cultural right to carry out such procedures." When the procedure is performed on infants and children, the child has no choice in the matter and is not mature enough to make the decision for herself.

\[\text{References}\]

134. See supra note 125.
135. See supra note 126.
136. Culture, supra note 115, at 1944.
137. For example, [In Akwa Ibom [State] and in villages in the Calabar area of Cross River State, uncircumcised women face derision when they quarrel with their more numerous circumcised sisters. A woman will make a particular clicking sound with her tongue during a disagreement, implying that the woman she is arguing with is uncircumcised. If the woman is indeed uncircumcised, she is shamed by the act. But so serious is the insult that if a woman is circumcised then the woman who insulted her would be fined.]
138. Slack, supra note 3, at 470.
139. Slack, supra note 3, at 470.
140. Alison Slack argues:

\[\text{[It seems unjust that the decision to have an operation on a baby girl—one that could risk her life or health, one that will permanently...}\]
Tribal law and custom mandate that female circumcision is imposed on women, and Nigerian law does little to protect women. Severe social penalties reinforce this practice and essentially prevent women from resisting female circumcision. Therefore, female circumcision fulfills this second factor.

3. Do the State Authorities Inflict, Condone or Tolerate Violence, Including Sexual or Domestic Violence? Do Non-State Groups or Individuals Use Sexual Violence Against Women as a Means of Punishing or Reinforcing Their Dominance over Other Groups?

Question 21 on the United States political asylum application asks:

Have you or any member of your family ever been mistreated/threatened by the authorities of your home country or by a group(s) controlled by the government, or by a group(s) which the government of your home country is unable or unwilling to control?  

The answer to this question will play a prominent role in determining whether Nigerian authorities inflict, condone, or tolerate violence based on the facts of this hypothetical case.

In her application for political asylum, the applicant states that she has been mistreated because of membership in a particular social group, namely “women opposed to female circumcision,” and that her daughter has been threatened because of membership in a particular social group, namely, “potential victims of female circumcision.” The evidence in this case indicates that the Nigerian Constitution can be interpreted

change her physical characteristics and may even harm her future children—should be made without her understanding or her consent. It is unacceptable for a person to have no choice in a matter that concerns her own sense of health, well-being, and physical existence.

Slack, supra note 3, at 470.

141. U.S. Dep’t of Just., Immigration and Naturalization Service, Request for Asylum in the United States, Form I 589 (Rev. 8/1/91), at question 21 [hereinafter Request for Asylum Form]. The question continues parenthetically by asking the applicant to

[s]pecify for each instance: your relationship, what occurred and the circumstances, date, exact location, who took such action against you, what was his/her position in the government or group, reason why the incident occurred, names and addresses of a few of the people who may have witnessed these actions and who could verify these statements.

Request for Asylum Form, supra, at question 21.
to make female circumcision illegal. However, the evidence also indicates that the practice often occurs in remote areas of Nigeria and that the government does not usually intercede in tribal law. Consequently, the Nigerian government has failed to utilize this constitutional interpretation to prohibit female circumcision. Based on this evidence, the tribe should qualify as a group that the Nigerian government is "unwilling or unable to control." Therefore, you should find that the Nigerian government condones or tolerates female circumcision.

In addition, the applicant has proven that Nigerian women's second-class status creates discrimination likely to result in persecution. She has also proven that Nigeria's laws are oppressive and that Nigerian authorities condone violence against women. As a result, you should find that the applicant has fulfilled the elements of the third requirement.

C. Determine the Seriousness of the Treatment Which the Claimant Fears

In order to analyze this point, the Gender Guidelines provide two factors to consider. These factors are:

1. For the treatment to likely amount to persecution, it must be a serious form of harm which detracts from women's human rights and fundamental freedoms.
2. In passing judgment on what kinds of treatment are considered persecution, an objective standard is provided by international human rights instruments that declare the lowest common denominator of protected interests.

An analysis of each of these factors will indicate that female circumcision is serious enough to provide a basis for political asylum.
1. For the Treatment to Likely Amount to Persecution, It Must Be a Serious Form of Harm Which Detracts from Women's Human Rights and Fundamental Freedoms

The examination of several human rights instruments, although they do not specifically mention female circumcision, is helpful to determine whether female circumcision amounts to a serious violation of women's human rights. These instruments are: 1) The Universal Declaration of Human Rights,\(^\text{147}\) 2) the Convention on the Rights of the Child,\(^\text{148}\) and 3) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\(^\text{149}\)

First, Articles 3 and 5 of the Universal Declaration of Human Rights can be applied to address our hypothetical situation.\(^\text{150}\) Under these articles, subjecting the daughter to female circumcision violates the Declaration because it is cruel and inhuman.\(^\text{151}\) Since evidence indicates that the Nigerian government would not guarantee the daughter's safety, sending her back to Nigeria would violate her basic human rights.


\(^{148}\) Child Convention, supra note 12.

\(^{149}\) Torture Convention, supra note 11.

\(^{150}\) Article 3 states that "[e]veryone has the right to life, liberty and security of person." Universal Declaration of Human Rights, supra note 147, at art. 3. Article 5 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, supra note 147, at art. 5.

\(^{151}\) The physical complications of female circumcision include the following:

"damage to the urethral meatus, Bartholin's glands, and even the perineum and rectum (the latter usually from struggling on the part of the child and crude surgical technique)." In addition, the female may suffer from hemorrhage; septicemia; shock from pain; infections of the external genitalia, vagina, ovaries, and uterus; difficult urination; urine retention due to occlusion; damage to and bleeding from adjacent organs and tissue; and even death.

Smith, supra note 2, at 2451 (footnotes omitted). In addition, childbirth for a circumcised female can be dangerous for both the woman and the fetus. "The circumcised female may also experience difficulties during birth, which include prolonged labor, perineal and deep trauma, and rupture of the uterus. In addition, circumcision increases the likelihood of fetal death or brain damage to the baby during birth." Smith, supra note 2, at 2451 (footnote omitted). Sexual intercourse is also painful for the woman. "[T]he consummation of marriage or the occasion of first intercourse is a painful ordeal for an infibulated woman. If the vaginal opening is too small for penetration, another incision must be made to enlarge the opening." Culture, supra note 115, at 1948 (footnote omitted).
Second, Articles 3, 9, 19, and 37 of the Convention on the Rights of the Child can be applied to address our hypothetical situation.\textsuperscript{152} Although the Convention is not yet enforceable against the United States,\textsuperscript{153} it is useful as a guide in analyzing this case. Based on the

\textsuperscript{152} Article 3 of the Convention states:  

\begin{quote}  
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.  
\end{quote}  

Child Convention, \textit{supra} note 12, at Part I, art. 3, para. 1 (emphasis added). Article 9 states:  

\begin{quote}  
States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.  
\end{quote}  

Child Convention, \textit{supra} note 12 at Part I, art. 9, para. 1 (emphasis added). Article 19 states:  

\begin{quote}  
States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.  
\end{quote}  

Child Convention, \textit{supra} note 12 at Part I, art. 19, para. 1. Article 37 states in part that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” Child Convention, \textit{supra} note 12, at Part I, art. 37(a).

\textsuperscript{153} Upon the direction of President Bill Clinton, Madeleine Albright, United States Ambassador to the United Nations, signed the Convention on the Rights of the Child on February 16, 1995. \textit{United States Signs the Convention on the Rights of the Child: A Giant Step Towards Ratifying International Treaty to Ensure the Basic Rights of Children}, PR Newswire, Feb. 16, 1995 \textit{available in LEXIS, NEWS Library, BUSDTL File}. At the time of this writing, the Convention was pending before the Senate Foreign Relations Committee. The President's reservations include a desire to "protect the rights of the various states under the nation's federal system of government and maintain the country's ability to use existing tools of the criminal justice system in appropriate cases." \textit{White House Statement on U.S. Decision to Sign U.N. Convention on the Rights of the Child}, U.S. Newswire, Feb. 13, 1995, \textit{available in LEXIS, AUST Library, USNWR File}. According to the President,  

[these reservations and understandings will ensure that the Convention does not infringe upon the central role of parents and the family and that it is consistent with our federal system of government. I also want to make clear that this Convention will not serve as a basis for litigation in America's courts.]
Convention, you determine that 1) it would not be in the best interest of the child (in this case, the daughter) to be denied asylum and have her mother deported to Nigeria, and 2) in order to protect the child from female circumcision, it would be in the best interest of all to keep the family together.

Finally, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies to this hypothetical. Female circumcision is recognized as a form of torture and child abuse in most Western countries. This practice is often performed under duress with the victim restrained so that she cannot move.

In summary, because female circumcision violates three well-recognized international human rights instruments, you conclude that this practice is a blatant violation of the applicant’s human rights.

2. In Passing Judgment on What Kinds of Treatment Are Considered Persecution, an Objective Standard Is Provided by International Human Rights Instruments That Declare the Lowest Common Denominator of Protected Interests

In assessing the human rights instruments mentioned above, this section requires that you as judge determine “the lowest common denominator” among the instruments that would amount to persecution in this hypothetical case. In other words, we are looking for the factors that exist in all three instruments that would constitute persecution. In looking at the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, we must come to the conclusion that the practice of female circumcision is both cruel and inhuman.

The applicant’s daughter, who is arguing for asylum in her own right as a member of a particular social group, namely “potential

---

Letter from President Bill Clinton to the author (Mar. 28, 1995) (on file with author). The United States is the 177th country to sign the Convention.

154. Article 3 states in part that “[n]o State Party shall expel, return ("refoulé") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Torture Convention, supra note 11, at Part I, art. 3, para. 1.

155. See Torture Convention, supra note 11.

156. See supra note 124 and accompanying text.
victims of female circumcision," faces a custom she cannot refuse because of her age.\textsuperscript{157} If the operation is performed erroneously (i.e., a major blood vessel is cut) death can result. If the operation is "successful," then she faces many potential side effects and will have a difficult time giving birth later in life.\textsuperscript{158} By using the "cruel and inhuman treatment" theme of these three instruments, you can conclude that female circumcision is a form of persecution.

\textit{D. Ascertain Whether the Claimant's Fear of Persecution Is for Any One, or a Combination, of the Grounds Enumerated in the Convention Refugee Definition}

The fourth point of the \textit{Gender Guidelines} requires an analysis of the applicant's fear of persecution as defined by the Convention on the Status of Refugees. In our hypothetical case, the only applicable ground is membership in a particular social group.\textsuperscript{159} Although the United States is not a party to the Convention on the Status of Refugees,\textsuperscript{160} it did accede to the Protocol Relating to the Status of Refugees.\textsuperscript{161} The United States's consent to the Protocol led to the passage of the Refugee Act of 1980.\textsuperscript{162} Under the Refugee Act, the Attorney General can

\begin{itemize}
  \item \textsuperscript{157} See \textit{supra} note 140 and accompanying text.
  \item \textsuperscript{158} For discussion of physical complications of female circumcision, see \textit{supra} note 151.
  \item \textsuperscript{159} The other grounds from the Convention are race, religion, nationality, and political opinion. \textit{Refugee Convention}, \textit{supra} note 108, at 19.
  \item \textsuperscript{160} \textit{Refugee Convention}, \textit{supra} note 108.
  \item \textsuperscript{162} The Supreme Court noted that "[i]f one thing is clear from the legislative history of . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring
grant asylum to a refugee if the persecution is based "on account of race, religion, nationality, membership in a particular social group or political opinion . . ." Therefore, women facing circumcision qualify as members of "a particular social group" under both the Convention and the Refugee Act because the women "have a certain degree of similarity . . . such as shared ethnic, cultural or linguistic origins, education, family background, or perhaps economic activity."

In this hypothetical case, the mother has already undergone circumcision and it is very likely that the same will happen to the daughter if they are deported to Nigeria. Therefore, you conclude that the daughter has a well-founded fear of persecution as a member of a particular social group, namely "potential victims of female circumcision."

E. Is Adequate State Protection Available to the Claimant?

The fifth point of the Gender Guidelines requires examining the laws of the applicant's country of origin. In Nigeria, female circumcision is governed by tribal law and tradition, not by civil law. Although Chapter IV of the Nigerian Constitution protects citizens against torturous acts, the government does not actively protect female citizens from circumcision. Since the Nigerian government rarely interferes with the tradition of female circumcision, the hypothetical applicant has no adequate state protection available to prevent her daughter's circumcision if she and her daughter are deported.

---

163. 8 C.F.R. § 208.13(b)(2)(i)(A)(1995). This should legally bind immigration judges to follow the Refugee Convention and Refugee Protocol, since the language of the Refugee Act and the Refugee Convention concerning the enumerated grounds for persecution are the same.

164. In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (citation omitted). Because the culture of many of these women demands that they be circumcised, they would qualify as a group.

165. Culture, supra note 115 and accompanying text.

166. See supra note 125.


F. Determine Whether, Under All the Circumstances Including the Possibility of an Internal Flight Alternative, the Claimant's Fear of Persecution Is Well-Founded

The sixth point of the Gender Guidelines requires a judge to make her final ruling based on the totality of the circumstances. As noted, female circumcision, although against civil law in Nigeria, is tolerated by the government. Evidence indicates this tolerance is due to deference to tradition. Since women are second-class citizens in Nigeria, they have no say in whether circumcision is performed on them or their daughters. Internal flight to escape female circumcision is often impossible because most tribal laws and customs do not allow women to own property in their own right or hold a job. Therefore, a woman’s independence would be very difficult to achieve and maintain, and many women who flee would ultimately be forced to return to their families.

Based on the facts of this hypothetical, the woman’s social group would be “women opposed to female circumcision.” If a woman opposes female circumcision and refuses to have her daughter circumcised, her independence and new way of thinking will expose her to ridicule and persecution. Ultimately, however, other women in her tribe will insist that the daughter be circumcised without her consent.

Additionally, the daughter would be a member of two social groups, “potential victims of female circumcision” and “minors.” As a minor, she will not have a say in determining whether she is circumcised; tradition dictates that it must be done. As an uncircumcised female, she would be ridiculed and perhaps even be called a whore. It is also likely that her relatives would not guarantee or keep her from becoming circumcised. This would make her a potential victim of this practice once she returns to Nigeria.

Applying the Gender Guidelines to the facts of this hypothetical, you find that the mother and daughter have a “well-founded fear of persecution” due to their membership in particular social groups. Therefore, both the mother and the daughter qualify for political asylum.

170. Culture, supra note 115, at 1945; Slack, supra note 3, at 448.
171. See O'Connor, supra note 128 and accompanying text.
172. 1993 Dep't of State Report, supra note 129, at § 5, para. 2, and accompanying text.
Conclusion

The United States should reform its political asylum laws and grant political asylum based on female circumcision and other gender-related persecution. In order to accomplish this change, immigration judges, the Board of Immigration Appeals, and the appellate courts need to recognize that women can suffer persecution that is related only to their sex, such as female circumcision. By following the precedent of In re Acosta, these judicial bodies should recognize that potential victims of female circumcision constitute a particular social group because of their shared characteristics. They must also determine which international human rights instruments apply to asylum cases involving female circumcision and seriously consider them in rendering their decisions.

To create a permanent, consistent change in political asylum law, Congress must also recognize that certain types of persecution are gender based. This recognition can be achieved by amending the Refugee Act of 1980 to include gender in the definition of persecution. This amended law would allow applicants to show a well-founded fear of persecution because of "race, religion, nationality, membership in a particular social group, political opinion, or related to gender."

Education and enlightenment are imperative in eradicating the practice of female circumcision worldwide. But until that day comes, Western countries, such as the United States, should be places where potential victims of female circumcision can feel safe and secure. As the last superpower in the world, we have a responsibility to lead the fight against the violation of women's human rights worldwide and to protect those within our borders should the need arise. This protection cannot occur unless we recognize that female circumcision is a form of persecution for which women should be granted political asylum.