

In September 2007 the BIA issued two precedent decisions which greatly impacted cases involving Female Genital Cutting (FGC). These cases, *Matter of A-K-*, 24 I & N Dec. 275 (BIA 2007), and *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007) are provided as Supplemental Materials, with the suggestion that they be read in conjunction with the materials in Chapter 10, sections E.3 and E.4.

*Matter of A-K-* addresses claims brought by a parent who bases his or her claim partially on fear of FGC to his or her child. *Matter of A-T-* addresses claims premised on past FGC. At this time, both decisions are being appealed to the respective court of appeals in which they arose.

The following Advice Memo, prepared by the Center for Gender & Refugee Studies provides a comprehensive overview of FGC cases, and within this overview, an analysis of how *Matter of A-K-* and *A-T-* may be understood and distinguished. Although this Advice Memo is prepared as an advocacy piece, its overall analysis and explanation of the cases should be helpful in teaching these cases.

### **CGRS Advice - Female Genital Cutting Asylum Cases**

Thank you for contacting CGRS about your asylum case involving female genital cutting (FGC). At the Center for Gender & Refugee Studies we are playing a central role in advising attorneys on gender asylum issues, and tracking these cases to inform national policy work on the issue. As such, we do not only distribute advice and information to you, but also actively encourage your role in keeping us up-to-date about the results of your case and any interesting developments along the way.

The advice below is broken into four main areas: overview of FGC cases; fear of future FGC; asylum based on past FGC as ongoing harm; and issues involving fear of FGC being inflicted on dependent minor children.

Note that CGRS engages in research on relevant country conditions on request; there is no fee. **Please consider making a donation** with the attached form or by credit card on our web site. We appreciate that many lawyers represent asylum seekers for little or no fee. CGRS also does not charge for its services, and yet our continuing ability to provide assistance depends in part on your support.

#### **1) General Asylum Overview & Advice**

The advice and information provided by CGRS of necessity assumes a familiarity with basic asylum law principles. Below is a selection of recommended sources for general information on asylum:

AILA's *Asylum Primer*

<http://www.ailapubs.org/ailasprim.html>

The ILRC's *Winning Asylum Cases*

[http://www.ilrc.org/php/pubdesc\\_output.php?id=13](http://www.ilrc.org/php/pubdesc_output.php?id=13)

The Ninth Circuit's *Immigration Outline*

<http://www.ca9.uscourts.gov/>

The National Immigrant Justice Center's asylum training manuals for pro bono attorneys

<http://www.immigrantjustice.org/probonoinfo.asp>

Kurzban's *Immigration Law Sourcebook*

<http://www.ailapubs.org/kurimlawsour1.html>

#### **2) Future FGC (with general advice on social group issues)**

*Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), and its progeny (see, e.g., *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005)) provide strong precedent for FGC as persecution and on the issue of providing a particular social group and nexus.

Gender cases may arise under a number of the asylum grounds, most commonly including particular social group, political opinion (actual and/or imputed), and religion. While social group is an established ground for cases involving FGC, such cases – which not infrequently include resistance to forced marriage, efforts to escape, etc., being met by increased violence – may also present the basis for an argument based on at least imputed political opinion. Religious issues are frequently also relevant.

Social groups should be defined by reference to relevant immutable / fundamental characteristics, such as:

- Gender- *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007), *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005), *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993), *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), etc.)
- nationality (*Mohamed, Kasinga, Fatin*)
- refusal to conform or submit (*Fatin, Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994))
- family (*Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Gebremichael v. INS*, 10 F.3d 28, 36 (1<sup>st</sup> Cir. 1993); *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), etc.)
- disability
- shared past experience
- marital status (DHS brief in *R-A-*; proposed gender regulations)
- lack of male protection (e.g. Afghanistan under Taliban)

You want to avoid defining the social group **solely** by the harm (e.g. “victims of female genital cutting”), as this is “circular” reasoning. A decision granting asylum on this basis because the decision will be difficult to defend on appeal. This issue is not so clear or well-understood, however, and we have seen adjudicators deny social groups that simply and appropriately reference the harm. Their mistake should be clear from the groups approved in the *Gao* and *Kasinga* decisions (which include reference to forced marriage or FGC, but are not circular). DHS defines the social group in Rodi Alvarado’s case in part by the inability to escape the abuser. And the fact of past harm may well be an immutable characteristic in a particular case, such as in a trafficking case where a woman on return to her home country may face persecution because she worked as or is perceived as having worked as a prostitute abroad, and/or for having escaped her traffickers. See the UNHCR’s guidelines on social group and trafficking, available on our web site.

The social group should be defined by reference to those specific immutable or fundamental characteristics which are the actual reason the applicant is targeted (or that the society fails to protect). A social group is not overbroad as long as the characteristics which define it are the characteristics which result in the individual being targeted. In some cases, it will simply be

characteristics such as gender and/or ethnicity if those are the reasons for the targeting for persecution. *Mohamed*.

Any factor making up a proposed social group should be documented as extensively as possible with country conditions evidence and testimony. Gender persecution cases also generally raise issues of whether the government is able or willing to protect your client, and whether internal relocation is possible, and you should also prepare to submit evidence addressing these issues.

We have seen FGC cases rejected on a number of arguments, including in one Mali case that the applicant could go live with the nomads in the Sahara until her US citizen girls are of age, and then they could return to the US to avoid ostracization. While the government itself later declined to defend the IJ's decision, this kind of ruling makes clear how important it is to document all aspects of your case, including the impossibility of internal relocation.

Here is one of many general resources on FGC and an important recent general medical report:

- World Health Organization, Gender and Women's Health Department, "Female Genital Mutilation: Information Pack"

[http://www.who.int/docstore/frh-whd/FGM/infopack/English/fgm\\_infopack.htm](http://www.who.int/docstore/frh-whd/FGM/infopack/English/fgm_infopack.htm)

- *WHO study group on female genital mutilation and obstetric outcome*, The Lancet 2006; 367:1835-41

A WHO study documenting that women who have had FGC are significantly more likely to experience difficulties during childbirth and that their babies are more likely to die as a result of the practice.

<http://www.who.int/mediacentre/news/releases/2006/pr30/en/index.html>

<http://www.who.int/reproductive-health/fgm/>

### 3) Past FGC

See generally Swink & Ibrahim, *Advisory: Asylum Claims Based on Past Female Genital Cutting* (83 No. 9 Interpreter Releases 385)

Available from CGRS: <http://cgrs.uchastings.edu/country/>

Unfortunately, the most recent development in past FGC cases, is the BIA's decision in *In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007), holding that FGC is generally inflicted once, it will normally be considered a change in circumstances sufficient to overcome the presumption of a well-founded fear of persecution (in other words, *FGC is not a continuing harm*). The *A-T-* decision currently applies to *all* circuits except the Ninth Circuit, where *Mohammed v. Gonzales*, holding that having been subjected to past FGC amounts to ongoing harm, is still controlling.

We believe that *In re A-T-* was wrongly decided and that it may be possible to challenge in circuit courts. The BIA's reasoning that the ongoing harm doctrine does not apply to FGC cases is based on a flawed analysis. Specifically, the BIA explains that the ongoing harm doctrine applies in coercive population control (CPC) cases only because of Congressional intent to grant asylum to individuals who have suffered from past CPC measures. This is absolutely incorrect. *Congress's decision to include CPC cases in the refugee definition was about nexus, not the severity of permanence of the harm.* The ongoing harm doctrine in forced sterilization cases comes *not* from the statute itself, but from BIA and circuit court jurisprudence, developed *after* the legislation was enacted. It is therefore critical to make the strongest record possible showing ongoing harm to preserve the possibility for appeal to the circuits.

Also, CGRS is very interested in closely tracking the impact of *A-T-* on women's cases for advocacy purposes, and with an eye to a fix (whether legislative, or in some other manner). To that end, we strongly encourage you to share developments in your cases with us.

### **Asylum based on past FGC following *A-T-*:**

#### A. Outside the Ninth Circuit

- In cases where you can demonstrate that FGC will be inflicted again, the presumption will not be overcome (ie re-infibulation, or as we've seen in some cases, further cutting when FGC was considered incomplete). The *A-T-* decision recognizes this by saying FGC is "generally inflicted only once."
- Humanitarian asylum is still available to women who have undergone past FGC. Humanitarian asylum is reserved for cases where the past persecution was severe and atrocious (*Matter of Chen*, 20 I. & N. Dec. 16, (BIA 1989)), or where there is a reasonable possibility that the applicant would face "other serious harm" upon removal. 8 C.F.R. §1208.13(b)(1)(iii).
  - Argue that FGC is severe and atrocious persecution
  - Put on evidence about the lingering effects of persecution that your client continues to suffer (ie pain during sex, inability to enjoy sex, complications during childbirth, psychological problems, etc)  
**\*\*a physician's report documenting the extent of the FGC, as well as a mental health expert's report would be very helpful**
  - Put on evidence about "other serious harm" your client would face upon removal.
- One year bar issues – in cases where the one year bar applies, we do not recommend filing for asylum based on past genital cutting alone. Your client would not be eligible for humanitarian asylum if the one year bar applies, and there is no equivalent humanitarian provision for withholding of removal claims.
- If you currently have a case pending based on past FGC alone, put on the strongest evidentiary case you can regarding ongoing harm to build your record for appeal. **PLEASE contact CGRS** if you are considering appealing a past FGC case to a circuit court; we believe that *A-T-* was wrongly decided and that it may be possible to challenge these cases in circuit court. **PLEASE also keep us posted on the outcome of your case** at the Asylum Office and Immigration Court; we are very interested in tracking agency decisions on these cases.

## B. In the Ninth Circuit:

As mentioned above, *Mohammed v. Gonzales* still applies. The social group approved in that case was simply gender plus nationality. Advocates need to build a detailed record around the fact that because a woman was subjected to FGC in the past does not mean that she does not face ongoing physical and psychological consequences and harm, up to and including potential reinfibulation, depending on the particular case and country.

CGRS has a number of resources relevant to this issue, including:

- a) A model affidavit by international FGC expert Hanny Lightfoot-Klein. This memo was drafted in collaboration with CGRS and is intended to be submitted as is, or to be modified to fit the specific facts of your case in collaboration with Ms. Lightfoot-Klein. A copy is attached; CGRS can mail you a copy stamped as authentic on request.
- b) A CGRS memo (attached) looking at the various health aspects and physical impacts of having been subjected to FGC, and the article by former CGRS law clerks Arwen Swink & Sara Ibrahim, *Advisory: Asylum Claims Based on Past Female Genital Cutting* (83 No. 9 Interpreter Releases 385, available at <http://cgrs.uchastings.edu/country/> ).
- c) A copy of an unpublished 2003 BIA case granting asylum on the same logic as *Mohamed*. Let us know if you would like a copy.

**\*\* Please note** - we have heard of credibility denials based on questioning whether the applicant was even subjected to FGC, so where relevant you should include a physical examination in the record.

## 4) FGC and dependent children

**PLEASE also keep us posted on the outcome of your case** at the Asylum Office and Immigration Court; we are very interested in tracking agency decisions on these cases.

- Unlike other immediate family members, **parents of asylees are not offered “derivative” protection** under the relevant statute.
  - “In general, a spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” 8 USCS § 1158 (b) (3) (A) (2004).
- Thus for parents of girls at risk for FGC, the issue is **whether or not the parents qualify for protection in their own right**. Recent circuit court decisions on this issue are diverse. (Some significant cases are charted on the following page)

**In addition to the below outlined federal decisions, it is critical to be aware of the BIA's recent decision in *In re A-K-*, 24 I. & N. Dec. 275 (BIA 2007).** In *A-K-* the BIA reversed a grant of withholding of removal to a Senegalese father whose claim rested on his fear that his US citizen daughters would be subject to genital cutting if forced to return to Senegal. The BIA did not rule on asylum eligibility, as only withholding and CAT were before the court.

The BIA's decision rests primarily **on the factual findings** that:

- a) the daughters would not be subject to constructive deportation; they were US citizen and could remain in the US with their mother who was not in proceedings and thus avoid FGC,
- b) the evidence did not establish that it was more likely than not that the girls would be subject to genital cutting in Senegal because -
  - the FGC is currently practiced only in some parts of Senegal so the family could relocate to avoid FGC
  - the government is not unwilling/unable to prevent FGC – the practice has been outlawed and carries serious penalties AND prosecutions have been brought against those performing FGC,

And

- c) the evidence did not establish that the father would be persecuted for his opposition to FGC; the BIA found that he would suffer only harassment

The BIA also denied the father's claim because it ruled that there is no statutory basis for "derivative" withholding of removal (which is an erroneous characterization of a parent-child claim based on persecution to the parent him or herself that FGC of the child would cause). This ruling is based on the BIA's distinction between U.S. citizen children and children who would not have the right to remain in the US if their parents were deported. However, the citizenship of the child is relevant only to the question of whether the child would return to the parent's country of origin/last habitual residence. The citizenship of the child **does not determine the soundness of the theory of persecution in parent/child FGC cases**, which is made evident by the BIA's distinction of *A-K-* from *Abay v. Ashcroft*, a Sixth Circuit case granting asylum to a mother who feared that her non U.S. citizen daughter would be subjected to FGC in Ethiopia (discussed below). The BIA did not discount or disagree with the theory of persecution set forth in *Abay* (that FGC of the daughter would be persecution to the mother); rather, the BIA distinguished *A-K-* from *Abay* based in significant part on the citizenship of the daughters in *A-K-*. While the opinion contains some broad negative language regarding FGC of a child as persecution to the parent, that discussion is dicta.

Because the BIA's decision was limited to the facts presented in *A-K-*, and because the BIA distinguished *A-K-* from *Abay* (discussed below), it will be critical to distinguish your client's claim from *A-K-*, as well as from the Seventh Circuit decisions in *Oforji and Olowo* (discussed below) and to get it into the *Abay* framework. **PLEASE contact CGRS** if you are considering appealing a parent-child FGC case before a federal circuit court; we believe that *A-K-* does not preclude relief and that it may be possible to challenge the decision.

CHART ON FEDERAL DECISIONS ON PARENT/CHILD FGC CASES:

(encouraging cases)

(discouraging cases)

Case	Circuit	Year	Facts	Outcome
<i>Nwaokolo v. Ashcroft</i> , 314 F.3d 303 (7th Cir. 2002).	7th	2002	<ul style="list-style-type: none"> <li>Nigerian mother</li> <li>Two USC daughters</li> <li>Demonstrated that 60-90% of Nigerian women are subjected to FGC</li> </ul>	<ul style="list-style-type: none"> <li><b>stay of removal granted</b> based on “obvious” irreparable harm to citizen children, “negligibility” of harm to DHS in delay, and “compelling” public interest in the stay</li> </ul>
<i>Osigwe v. Ashcroft</i> , 77 Fed. Appx. 235, 235 (5th Cir. 2003) (unpublished).	5th	2003	<ul style="list-style-type: none"> <li>Nigerian couple</li> <li>USC daughter</li> </ul>	<ul style="list-style-type: none"> <li>parents’ asylum and CAT claims <b>denied</b></li> <li>case <b>remanded</b> for consideration of mother’s past persecution claim</li> </ul>
<i>Obazee v. Ashcroft</i> , 79 Fed. Appx. 914 (7th Cir. 2003) (unpublished)	7th	2003	<ul style="list-style-type: none"> <li>Nigerian mother</li> <li>USC daughter</li> <li>USC father</li> </ul>	<ul style="list-style-type: none"> <li><b>denial affirmed</b> for failure to show that the daughters would actually be constructively deported</li> <li>dicta from the opinion explains that harm to a citizen child <i>is</i> relevant to the parent’s asylum claim</li> </ul>
<i>Oforji v. Ashcroft</i> 354 F.3d 609 (7th Cir. 2003)	7th	2003	<ul style="list-style-type: none"> <li>Nigerian mother</li> <li>Two USC daughters</li> </ul>	<ul style="list-style-type: none"> <li><b>denial affirmed</b> based on a rejection of “derivative asylum” claim for parents</li> <li><i>Nwaokolo</i> distinguished</li> </ul>
<i>Azanor v. Ashcroft</i> , 364 F.3d 1013 (9th Cir. 2004).	9th	2004	<ul style="list-style-type: none"> <li>Nigerian mother</li> <li>USC daughter</li> </ul>	<ul style="list-style-type: none"> <li><b>remanded</b> to the BIA on other grounds (where the BIA used erroneous legal standard for torture)</li> </ul>
<i>Olowo v. Ashcroft</i> , 368 F.3d 692 (7th Cir. 2004).	7th	2004	<ul style="list-style-type: none"> <li>Nigerian mother</li> <li>two LPR daughters</li> <li>LPR father</li> </ul>	<ul style="list-style-type: none"> <li>fact and law based <b>denial</b></li> <li>hardship to LPR or USC family members is irrelevant to an asylum claim</li> <li>DHS must <b>report</b> applicant to child protection authorities for her “intention” to bring her daughters to Nigeria, where they would face the threat of torture</li> </ul>
* <i>Abay v. Ashcroft</i> , 368	6th	2004	<ul style="list-style-type: none"> <li>Ethiopian mother</li> </ul>	<ul style="list-style-type: none"> <li>Both mother and daughter met refugee definition because of well-</li> </ul>

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F.3d 634 (6th Cir. 2004).			<ul style="list-style-type: none"> <li>• Ethiopian daughter</li> <li>• Demonstrated that FGC was “nearly universal” in Ethiopia</li> </ul>	<p>founded fear that the daughter would be subjected to FGC</p> <ul style="list-style-type: none"> <li>• <b>remanded</b> for exercise of discretion on the asylum claims and a new opinion on the withholding claims</li> </ul>
<i>Abebe v. Ashcroft</i> , 432 F.3d 1037 (9th Cir. 2005)	9th	2005	<ul style="list-style-type: none"> <li>• Ethiopian parents</li> <li>• USC daughter</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Petition for rehearing en banc granted</b></li> <li>• <i>En banc</i> panel found well founded fear that USC daughter would be subjected to FGC</li> <li>• <b>Remanded</b> to BIA for determination in first instance as to whether parents qualify for asylum based on fear of FGC to USC daughter (case pending before IJ)</li> </ul>
<i>Bah v. Gonzales</i> , 462 F.3d 637 (6th Cir. 2006)	6th	2006	<ul style="list-style-type: none"> <li>• Guinean mother</li> <li>• Daughters in Guinea</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Denial affirmed</b></li> <li>• BIA distinguished from <i>Abay</i> because daughters in Guinea – already “at risk” and cannot apply for asylum while in Guinea</li> </ul>
<i>Niang v. Gonzales</i> , 492 F.3d 505 (4th Cir. 2007)	4th	2007	<ul style="list-style-type: none"> <li>• Senegalese mother</li> <li>• USC daughter</li> <li>• Withholding of removal claim (one year bar on asylum)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Denial affirmed</b></li> <li>• “Psychological harm” without physical harm (to parent) is not enough to establish persecution</li> <li>• No “derivative” withholding of removal claim as a matter of law</li> <li>• Court noted mother might establish humanitarian claim based past FGC fact that daughter would be subject to FGC upon removal</li> </ul>



<p><b>Hassan</b> v. <b>Gonzales</b>, 484 F.3d 513 8<sup>th</sup> Cir. 2007)</p>	<p>8th</p>	<p>2007</p>	<ul style="list-style-type: none"> <li>• Somali mother who experienced past FGC</li> <li>• USC daughters</li> </ul>	<ul style="list-style-type: none"> <li>• The government failed to rebut the presumption of a well founded fear of persecution and country conditions evidence of widespread persecution of Somali women would make it difficult for the government to overcome the presumption</li> <li>• IJ’s denial of “derivative” claim was based on assumption girls could remain in US with father – but his asylum status was terminated</li> <li>• <b>Remand</b></li> </ul>

*\*Abay is the most encouraging case to date. This section outlines how to use Abay’s framework as a template for future claims.*

**ARGUING THE APPLICANT’S CASE WITHIN THE ABAY FRAMEWORK**

- **Persecution to self versus derivative asylum**
  - Avoid the “derivative asylum” argument.
    - The derivative asylum argument brings the applicant’s claim under the scope of 8 USCS § 1158 (b) (3) (A) (2004), which *does not* include parents in its list of family members who are eligible for subsidiary protection.
      - “In general, a spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.” 8 USCS § 1158 (b) (3) (A) (2004).
    - The derivative asylum brings the applicant’s case under the compass of *Oforji*, a decision that rejects the extension of derivative asylum to parents who fear that their daughters will be subjected to FGC. (Derivative claim also brings the case into the *A-K-* and *Niang* framework for withholding claims)
      - See *Protecting Parents at 3*.
        - For **counterargument**: cf. Justice Ferguson’s dissenting opinion in the initial *Abebe* decision (379 F.3d 755 (9th 2004)), summarized in *Protecting Parents at 6*.
    - The derivative asylum argument overlooks the existence and severity of the *personal* harm (typically psychological) that parents can experience when their daughters are subjected to FGC despite their opposition.

- Argue instead that the applicant’s daughter’s subjection to FGC will constitute persecution/torture **as to the applicant him or herself**.
  - Cite *Abay*:
    - *See Protecting Parents at 5*.
    - “[W]e conclude that a rational factfinder would be compelled to find that Abay's fear of taking her daughter into the lion's den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is well-founded. Accordingly, we find that Abay is also a "refugee" within the meaning of the Act.” *Abay v. Ashcroft*, 368 F.3d 634 at 642 (6th Cir. 2004).
  - “Persecution” encompasses psychological harm – **argue that cutting of child is mental anguish to parent and harms parent/child relationship which is given special recognition/protection under international law**. (However, note that under *Niang*, in the 4th Circuit “psychological harm” without accompanying physical harm is not enough to establish persecution.). *See* p. 8 of this advisory for cites to International Human Rights Law on family protection.
    - *See Protecting Parents at 7*.
    - *See Kovac v. INS*, 407F.2d 102 (9th Cir. 1969).
      - (Four years after Congress removed the word “physical” from the statutory asylum requirement of “physical persecution”, the Ninth Circuit interpreted that amendment to have expanded refugee protection to victims of both economic and mental harm).
    - *IF* the mother herself experienced genital cutting, argue permanent persecution under *Mohammed* AND argue eligibility for “humanitarian asylum” based on FGC being a severe and atrocious harm, and based on mother’s personal knowledge/experience of the devastating impact FGC will have on her daughter. *Niang* notes possible humanitarian grant under such circumstances.
    - Put on a mental health expert to bolster claim of extent of mental anguish to parent should child be subject to FGC
  - “Persecution” encompasses harm to family members.
    - *See Protecting Parents at 7*.
    - *See Persecution of Family Members*, Memorandum from the Office of International Affairs, Asylum Division, (June 30, 1997) at 1.
      - “[h]arm to an applicant’s family member may constitute persecution to the applicant.”
    - *See Matter of Chen*, 20 I.& N. Dec. 16 (BIA 1989) (where the BIA granted humanitarian asylum based in part on past harm to the applicant’s father in); *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (where the BIA concluded instead the forced sterilization of the applicant’s wife constituted past persecution as to the applicant himself). *See also Khassai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J.,

- concurring); *Mashiri v. Aschcroft*, 383 F.3d 1112 (9th Cir. 2004) (finding asylum eligibility in part based on psychological and emotional harm to mother/wife caused by harm to immediate family members).
- At first glance the Seventh Circuit appears to reject harm to family members as persecution, however this rejection is based on a misreading of precedent. *See Protecting Parents at 8*.
  - “Torture” encompasses the threat of harm to family members.
    - *See Protecting Parents at 10-11 (and cases referenced therein)*.
    - The CAT defines torture as:
      - “any act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind . . . [when performed with official acquiescence]” G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984).
    - The U.S. criminal statute that implements the CAT defines torture as an act under color of law that is “specifically intended to inflict *severe physical or mental pain or suffering*.” 18 U.S.C. § 2340 (2004) [emphasis added]. Severe mental pain or suffering is defined as “prolonged mental harm caused by or resulting from . . . [among other things] the *threat that another person will imminently be subjected to death*, [or] *severe physical pain or suffering* . . .” *Id.*
    - By means of the Alien Torts Claims Act and the Torture Victim Protection Act, U.S. courts have acknowledged the severe mental suffering that accompanies witnessing the torture of a relative.
    - International judicial organs have come to recognize the mental anguish experienced by immediate family members of human rights abuse victims.
    - Medical experts and legal scholars maintain that forcing a person to witness or personally inflict torture on a relative also constitutes torture.
  - For a parallel to Intentional Infliction of Emotional Distress cases, *see Protecting Parents note 186*.
  - Make a showing of the risk of FGC.
    - The *Abay* court considered both the immediate risk posed by the girl’s grandmother *and* the potential risk from future husbands. (The latter risk was demonstrated with documentation of general country conditions).
    - In *A-K-*, the BIA’s denial rested on its finding that it was not more likely than not that the daughters would be subject to FGC because the practice had decreased in

Senegal, was only happening in certain parts of the country, and was banned by the government. *Expert testimony or an affidavit may be critical to establishing the prevalence of the practice, and the government's inability/unwillingness to protect women and girls from FGC.*

- Take care to demonstrate that this risk exists despite parental opposition to the practice.
  - See initial *Abebe* decision (379 F.3d 755), where the Ninth Circuit upheld the lower court's conclusion that the applicants would be able to prevent their daughters' subjection to FGC. Here the dissent countered that the IJ had "transformed the couple's expressions of disapproval of FGM, and their desire to protect their daughter from it, into affirmations of their ability to prevent it." (See *Protecting Parents* at 6.)
- Note that all that is necessary is that the fear be "well-founded" (for asylum)!
- Make a showing of **actual constructive deportation**.
  - Provide evidence that deportation of this particular mother or father will result in *de facto* deportation of this particular daughter **this is critical given A-K- where the BIA's denial rested in large part on its finding that the US citizen daughters could remain in the US with their other parent or a legal guardian**
    - show the minor age of the daughter
    - show parental dependency on parent facing removal
    - show absence of other suitable guardians in the U.S. AND/OR inability of parent in lawful status in the US to care for the child
  - Argue that requiring evidence of *actual* constructive deportation is inconsistent with the policy of family unity enshrined in international treaty law, the United States Constitution, and statutory law.
    - See *Protecting Parents* at 12-13 and note 250.
    - "[N]ormally a mother would not be expected to leave her child in the United States in order to avoid persecution." *Matter of Dibba*, No. A73 541 857 at 2.
    - (Make this showing anyway if possible in light of *A-K* and requirement of this showing by some federal courts).
      - I.e. the *Obazee* denial hinged on the un-rebutted alternative that the girl could remain in the U.S. in the custody of her father. (See *Protecting Parents* at 3).
      - The *Olowo* denial also relied in part on an absence of evidence of *actual* constructive deportation. (See *Protecting Parents* at 5).
  - (For the *Oforji* court's conclusion that it was barred from considering evidence of constructive deportation, and for relevant counterargument: see *Protecting Parents* at 11-12).
- Make a showing of the applicants' opposition to FGC
  - In some cases this may be influenced by past persecution.
    - Has the mother herself been subjected to FGC?
    - Does the applicant have other daughters? If so, have they been subjected to FGC? Have they suffered adverse health effects or even death?

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- (this evidence will also apply to the well-founded-ness inquiry)
- Make a showing of other persecution directed at parents who oppose FGC in the applicant's society.
  - i.e. ostracism
    - See *Abay* at 640.
  - any other persecution – threats, harm
  - make this showing in any way possible because the *A-K*- denial is based in part on the BIA's finding that the father did not establish threats to life or freedom (for withholding) directly to himself, he only established ostracism
- Present *Abay's* consistency with international refugee law decisions.
  - See *Protecting Parents at 9-10*.
    - The Canadian Immigration and Refugee Board granted asylum to a mother who feared that her daughter would be subjected to FGC.
      - *Khandra Hassan Farah*, IRB Refugee Division (Toronto) July 13, 1994.
    - A Canadian Federal Court granted a stay of removal to a woman who feared that her removal would result in her Canadian citizen daughter's subjection to FGC.
      - *Obasohan v. Minister of Citizenship and Immigration*, 2001 CarswellNat 325, 2001 FCT 92, 13 Imm. L.R. (3d) 82.
    - A British appellate court granted a father protection under the European Convention of Human Rights because *his experience* of his daughter's subjection to FGC would violate the convention's ban on torture, inhuman, and degrading treatment.
      - *M.H. & Others*, [2002] U.K. Immigration App. Trib. 02691 para. 13, available at <http://www.bailii.org/uk/cases/UKIAT/2002/02691.html>
    - The Australian Refugee Review Tribunal held that a mother qualified as a refugee, identifying her fear of persecution as "double" because both her daughter and she faced the threat of FGC.
      - *Reference Number N97/19046* [1997] (Australia), available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/rrt/N9719046.html?query=fgm>.

## AVOIDING THE *OFORJI/OLOWO/Niang* and *A-K*- FRAMEWORK

- Legal Arguments against *Oforji/Olowo/Niang* and *A-K*-
  - The *Oforji* opinion is flawed. See *Protecting Parents at 11-12*
    - The court relied on questionable statutory interpretation when it concluded that evidence of constructive deportation could only be considered in cancellation of removal cases.
    - The court did not consider the possibility of psychological harm as torture, despite the fact that the CAT, the relevant U.S. statutes and regulations, domestic and international decisions, scholarly works, and medical experts

recognize the infliction of extreme mental harm as torture. [*Neither did the BIA in A-K-*]

- The court misconstrued testimony regarding the whereabouts or custodial ability of the girls' father.
- The court conflated the distinct requirements for asylum and cancellation of removal in an attempt to distinguish the precedent, *Nwaokolo*.
- \*\*The applicant in *Oforji* was found not credible and thus was ineligible for asylum on that basis. Thus the Seventh Circuit really was rejecting what is called a "derivative" CAT claim, not an asylum claim.
- The *Olowo* opinion relies on the *Oforji* opinion and is thus correspondingly weakened
- The *Niang* decision is also flawed:
  - The court held that psychological harm without accompanying physical harm does not constitute persecution – which contradicts BIA and circuit court asylum jurisprudence
  - The court treated the claim as derivative and did not consider evidence of harm to the mother herself
- In *A-K-* the BIA attempted to distinguish the case of parents of US citizen daughters from parents of daughters facing removal. *This distinction is meaningless, however, because daughters facing removal could qualify for asylum based on their own well founded fear of persecution, and thus gain a legal right to remain in the US as well.* Hence, the legal status of a daughter as a US citizen does not provide additional protection from FGC.
- Policy Arguments against *Oforji/Olowo/Niang* and *A-K-*
  - As the *Oforji* court recognized, and declined to remedy, a mother in this situation has **two options**. She “will be faced with the unpleasant dilemma of permitting her citizen children to remain in this country under the supervision of the state of Illinois or an otherwise suitable guardian, or taking her children back to [her home country] to face the potential threat of FGM.” *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), at 618.
    - Problems with “**option one**” (taking the daughter back)
      - *See Protecting Parents at 12*
        - By taking a child “back” to the parent’s home country (often a place the child has never been!), the parent subjects the child to the threat of a practice that is recognized as a crime, persecution and torture.
        - If she expresses intent to take a child “back” to her home country, the parent’s legal custody may be put in jeopardy for (presumably) endangerment. *See Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004), at 702-704.
      - => This is therefore not a legal option.
    - Problems with “**option two**” (leaving the daughter behind)
      - *See Protecting Parents at 12-13*

- This “option” runs contrary to the time-honored **policy of family unity** in U.S. law.
  - One of **immigration law’s** principle aims is to reunite families
    - i.e. waiver of inadmissibility for “humanitarian purposes, *to assure family unity*, or when it is otherwise in the public interest.” INA § 245(h)(2)(B) [8 U.S.C.A. § 1255(h)(2)(B)] (2004) [emphasis added].
    - failure to consider hardship to children in parents’ deportation cases is abuse of discretion
  - The sanctity of family unity is reflected in American **Constitutional law**.
    - The Ninth Amendment and the equal protection clause and substantive due process clause of the Fourteenth Amendment are sources of protection for the family unit.
      - *See Protecting Parents note 251.*
      - *See Abebe, Ferguson, J., dissenting*
  - **International human rights law** protects family unity.
    - *See Protecting Parents at 13 and note 255.*
    - The Universal Declaration of Human Rights, Article 16 (3), “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”
    - The International Covenant on Civil and Political Rights, Article 17, and the International Covenant on Economic, Social, and Cultural Rights Article 10 (1), “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home . . .” and “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”
    - The Convention on the Rights of the Child, Article 9 (1), “[s]tate 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 laws and

procedures, that such separation is necessary for the best interests of the child”

- \* Separating the parent and child also unnecessarily shifts burden of custody onto the relevant state’s foster care system (an ultimately onto the shoulders of the American taxpayer) **and runs counter to international and domestic child welfare principles regarding best interests of the child.**





