



**CENTER FOR GENDER & REFUGEE STUDIES**  
UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW

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**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*. Whatever the characteristics, the group must be defined with **sufficient particularity and must be socially visible**. (See *In re C-A-*, 23 I. & N. Dec. 951 (BIO 2006); *In re A-M-E & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007)).

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 Claims

#### A) Background

Recently, there have been some very significant developments in past FGC asylum claims. Prior to BIA's September 27, 2007 decision in *In re A-T-* (discussed below), many cases involving past FGC were granted pursuant to the regulation that entitles an applicant to a presumption of a well founded fear of future persecution (or threats to life/freedom for withholding cases), upon establishing past persecution. 8 C.F.R. § 1208.13(b)(1)(i); §1208.16 (b)(1)(i). Federal decisions (discussed below) had upheld or reversed BIA decisions on that or similar bases.

In September 2007, the BIA ruled that in cases of past FGC, the presumption of a well founded fear (and threats to life/freedom) was rebutted by the mere fact that FGC had already occurred and thus could not be repeated. *See In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007). According to the

BIA, the *past FGC itself was the changed circumstance* that rebutted the presumption. 8 C.F.R. § 1208.13(b)(1)(i); §1208.16 (b)(1)(i). The *A-T-* decision resulted in denials of protection to women across the country who had suffered past FGC.

In June 2008, the Second Circuit issued a published decision in *Bah v. Mukasey* (discussed below), rejecting the BIA's rationale in its 2007 decision in *In re A-T-*. Attorney General Mukasey then certified *A-T-* to himself. On September 22, 2008 the Attorney General ruled that the BIA erred in its decision in *A-T-*, vacated the decision, and remanded it back to the BIA. On June 4, 2009, the BIA issued a new decision in the case, consistent with the Attorney General's decision. Therefore, the current state of the law is that women who have suffered past FGC may be eligible for asylum. The remainder of this section reviews the decisions described in these background paragraphs, and offers suggestions on how to argue a past FGC case.

## **B) Precedential federal decisions in cases of past FGC:**

- *Mohammed v. Gonzales*, 400 F.3d 785 (9<sup>th</sup> Cir. 2005):

The Ninth Circuit ruled that for women who have already undergone FGC, the presumption cannot be rebutted because the harm of FGC has ongoing, adverse consequences throughout a woman's life. Analogizing the ongoing harm of genital cutting to forced sterilization, found by the BIA to be a permanent and continuing harm in *In re Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003), the court held that a woman can be eligible for asylum based on past FGC alone.

The court noted that even were FGC not to be deemed a continuing harm, the government would have a difficult time rebutting the presumption for two reasons – a) because FGC could be repeated, and b) because Ms. Mohammed could expect to suffer numerous additional forms of persecution (aside from FGC) as a Somali woman.

Alternatively, the court found that even if the government could rebut the presumption, Ms. Mohammed could qualify for humanitarian asylum under 8 C.F.R. §1208.13(b)(1)(iii) based on the severe and atrocious nature of her past FGC, as well as her risk of suffering other serious harms in Somalia.

- *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007)

The Eighth Circuit found that Ms. Hassan, a Somali woman who had been subjected to FGC in her youth, had suffered persecution on account of her membership in the particular social group of "Somali females." The court rejected the government's argument that the presumption of a well-founded fear of persecution had been rebutted by the mere fact that Ms. Hassan had already been subjected to FGC. Rather, the court noted that there were widespread forms of persecution – aside from FGC- that Ms. Hassan could suffer as a Somali woman. As a result, the court noted that the government would have a difficult time rebutting the presumption. The court further explained that Ms. Hassan need not fear "the exact same harm she has suffered in the past [ because] [o]ur definition of persecution is not that narrow." (484 F.3d 513, 518).

- *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008)

The *Bah* case was the consolidated case of three Guinean women who had suffered past FGC and had been denied withholding of removal (they had all been time-barred from asylum) by

immigration judges. *Bah* is the only circuit court case discussed in this section which issued subsequent to the BIA's September 2007 decision in *A-T-*, so it is the only federal court decision which explicitly rejects the BIA's ruling. As explained in detail below, following the Second Circuit's decision in *Bah*, A.G. Mukasey vacated *A-T-*. The women appealed their cases to BIA, which found in every case that the presumption had been rebutted because the women had already undergone FGC and thus would not suffer future threats to life or freedom in the form of FGC.

The Second Circuit rejected the BIA's decisions in these cases as erroneously applying the regulation regarding the presumption. Specifically, the court held that the BIA erred by: 1) simply assuming that FGC could not be repeated rather than holding the government to its burden of proving that FGC would not be repeated in each woman's individual case, 2) requiring that the identical form of harm (FGC) be repeatable when the regulations have no such requirement and no other BIA decisions have so held, and 3) assuming that FGC was the only form of harm that the women would face on account of their social group membership, rather than requiring the government to prove that each woman would not face future threats to life or freedom on account of her social group membership.

### **C) BIA jurisprudence on past FGC**

Prior to September 2007, the BIA had issued no published decisions in past FGC cases. In a series of unpublished decisions on file at CGRS, the BIA granted asylum to women who had suffered past FGC, using similar logic to its own decision in *Y-T-L-*, as well as the *Mohammed* Court's continuing harm theory. However, in September 2007, the BIA reversed course and denied asylum based on past FGC in a published decision known as *In re A-T-*.

#### **▪ BIA's 2007 decision in *In re A-T-***

In *In re A-T-*, 24 I. & N. Dec. 296 (BIA 2007), *vacated and remanded by Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008), the BIA held that FGC is generally inflicted once and therefore it will normally be considered a change in circumstances sufficient to overcome the presumption of a well-founded fear of persecution or a threat to life or freedom. It also held, contrary to Ninth Circuit precedent in *Mohammed v. Gonzales*, that *FGC is not a continuing harm*. As a result, many asylum and withholding claims based on past FGC were denied as the presumption of a well-founded future fear was deemed rebutted by the very fact the FGC had already been inflicted. The *A-T-* decision had applied to *all* circuits except the Ninth, where *Mohammed v. Gonzales* controlled, although the DHS argued in the Ninth Circuit that under the Supreme Court's decision in *National Cable and Telecommunication Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the agency's decision in *A-T-* trumped Ninth Circuit precedent.

The *A-T-* decision was considered a major setback to the gains made over more than a decade ago to protect women and girls fleeing FGC. As a result, CGRS and other advocates around the country worked to reverse the decision by strategizing with the attorneys appealing it, organizing grassroots advocacy, coordinating a congressional request that the Attorney General review the decision, targeting major national media outlets to educate the public about the decision and its

effects on refugee women, and filing briefs in other, related federal cases - such as the successful Second Circuit case, *Bah v. Mukasey*, 529 F.3d 99 (2nd Cir. 2008), discussed above.

▪ **Attorney General's decision in *In re A-T-***

On September 22, 2008, Attorney General (A.G.) Mukasey issued a decision vacating *A-T-* and remanding the case back to the Board for reconsideration. *Matter of A-T-*, 24 I & N. Dec. 617 (A.G. 2008). Specifically, the A.G. held that the Board had erred in reaching the conclusion that FGC was a one-time act and once a woman had undergone the procedure it could not be repeated in the future. *Id.* at 621. The A.G. noted that the procedure is “indeed capable of repetition” and even the Board itself had recognized this in other cases. Related to this error, the A.G. criticized the Board’s legal conclusion that having suffered FGC in the past itself rebutted the presumption of future persecution. *Id.* at 622. “The fact that respondent had previously been the victim of female genital mutilation would not and could not, by itself, rebut the presumption because, contrary to the Board’s assumption, she could possibly be subjected to the practice again.” *Id.* The A.G. also held that the Board incorrectly required that the harm the respondent feared in the future be identical to the harm she had suffered in the past, namely FGC. *Id.* The A.G. clarified that the law requires only that the future harm feared be based on the same statutory ground as the past harm suffered, not that the form of the past and future harms be identical. *Id.*

This decision renewed hope for asylum cases based on past FGC.

▪ **BIA’s 2009 decision in *In re A-T-***

On June 4, 2009, the BIA issued a new decision, adopting the A.G.’s decision. *See Matter of A-T-*, 25 I. & N. Dec. 4 (BIA) 2009.

The new BIA decision holds that:

- 1) asylum and withholding of removal claims based on past FGC are to be adjudicated according to the framework set out by the A.G. decision;
- 2) once an applicant establishes past persecution on account of a statutorily protected ground, she is entitled to the presumption of a well founded fear of persecution or future threats to life/freedom based on the same ground. The burden then shifts to the government to establish, by a preponderance of the evidence, that either: a) there has been a fundamental change in circumstances such that future persecution or threats to life/freedom would not be on account of a statutorily protected ground, or b) she could reasonably relocate to avoid future persecution or threats to life/freedom. *See* 8 C.F.R. § 1208.13(b)(1)(i); 1208.16(b)(1)(i);
- 3) an applicant for asylum or withholding of removal must clearly state the statutorily protected ground(s) upon which she bases her claim, including “the exact delineation” of any particular social group in which she claims membership.

At the BIA, both parties (the government and Ms. A-T-) had sought a remand for further fact finding in accordance with the framework set out by the A.G. In its brief to the BIA, the

government had requested that Ms. A-T- present evidence on remand as to why her past FGC rose to the level of persecution since she was very young at the time and does not remember being cut. In its decision, the BIA rejected the government's assertion that Ms. A-T-'s FGC may not have been persecutory and reiterated that FGC is a "deplorable and extremely harmful" act. The BIA further explained that short of an applicant stating that she did not consider FGC to be persecutory, FGC would constitute persecution, even for an applicant who does not recall it. *Id.* at 10-11. The BIA agreed with the parties that additional fact finding is necessary in order for the judge to reassess Ms. A-T-'s claim "in light of the framework set out by the Attorney General[ 's decision]" and remanded the case accordingly. 25 I. & N. Dec. 4 at 9.

The case is now pending before the immigration court. Please visit our website for updates on the A-T- case, as well as other past FGC cases.

#### D) **Tips for presenting past FGC claims:**

The central basis for the claim will of course be showing that your client was subjected to FGC in the past. This can be proven by your client's credible testimony, sworn affidavits or testimony of friends or family members who can attest to the fact that she underwent the procedure, a medical report, a psychological evaluation, etc. and supported by expert witnesses and country conditions information regarding the prevalence of the practice in the particular country and the lack of protection available. **\*\* Please note** – CGRS has 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.

However, successfully establishing past persecution is only the first step. **Below are tips for three ways of showing asylum/withholding eligibility when FGC has already occurred.**

#### Well-founded Fear or Clear Probability of Persecution

- In cases where you can demonstrate that FGC will be inflicted again - which the AG's decision, as well as the *Bah* and *Mohammed* decisions recognize as possible - the presumption regarding future persecution will not be overcome. For example, where facts permit, one might show that a client risks re-infibulation or further cutting if the initial FGC was considered incomplete. Or perhaps, in a client's community, women are subjected to repeated mutilation at different times of life – e.g., immediately before marriage, or before or after childbirth. It is critical to understand precisely what types of genital cutting are relevant to your client's claim – and when, traditionally, she would be expected to undergo any of them. Your client's testimony, expert witnesses, and country conditions information can help to establish this.
- In cases where your client may face other forms of persecution (other than FGC) based on the same protected ground as the past persecution, present evidence of her fear and the possibility of that future persecution. Show that the persecution feared is related to the basis for the claim of past persecution. *See* 8 CFR §

1208.13(b)(1); 1208.16(b)(1)(iii). Specifically, one might argue that the same characteristics which made an asylum seeker vulnerable to FGC in the past mark her for other forms of persecution in the future, such as forced marriage, rape, physical abuse, etc. Again, under the AG's decision as well as the BIA's 2009 decision in *Matter of A-T*, the type of harm feared need not be identical to the harm suffered in the past. The Second, Ninth, and Eighth Circuit decisions discussed above also support this reading of the law. **\*\*Advocates should carefully define the particular social group advanced under this theory - as now required by the BIA - because the crux of the claim is that the client was targeted for FGC and may be targeted in the future on account of membership in the same social group.** The social group might be defined by gender, nationality, and ethnicity, for example. Please contact CGRS for assistance in crafting the group.

### Continuing harm stemming from past FGC

In both asylum and withholding cases, advocates can argue that although the actual genital cutting occurred in the past, persecution is ongoing because of the continuing physical and psychological harm the woman suffers, and thus the presumption cannot be rebutted. The continuing harm theory is good law in the Ninth Circuit.<sup>1</sup> See *Mohammed*, above. The argument can also be raised in other circuits now that *In re A-T* has been vacated; however, neither the AG's decision in *A-T* nor the BIA's 2009 decision in *A-T* address the continuing harm theory in FGC cases. The positive decisions in *Bah* and *Hassan* also were not based on the continuing harm theory. Advocates should be aware that outside the Ninth Circuit, arguments focused on the presumption are on stronger legal ground than those focused on the continuing harms of FGC.

Advocates arguing this theory should present evidence about the lingering effects of persecution that client continue to suffer. Some examples may include 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 regarding psychological impact should be offered if at all possible). Included in your materials from CGRS in support of the claim, you should have received a model affidavit by international FGC expert Hanny Lightfoot-Klein, which discusses the ongoing harms FGC causes women. This affidavit 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.

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<sup>1</sup> Though the BIA's 2007 decision in *A-T* rejected the Ninth Circuit's continuing harm doctrine, that decision was vacated in its entirety. See *Matter of A-T*, 24. I. & N. Dec. at 617; cf. *Scheerer v. U.S. Atty. Gen.*, 445 F.3d 1311 (11th Cir. 2006) (vacating BIA decision in part).

## Humanitarian asylum

In cases of asylum, but not withholding of removal, relief may be granted on the basis of past harm, even where there is no well-founded fear of future harm, 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). The BIA itself has granted humanitarian asylum based on past FGC. (*Matter of S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008)). One or both prongs of humanitarian asylum should be argued in cases where your client has suffered FGC in the past. Advocates can:

- Argue that the FGC suffered was severe and atrocious persecution
- Present evidence about the lingering effects of persecution that your client continues to suffer. See above for examples.
- Put on evidence about “other serious harm” your client would suffer upon removal. The other serious harm need not be based on one of the five protected grounds. It does not have to rise to the level of persecution, and can include things such as lack of adequate medical care for FGC-related complications, psychological counseling for effects of FGC, ostracism for opposition to FGC, etc.

**\*Please note that there is no equivalent humanitarian withholding of removal.**

Therefore, for clients who are ineligible for asylum (due to the one year bar, or some other reason), a past FGC claim will only be successful where the presumption is not overcome, where the client establishes a clear probability of future threats to life/freedom, or where the continuing harm theory is accepted.

## 4) FGC and dependent children

- 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 USC § 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 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

While the opinion contains some broad language about eligibility for asylum and treating persecution to a family member as “automatic” persecution to the self, that discussion is dicta. The BIA erroneously characterized the claim as a “derivative” claim for withholding of removal and denied the claim, in part, because there is no basis for derivative withholding of removal (\*\*“derivative” implies that the parent, who is not eligible for relief in his or her own right is attempting to gain status through his or her child). 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 the likelihood of the child to return with her parent to the parent’s native country or country of last habitual residence. The citizenship of the child does not determine the soundness of the theory of persecution in parent/child FGC cases (that FGC of the child is persecution to the parent), 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. The BIA does 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 says that *Abay* does not apply to *A-K-*, because the daughters in *A-K-* are U.S. citizens.

Because the BIA’s decision was limited to the facts presented in *A-K-*, 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 (also discussed below).

CHART ON FEDERAL DECISIONS ON PARENT/CHILD FGC CASES:

(encouraging cases)

(discouraging cases)

Case	Circuit	Year	Facts	Outcome
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CGRS / FGC Asylum Advisory

<b>Nwaokolo</b> v. <i>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>
<b>Oforji</b> v. <i>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” 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>
<b>Olowo</b> v. <i>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>
* <b>Abay</b> v. <i>Ashcroft</i> , 368 F.3d 634 (6th	6th	2004	<ul style="list-style-type: none"> <li>• Ethiopian mother</li> <li>• Ethiopian</li> </ul>	<ul style="list-style-type: none"> <li>• Both mother and daughter met refugee definition because of well-founded fear that the daughter</li> </ul>

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Cir. 2004).			<p>daughter</p> <ul style="list-style-type: none"> <li>• Demonstrated that FGC was “nearly universal” in Ethiopia</li> </ul>	<p>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>
<b>Abebe</b> v. Ashcroft, 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>
<b>Niang</b> v. <i>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.

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- 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?
- (*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 *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.**

**We encourage you to be in touch with CGRS regarding questions you have about this development in the law or other inquiries related to gender-based asylum claims. We appreciate being provided with updates about the outcome of your cases.**

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