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Circuit Rebukes Immigration Board on Mutilation Ruling

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An immigration board that concluded that women who have suffered forced genital mutilation cannot be persecuted in the future because the damage is already done drew a sharp rebuke yesterday from the U.S. Court of Appeals for the Second Circuit.

Saying it was "deeply disturbed" by "fairly obvious errors" in the Board of Immigration Appeals' handling of appeals for three victims of the barbaric practice, the circuit reinstated the cases and told the board to get back to work.

Judges Chester Straub, Rosemary Pooler and Sonia Sotomayor ordered remands in the consolidated cases of *Bah v. Mukasey*, 07-1715-ag, *Diallo v. Department of Homeland Security*, 07-1994-ag, and *Diallo v. Department of Homeland Security*, 07-2120-ag.

"Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection," Judge Straub said. "The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due. Our concern is heightened by the very serious nature of the harm suffered by petitioners in these cases, which the BIA itself has previously recognized."

The judges said the big mistake by the board was its failure to follow its own regulatory framework.

The board (BIA) held in an en banc session in 1996 that genital mutilation can constitute persecution on account of membership in a particular social group, which is one step on the road to a grant of asylum or withholding of removal. The three women in the cases before the circuit, Salimatou Bah, Mariama Diallo and Haby Diallo were pursuing claims for withholding of removal and Convention Against Torture relief.

Once persecution is established, a presumption is created under 8 C.F.R. §1208.16(b)(1) (i) that a petitioner's "life or freedom would be threatened in the future in the country of removal on the basis of the original claim."

The burden then shifts to the government to show that circumstances have changed and the petitioner would no longer be threatened because of their membership in a particular group.

Here, Judge Straub said, the appeals board "failed to shift the burden to the government."

"Instead, the BIA stated conclusorily that the fact that petitioners had already undergone genital mutilation in and of itself rebutted the presumption that their lives or freedom would be threatened in the future, because, in its view, genital mutilation is a 'one-time' act," he said.



There were two key errors in the immigration appeals board's decision, the judge said.

The first was that it "erred in stating categorically without citation to the record or relevant reports that 'female genital mutilation is a 'one-time' act,'" Judge Straub said, adding that "record evidence reveals that genital mutilation . . . is often repeated in Guinea."

The agency was engaged in "impermissible speculation" when it assumed mutilation was a one-time act because it made no mention of record evidence or country reports, he said, and on remand, the agency must insist that the government meet its

burden of showing that the three women would not be further mutilated upon their return to Guinea.

The second error committed by the board was to assume "that genital mutilation is the only type of persecution relevant to the analysis of whether petitioners merited withholding of removal," he said.

The government cannot meet its burden only "by showing that the particular act of persecution suffered by the victim in the past will not recur," he said.

Future Threats

The judge credited the argument of amicus Center for Gender and Refugee Studies, represented by Ana Reyes, that "it would be incongruous to hold, for example, that the fact that an applicant's tongue was severed because he spoke out against the government

in and of itself rebutted the presumption that his life or freedom would be threatened in the future simply because his tongue could not be cut off again."

With ample evidence in the record that women in Guinea are subject to forms of persecution aside from mutilation, including rape and forced sex trafficking, Judge Straub said that, under the regulations, "it should have been presumed" that the lives and freedom of Ms. Bah, Ms. Diallo and Ms. Diallo "would be threatened in the future."

The three cases reviewed by the circuit were unpublished opinions from the Board of Immigration Appeals. But soon after the opinions were issued, the board made public *In re A-T-*, 24 I.&N. Dec. 296 (B.I.A. 2007), in which it made essentially the same holding.

Judge Straub said the circuit was declining to adopt the reasoning and holding of *A-T-*. He also offered a concurring opinion in which he said he thought the court should have decided the issue of whether the Board of Immigration Appeals erred in declining to apply the notion of "continuing persecution" to the cases. The agency has applied "continuing persecution" in the context of asylum cases based on forced sterilization in China.

Ms. Reyes, of Williams & Connolly, said yesterday, "The court rightly rejected the BIA's assumption that female genital mutilation is a one-time act that is not related to other types of gender persecution. The ruling confirms what should have been obvious, that victims of this persecution are entitled to the same protection under our laws as are victims of any other type of persecution."

Ronald S. Salomon represented Salimatou Bah. Theodore Vialet represented Mariama Diallo and Haby Diallo.

U.S. Department of Justice Trial Attorney Michael C. Heyse argued the case before the Second Circuit.

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