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FEMALE CIRCUMCISION IN THE MODERN AGE: SHOULD FEMALE CIRCUMCISION NOW BE CONSIDERED GROUNDS FOR ASYLUM IN THE UNITED STATES?

Gregory A. Kelson*

Today . . . this Board decides that a young woman of a particular tribe in Togo, who opposes being subjected to female genital mutilation as practiced by that tribe, is a member of a particular social group, and that on account of that membership, a reasonable person could fear persecution as defined in the Immigration and Nationality Act.¹

I. INTRODUCTION

On March 23, 1994, Lydia Oluloro, a Nigerian national who was in the United States illegally, sat in the Portland, Oregon, office of her attorney, Tilman Hasche, listening to the oral decision of U.S. Immigration Judge Kendal Warren.² Judge Warren had granted Ms. Oluloro a suspension of deportation³ based on "extreme hardship" for herself and her American-born daughters.⁴ Ms. Oluloro had argued before the judge that if she were deported, "her daughters would be subject to female circumcision in Nigeria."⁵

In Baltimore two years later, a woman from Sierra Leone appeared before U.S. Immigration Judge John Gossart, Jr. in the hopes of winning asylum based on the fear of female circumcision. Judge Gossart denied asylum to the woman, stating "respondent cannot change that she is a female, but she can change her mind with regards to her position towards the [female genital

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* Executive Director, Institute for Women and Children's Policy, Chicago, Illinois. I would like to thank Hillary Frommer for her comments.

¹ In re Kasinga, Interim Decision 3278 (BIA 1996) (Rosenberg, Board Member, concurring).


⁴ See Oluloro, A72-147-491 at 17-18.

mutilation] practices. It is not beyond the respondent's control to acquiesce to the tribal position on [genital mutilation]. In two other cases, in Orange County, California and Arlington, Virginia, asylum was granted to a Somalian woman and a woman from Sierra Leone respectively based on the same fear of persecution. In the Virginia case, Immigration Judge Paul Nejelski stated "that mutilation alone provides a 'humanitarian justification' for awarding asylum."

The Oluloro case in Portland, Oregon marked the first time that a woman used the defense of female circumcision in an immigration case in the United States. Oluloro, however, was not an asylum case, but a request for a stay of deportation and thus has limited precedential value. The other three cases described above were asylum cases, but with different results. None of the four cases are binding on other immigration judges in the United States.

On June 13, 1996, the United States Board of Immigration Appeals (BIA) granted asylum to a 19-year-old woman from Togo who was seeking to escape the practice of female circumcision. In this precedent-setting case, Fauziya Kasinga became the first woman to establish that female circumcision is a legitimate ground for asylum in the United States. Although this decision is binding on the nation's 179 immigration judges, it still left questions as to how female circumcision should be treated. Most notably is the question, "Can female circumcision now be considered grounds for asylum in the United States?"

Paul W. Schmidt, Chairman of the Board of Immigration Appeals and author of the Kasinga opinion, noted "in deciding this case, we decline to speculate on, or establish rules for, cases that are not before us."

This Article will look at how the practice of female circumcision is treated in asylum proceedings in the United States. First, it will examine the practice of female circumcision and why it should be considered persecution. The article will then revisit the Kasinga case leading up to the BIA's decision. Finally, it will offer suggestions on how this practice should be treated and the steps that should be taken to assure that immigration panels and courts in the United States treat the practice of female circumcision as persecution.

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7 See id.
8 Id.
9 See Kelson, supra note 5, at 266.
II. HISTORY OF FEMALE CIRCUMCISION

A. What is Female Circumcision?

The practice of female circumcision\(^{11}\) can be traced back as far as the Egyptian Pharaohs.\(^{12}\) It is estimated that at least 6,000 girls per day (2 million per year) are at risk of undergoing female circumcision.\(^{13}\) The World Health Organization estimates that between 100 and 114 million females worldwide have been victims of this practice.\(^{14}\)

Female circumcision, also known as female genital mutilation (FGM), is the generic name for a series of three operations that can be performed on a woman's genitalia. The first operation, known as circumcision, involves the removal or the prepuce, or hood, of the clitoris. In the second operation, known as clitoridectomy, the clitoris and labia minora (small lips of the vagina) are removed with the remainder of the vagina left intact. In its most severe form, infibulation, the clitoris, labia minora and the labia majora (large lips of the vagina)

\(^{11}\) There has been a dispute for years over whether the correct term should be "female circumcision" or "female genital mutilation" (FGM). Many feminists do not like the term "female circumcision" because it relates too closely with the male operation of removal of the foreskin from the penis. See, e.g., Nahid Toubia, Female Genital Mutilation, in WOMEN'S RIGHTS, HUMAN RIGHTS 224, 226 (Julie Peters & Andrea Wolper eds., 1995) ("[Female circumcision] implies a fallacious analogy to nonmutilating male circumcision, in which the foreskin is cut off from the tip of the penis without damaging the organ itself."). See also, Layli Miller Bashir, Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law, 4 Am. U.J. GENDER & L. 415, 415 n.* (1996) (stating that "[In 1990, the regional conference of the Inter-African Committee voted that 'female circumcision' did not accurately reflect the ritual practice and decided that it should be called 'female genital mutilation.'"). I personally believe that the term "female genital mutilation" has an unduly negative overtone because the cultures that practice female circumcision do not believe that they are doing anything of a negative nature. See Kelson, supra note 5, at 258 n.2. See also Robyn Cerny Smith, Female Circumcision: Bringing Women's Perspectives Into the International Debate, 65 S. CAL. L. REV. 2449, 2450 n.7 (1992) (stating that "many authorities object to [female circumcision] because it insinuates that the practice has no positive aspects, when in actuality it may positively contribute to a tribal group's identity"). For the purposes of clarity, I will use the term "female circumcision" in this article unless I quote from another source.

\(^{12}\) See Kelson, supra note 5, at 257-58.

\(^{13}\) See Toubia, supra note 11, at 224.

\(^{14}\) See Kelson, supra note 5, at 258.
are removed. The vulva is then sutured together with thorns or catgut leaving a small opening just large enough for the passage of urine and menstrual fluids. The operation is usually performed by a village midwife or barber who has little or no medical training and without the use of anesthesia.

B. Justifications for Female Circumcision

Proponents of female circumcision cite many reasons why the practice exists and why it must continue. Among the reasons most frequently cited are: preservation of virginity and sexual control of women, religion, and acceptance in the community. This section will take a closer look at this reasoning.

1. Preservation of Virginity and Sexual Control of Women

Virginity is a very important aspect for an unmarried woman in the cultures where female circumcision is practiced. Female circumcision, especially infibulation, ensures that a prospective bride is a virgin before marriage. For this reason, the groom will pay an appropriate "bride price" to the bride's family expecting her to be circumcised. In some cultures, it is considered unthinkable for a man to marry a woman who is not circumcised. In some tribes, infibulation is performed to protect family lineage through ensuring that wives are virgins at marriage and that the children are verifiably the

\[\text{15 See Smith, supra note 11, at 2460-66 (discussing in more detail these procedures, including accompanying ceremonies).}\]
\[\text{16 See Kelson, supra note 5, at 258.}\]
\[\text{17 See Alison T. Slack, Female Circumcision: A Critical Approach, 10 Hum. Rts. Q. 437, 447 (1988) ("protecting female modesty and chastity, which are highly valued in Islam and are clearly prescribed in the Qu\'ran [sic] . . . . Virginity is still considered the most precious possession of the unmarried woman.").}\]
\[\text{18 After an infibulation is performed, the woman is sutured together until her wedding night. It is the duty of the husband to cut open his new bride before attempting to have intercourse with her. See id. at 453.}\]
\[\text{19 See Note, What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision, 106 Harv. L. Rev. 1944, 1944 (1993) [hereinafter Culture].}\]
Controlling a woman's sex drive after marriage is another reason for the justification of female circumcision. One commentator notes that the clitoris "provokes[s] women to make uncontrollable sexual demands on their husbands--demands that will drive a woman to seek extra-marital affairs if her husband does not meet them..." Several commentators have indicated that this is more of a problem of controlling the male sex drive which would "eliminate the 'need' for female excision." Ironically, control of a woman's sex drive used to be a practice in the United States and Great Britain, as well.

Clitoridectomies were prescribed to US and British women during the 19th century as treatment for ailments such as hysteria, epilepsy, melancholy, lesbianism, and excessive masturbation. Currently, clitoridectomies of US women and girls are infrequent, but in rare instances they are inappropriately prescribed as treatment for controlling female masturbation and sexuality.

2. Religion

In most of the countries where female circumcision is practiced, the major religion practiced is Islam, with Christianity coming in a close second. While religious leaders in these cultures have insisted that female circumcision is required, neither Islam nor Christianity requires circumcision of females,
although the Christian Bible does mention circumcision of males. Islamic scholars have stated on many occasions that Islam does not require female circumcision. In fact, in Saudi Arabia, where the Islamic holy city of Mecca is located, the practice is virtually unknown.

3. Acceptance in the Community

Women who have not undergone female circumcision can be ostracized by their community. Those who have not undergone the procedure are viewed in some societies as 'unclean' and promiscuous, and may be barred from entering certain worship areas. These women will be social outcasts...

In one community, women will make a "clicking" sound if she believes she is in the company of an uncircumcised woman with the goal of shaming her.

C. Medical Effects of Female Circumcision

Female circumcision can bring about harmful medical effects from internal bleeding to death.

The most immediate danger of female genital mutilation is exsanguination. There are no worldwide records of how many girls bleed to death as a result of female genital mutilation. Four girls are known to have died from the practice in England since 1978. Other immediate complications of

It has been proven that if all the clitoris is removed or if it is not removed at all a woman's face takes on a sallow complexion. But if the extra part is removed... her complexion is rosy, her cheeks are red as apples, not like your yellow ones...

Tiajuana Jones-Bibbs, Note, United States Follows Canadian Lead and Takes an Unequivocal Position Against Female Genital Mutilation: In Re Fauziya Kasinga, 4 TULSA J COMP. & INT'L L. 275, 278 (1997) (citation omitted).

26 See Kelson, supra note 5, at 286 n.122.

27 See Bashir, supra note 11, at 425.

28 Robin M. Maher, Female Genital Mutilation: The Struggle to Eradicate This Rite of Passage, HUM. RTS., Fall 1996, at 12, 13.

29 See Culture, supra note 19, at 1950. However, if the woman is circumcised, the penalty can be severe. Id.
female genital mutilation are shock, hemorrhage, infection, damage to the urethra or anus, keloid scar formation, epidermoid cysts, tetanus and septicemia from unsterilized instruments, and bladder infection. As with any medical procedure performed with the use of one instrument in multiple operations, there is also the risk of infection by blood-borne pathogens, such as human immunodeficiency virus [HIV] and hepatitis B.

One of the most common problems with infibulated women is the retention of urine due to the pain of the wound and narrowly sewn introitus. Consequent procedures to open the scar during marriage and childbirth provide other possible routes for infection and disease transmission. Long-term complications include chronic vaginal and uterine infections, which can lead to sterility, urinary tract infections and increasingly difficult urination, dysmenorrhea, dyspareunia, and apareunia. Since tightly infibulated women can only urinate drop by drop, their average time of urination is 10 to 15 minutes. Menstruation for the tightly infibulated women lasts for 10 or more days and is painful and malodorous enough to prevent some women from working.

Infibulated women experience many obstetric complications due to the obstruction of the birth canal by scar tissue. The scar always must be cut open . . . and can delay the second stage of labor if it is not opened in time, leading to fetal damage or death. Infibulated women also suffer the consequences of anterior episiotomy, such as vesicovaginal and rectovaginal fistulas. Mutilated women have been reported to suffer from severe anxiety, "frigidity," and fear of pain during sexual intercourse.\(^{30}\)

In fact, some of the medical myths supporting female circumcision that have circulated is that it will increase a woman’s fertility, that the clitoris contains poison that can harm men during sexual intercourse and kill babies during

\(^{30}\) Council Report, supra note 21, at 1715.
childbirth, and that the clitoris "will eventually grow to the size of a penis and dangle between the woman's legs."\textsuperscript{31}

III. History of the Kasinga Decision

Fauziya Kasinga is a native of Togo and a member of the Tchamba-Kunsuntu Tribe of Northern Togo. According to her testimony to an immigration judge, most young women of her tribe undergo circumcision at the age of 15. Ms. Kasinga and her five sisters were able to avoid the procedure and enter into monogamous marriages because of their rich and influential father.\textsuperscript{32} When her father died unexpectedly in 1993, Ms. Kasinga's paternal aunt, in accordance with tribal custom, took over as head of the family. Ms. Kasinga's mother was banished from her home and went back to her family in Benin.\textsuperscript{33} Ms. Kasinga was 17 years old at this point.

Her aunt pulled her out of school and forced her into a polygamous marriage in October 1994 to a man who was 45 years old\textsuperscript{34} and had three other wives.\textsuperscript{35} Under tribal custom, her aunt and husband planned to force Ms. Kasinga to undergo female circumcision before the marriage was consummated.\textsuperscript{36}

The day that the operation was to take place, an older sister helped Ms. Kasinga escape into Ghana. Using money given to her by her mother, she took a flight to Germany. Several hours after she arrived there, she struck up a conversation with a German woman who took her in. While at the German woman's house, she performed cooking and cleaning duties and slept in her living room.\textsuperscript{37}

\begin{thebibliography}{9}
\bibitem{31} Id.
\bibitem{32} See \textit{In re Kasinga}, Int. Dec. 3278, at 3 (BIA 1996).
\bibitem{33} See id.
\bibitem{34} See id. It is interesting to note that, although most published reports put Issakah Ibrahim, the man that Ms. Kasinga was to marry, at age 45, Mr. Ibrahim himself has said that he is 28. Celia W. Dugger, \textit{A Refugee's Body is Intact But Her Family is Torn}, N.Y. TIMES, Sept. 11, 1996, at A1.
\bibitem{35} See \textit{Kasinga}, Int. Dec. 3278, at 3.
\bibitem{36} See id.
\bibitem{37} See id. at 4.
\end{thebibliography}
In December 1994, she met a Nigerian man while on a shopping trip. The two began a conversation and Ms. Kasinga told the man her story. The man offered to sell Ms. Kasinga his sister's British passport to allow her to travel to the United States to seek asylum. Ms. Kasinga took the man's suggestion and bought the passport and a ticket to the United States, using the money given to her by her mother.

Upon landing at Newark International Airport, Ms. Kasinga did not attempt to use the false passport to enter the United States, but instead, immediately requested asylum. She was immediately arraigned. Ms. Kasinga was in prison from December 1994 to April 1996, when the BIA agreed to hear her appeal.

In a hearing before U.S. Immigration Judge Donald Ferlise, Ms. Kasinga testified that the government of Togo would take no steps to protect her from the practice of female circumcision. She continued that she was reported to the police in Togo and if she returned, she would be arrested and forced to return to her husband and undergo female circumcision.

Judge Ferlise denied the application, finding Ms. Kasinga to be an "incredible witness." Judge Ferlise based this on the fact that Ms. Kasinga did not know the present whereabouts of her mother, how her father could protect Ms. Kasinga and her sisters from the practice and her escape to the United States through Germany.

On appeal, the BIA noted:

The applicant is a 19-year-old woman, who was a 17-year-old high school student at the time the events in question occurred. The applicant's father had died, she was separated from her mother, and she was under the control of an unsympathetic aunt. Her arrival in the United States followed flight from her homeland and a lonely journey of thousands of miles that took her through a strange country. Her Testimony followed more than 8 months of continuous INS detention, in several facilities, one of which was closed by a riot.

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38 See id.
39 Ms. Kasinga had an uncle, aunt, and cousin who lived in the United States. See id.
40 See id.
41 See id. at 12.
42 Id. at 11.
In rejecting Judge Ferlise’s ruling, Paul W. Schmidt, writing the majority opinion for the BIA, held:

First, the record before us reflects that the applicant is a credible witness. Second, FGM [female genital mutilation], as practiced by the Tchamba-Kunsuntu Tribe of Togo and documented in the record, constitutes persecution. Third, the applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Fourth, the applicant has a well-founded fear of persecution. Fifth, the persecution the applicant fears is “on account of” her social group. Sixth, the applicant’s fear of persecution is country-wide. Seventh, and finally, the applicant is eligible for and should be granted asylum in the exercise of discretion.\(^{43}\)

The BIA granted Ms. Kasinga asylum based on a well-founded fear of persecution because of membership in a particular social group. The Board declared the social group to be “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”\(^{44}\)

Ms. Kasinga now lives in Washington, D.C., completing her high school education and hoping to enter a full four-year college at a later date.\(^{45}\)

IV. Discussion

A. Definition of Persecution

There is no standard legal definition of persecution in the United States.\(^{46}\) U.S. asylum law is modeled after the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status

\(^{43}\) Id. at 2-3.

\(^{44}\) Id. at 13.

\(^{45}\) See Dugger, supra note 34, at B6.

\(^{46}\) See Kelson, supra note 5, at 274.
1998  FEMALE CIRCUMCISION IN THE MODERN AGE  195

The Refugee Act of 1980 defines a refugee as:

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

There have been several interpretations of this definition in several judicial circuits and from the BIA itself. For example, in Zalega v. INS, the Seventh Circuit defined persecution as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." The Ninth Circuit warns, however, that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive." In Matter of Acosta, the BIA ruled that persecution was: 1) "harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome," and 2) "harm or suffering . . . inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control."

The BIA, in ruling that female circumcision is a form of persecution, used the definition from Acosta, stating that "we have recognized that persecution can

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47 The United States is not a party to the 1951 Convention Relating to the Status of Refugees, which covers refugees prior to January 1, 1951, but did accede to the 1967 Protocol Relating to the Status of Refugees, which covers refugees after January 1, 1951. The 1967 Protocol binds parties to certain provision of the 1951 Convention. See id. at 295 n.161.


50 916 F.2d 1257 (7th Cir. 1990).

51 Id. at 1260.

52 Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (quoting Fisher v. INS, 37 F.3d 1371 (9th Cir. 1994)).


54 Id. at 222.
consist of the infliction of harm or suffering by a government, or persons a
government is unwilling or unable to control, to overcome a characteristic of the
victim.\footnote{In re Kasinga, Int. Dec. 3278, at 12 (BIA 1996) \textit{(citing Acosta}, 19 I. & N. Dec. at 222-23).}

\section*{B. Particular Social Group}

It is also troublesome is that, along with the fact that no standard
definition of "persecution" exists, no standard definition of "particular social group"
exists in the United States.\footnote{See Kelson, \textit{supra} note 5, at 276.} The definition of this phrase has also varied from
circuit to circuit. For example, the Ninth Circuit, in \textit{Kotasz v. INS}\footnote{31 F.3d 847 (9th Cir. 1994).}, stated that
"group membership itself subjects the alien to a reasonable possibility of
persecution, so that he or she will be able to satisfy the objective component of
the well-founded fear standard simply by proving membership in the targeted
group." The BIA, using the doctrine of \textit{ejusdem generis}, (meaning of the same
kind, class, or nature), ruled that persecution based on membership in a
particular social group:

is directed toward an individual who is a member of a group of
persons all of whom share a common, immutable
characteristic. The shared characteristic might be an innate
one such as sex, color, or kinship ties, or in some
circumstances it might be a shared past experience. . . . The
particular kind of group characteristic that will qualify under this
construction remains to be determined on a case-by-case
basis. However, whatever the common characteristic that
defines the group, it must be one that members of the group
either cannot change, or should not be required to change
because it is fundamental to their individual identities of
consciences. Only when this is the case does the mere fact of
group membership become something comparable to the
other four grounds of persecution under the act, namely,
something that either is beyond the power of an individual to
change or that is so fundamental to his identity or conscience

\footnote{id. at 852.}
that it ought not be required to be changed.⁵⁹

The Third Circuit, in *Fatin v. INS*,⁶⁰ established a three-prong test for determining whether an alien qualifies for asylum as a member of a particular social group. According to the court "[t]he alien must (1) identify a group that constitutes a 'particular social group' . . . (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership."⁶¹

The BIA ruled that Ms. Kasinga’s particular social group was "[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."⁶² It went on to say that, in keeping with the definition of *Acosta*:

the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.⁶³

**C. Well-Founded Fear**

In order to be granted asylum in the United States, a claimant must possess a "well-founded fear of persecution."⁶⁴ Proving this, according to Layli Miller Bashir, "may be difficult for many women to convey because of the sensitive nature of [female circumcision]."⁶⁵ She further points out that:

⁵⁹ *Acosta*, 19 I. & N. Dec. at 233-34 *(modified on other grounds)*.
⁶⁰ 12 F.3d 1233 (3d Cir. 1993).
⁶¹ *Id.* at 1240.
⁶³ *Id.*
⁶⁵ Bashir, *supra* note 11, at 439.
[a] woman who is conditioned to be quiet and submissive and to believe that her opinions have no weight may be reluctant to articulate her story of genital mutilation to an official. In addition, by fleeing FGM, she has demonstrated a rejection of the social mores of her community that may dishonor her family and frustrate her chances for marriage. In fear of further ostracism from her community because of her rejection of FGM, she may be reluctant to discuss her situation; accordingly, her story may be viewed as incredible.66

The BIA has also ruled that "a fear is well-founded if a reasonable person in her circumstances would fear persecution."67 So, how does a woman satisfy this requirement?

One way is to "provide expert witnesses, reports from the State Department, non-governmental organizations (NGOs), and other testimony to demonstrate a 'reasonable possibility' that she would be forced to undergo FGM."68 In the Lydia Oluloro case, for example, Susan Rich, of Population Action International, testified on "the ill effects of FGM, both psychological and physical, and also noted that because [Ms. Oluloro] had charged her husband with rape in 1992, that this could lead to repercussions if she ever returned to Africa."69

D. United States Gender Guidelines

On May 26, 1995, the United States Office of International Affairs of the U.S. Department of Justice issued a memorandum entitled "Considerations For Asylum Officers Adjudicating Asylum Claims From Women." The memo, issued by Phyllis Coven, Director of the Office of International Affairs, to the INS Asylum Officer Corps, was issued to provide "guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender"70 and to "more sensitively deal with substantive and procedural aspects of gender-

66 Id. at 439-40.
67 Id. at 439.
68 Id. at 440.
70 Phyllis Coven, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, at 1 (May 26, 1995) (memorandum to INS Asylum Office/rs and HQASM Coordinators) (on file with author) [hereinafter American Guidelines].
related claims, irrespective of country of origin.**71**

The American Guidelines instruct Asylum Officers to be more sensitive to the plight of women coming in their own right to request asylum. Asylum Officers are to be "customer friendly" when dealing with women claimants, to allow them to "discuss freely the elements and details of their claims."**72** The memo points to these variables:

1. The laws and customs of some countries contain gender-discriminatory provisions. Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries.

2. Although women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender. A woman may present a claim that may be analyzed and approved under one or more grounds. For example, rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.

3. Some societies require that women live under the protection of male family members. The death or absence of a spouse or other male family members may make a woman even more vulnerable to abuse.

4. Women who have been raped or otherwise sexually abused may be seriously stigmatized and ostracized in their

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71 Id.
72 Id. at 4.
societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.\textsuperscript{73}

The American guidelines were not considered by either Judge Ferlise or the Board of Immigration Appeals when it considered the \textit{Kasinga} decision.\textsuperscript{74} The next section will illustrate how the BIA should have ruled in this case.

\section*{V. The \textit{Kasinga} Decision Revisited}

It has long been my claim that the United States and other world governments should grant political asylum premised on gender-based persecutions, such as female circumcision.\textsuperscript{75} Although the correct decision came out of this case and asylum was granted, there is still no guideline as to how future cases should be handled. The BIA has ruled that female circumcision is a form of persecution, but it has only established a social group in which asylum could be granted. Female circumcision is a form of persecution that, along with other forms of gender-based persecution, should stand on its own. This section will revisit the \textit{Kasinga} decision and propose guidelines for the granting of asylum for female circumcision.

\subsection*{A. Human Rights Instruments to be Considered}

There are several human rights instruments that the United States is a party or signatory to that are applicable in this situation. They are: 1) the Universal Declaration of Human Rights,\textsuperscript{76} 2) the Declaration on the Elimination

\footnotesize
\textsuperscript{73} \textit{Id.} at 4-5.
\textsuperscript{74} The \textit{Kasinga} opinion did include a quote from the American Guidelines. \textit{See In re Kasinga}, Int. Dec. 3278, at 6 (BIA 1996). One of the concurring opinions also mentions the American Guidelines. \textit{See id.} at 5 (Rosenberg, Board Member, concurring).
\textsuperscript{75} \textit{See Kelson, supranote 5, at 298; Gregory A. Kelson, Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins, 6 TEx. J. WOMEN & L. (forthcoming 1998).}
of All Forms of Violence Against Women,\(^\text{77}\) and 3) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\(^\text{78}\) This section will examine how these instruments apply to female circumcision and political asylum.

1. **Universal Declaration of Human Rights**

   Subjecting a woman to female circumcision violates Articles 3 and 5 of the Universal Declaration of Human Rights.\(^\text{79}\) Article 5 especially comes into play here because many countries consider female circumcision as a form of torture.\(^\text{80}\) It can be considered torture because when the procedure is performed, the girl is usually held down by others while the circumciser performs the operation.\(^\text{81}\) Furthermore, removal of the clitoris, which controls sexual pleasure in the female, is a violation of bodily integrity, thus it becomes a violation of Article 3.

2. **Declaration on the Elimination of Violence Against Women**

   "Violence against women," in the Declaration, is defined as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women . . . ."\(^\text{82}\) The Declaration continues by stating that violence against women encompasses "[p]hysical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation . . . ."\(^\text{83}\)


\(^{79}\) Article 3 states that “[e]veryone has the right to life, liberty and security of person.” UDHR, supra note 76, art. 3. Article 5 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” \textit{id}. art. 5.

\(^{80}\) See Kelson, supra note 5, at 259 n.11.

\(^{81}\) See \textit{id}. at 286.

\(^{82}\) Declaration on Violence Against Women, \textit{supra} note 77, art. 1.

\(^{83}\) \textit{id}. art. 2(a).
Also interesting in this Declaration is Article 3, which mirrors almost word for word Articles 3 and 5 of the Universal Declaration of Human Rights. This Article is continued justification for granting asylum to victims of female circumcision.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Within this Convention, Article 3 needs to be considered. The Convention itself defines torture as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person when such pain or suffering is inflicted by... or with the consent...[a] person acting in an official capacity." As mentioned earlier, many western countries, including the United States, consider female circumcision as a form of torture. Unlike the Declaration of Human Rights and the Declaration on the Elimination of Violence Against Women, this Convention has the force of a treaty which all signatories, including the United States, are expected to follow. As such, anyone who comes into the United States and claims asylum based on female circumcision should reasonably expect to be granted asylum based on this Convention.

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84 Article 3 states, in part,

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia:

(a) The right to life;

... The right to liberty and security of person;

... The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

Id. art. 3; cf. UDHR, supra note 76, arts. 3 and 5.

85 Article 3 states in part that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, supra note 78, art. 3.

86 Id. art. 1.

87 See supra text accompanying notes 80-81.
If we were to look at the "lowest common denominator" of these three human rights instruments, we can see that female circumcision is a form of torture, an invasion of bodily integrity, and a violation of security of the person. It would be well for a potential asylee to bring up these points during an immigration hearing.

B. Other Considerations

One commentator states this best.

[A] claimant [for asylum] must establish that she has been persecuted in the past or has a fear of future persecution, that her fear is well-founded, that she will be persecuted by the government or an individual or group that the government is unwilling or unable to control, and that the feared persecution is on account of one of the five enumerated grounds.89

In revisiting the Kasinga decision, how will these factors influence the decision?

1. Well-Founded Fear of Past Persecution or Future Persecution

United States law states that a person seeking asylum must have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."90 According to the Code of

88 Kelson, supra note 5, at 294-95.
89 Mousse, supra note 20, at 354 (emphasis added).

There is no hard-and-fast definition for "well-founded fear of persecution." No definition of the phrase [has been supplied by the Supreme Court]. The Supreme Court, however, continues to emphasize that this standard involves, in part both objective and subjective evidence, and is determined on a case-by-case basis. ... We have held in assessing the "well-founded fear" standard, that the alien "must present specific facts through objective evidence to prove either past persecution or good reason to fear future persecution."
Federal Regulations, that fear can be either fear of past persecution or a fear of future persecution. Most women seeking asylum based on female circumcision, especially those with daughters they are trying to protect from the practice, will base their claim on the fact that their daughters will face the practice (future persecution) and will often times offer as evidence stories of their own circumcision (past persecution). The American Guidelines state that "rape... sexual abuse and domestic violence, infanticide and genital mutilation... may serve as evidence of past persecution on account of one or more of the five grounds."

The Office of the United Nations High Commissioner for Refugees, in its Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, in recognizing that "victims of past persecution should in some cases be treated as refugees or asylees even when the likelihood of future persecution may not be great," has stated:

It is frequently recognized that a person who -- or whose family -- has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.

Bogdzia v. INS, No. 89-2636, 1990 WL 125907, at **2 (7th Cir. Aug. 29, 1990) (citations omitted). The court noted that the BIA has adopted the Fifth Circuit's definition of the phrase, stating that "'an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution.'" Id. (citation omitted).

91 See 8 C.F.R. § 208.13(b) (1997).
92 For example, Lydia Oluloro testified in her deportation hearing that she herself had a clitoridectomy. In re Oluloro, A72-147-491, at 12-14 (Trial Memorandum) (on file with author).
93 American Guidelines, supra note 70, at 4.
Taking this into consideration, the BIA, in *In re Chen*, ruled that "while the likelihood of future persecution is a factor to consider in exercising discretion in cases where an asylum application is based on past persecution, asylum may in some situations be granted where there is little threat of future persecution."96

However, in the case of Fauziya Kasinga, the situation was a fear of future persecution because she had not yet undergone the procedure, although it was "imminent."97 Ms. Kasinga's paternal aunt had arranged for her to marry and, in accordance to tradition, had arranged for her to be circumcised before the marriage was to be consummated.98 Ms. Kasinga had testified that "there could be no refuge for her because Togo is a small country and the police would not protect her."99 The American Guidelines address this by saying that:

> [b]reaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries.100

2. **Persecution by a Government, Individual or Group that the Government is Unwilling or Unable to Control**

Ms. Kasinga testified that her paternal aunt and husband were planning on subjecting her to female circumcision prior to the consummation of the marriage.101 She testified that she could not hide in Ghana or assimilate within another tribe in Togo because her husband was friends with the police and they were looking for her after her escape.102

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96 *Chen*, 20 I. & N., at 19.
98 *See id.*
99 *See id.* at 15.
100 American Guidelines, *supra* note 70, at 4.
101 *See Kasinga*, Int. Dec. 3278, at 3.
102 *See id.* at 5; *see also* Linda Burstyn, *Asylum in America: Does Fear of Female Mutilation Qualify?*, WASH. POST, Mar. 17, 1996, at C5.
The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... when such pain or suffering is inflicted by... or with the consent [of]... [a] person acting in an official capacity.” The key to this definition would be “[a] person acting in an official capacity.”

In many countries, the practice of female circumcision is governed by tribal law and tradition, and not by civil law. However, many civil laws could be interpreted to protect women against the practice. In practice, however, many governments will defer to tribal law and not interfere, which could be interpreted as condoning the practice of female circumcision. If nothing else, the tribal elders could be interpreted as a group that the government is unwilling to control.

3. Persecution on One of the Five Enumerated Grounds

To qualify for political asylum in the United States, a person must state that they face a well-founded fear of persecution because of race, religion, nationality, political opinion or membership in a particular social group. Amongst this group, the only one that female circumcision could possibly fall under is membership in a particular social group. How that social group is defined will depend on who is hearing the case at the time. Layli Miller Bashir notes that two different tests have been developed in the United States to determine if a person meets the particular social group category.

In Matter of Acosta, the BIA developed the “immutable characteristic” test, which requires that “the common characteristic that defines the group... must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual...
identities or consciences." In Sanchez-Trujillo v. INS, the Ninth Circuit court established a test that defines the social group category as encompassing "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." As demonstrated in several recent court decisions, a woman claiming asylum based on FGM may satisfy these tests and, subsequently, show that her persecution is on account of a particular "social group."108

There are two common threads in both of these tests: 1) members of the group cannot (or should not be required to) change their characteristics and 2) they must share a common interest. For a woman seeking to protect herself or her daughter from the harm of female circumcision, asylum officers must realize that women cannot change the fact that they are female. They also must realize that women who oppose this practice will be severely ostracized if they return to their home countries.

VI. CONCLUSION

This article has given examples and reasons why women who fear persecution on account of female circumcision should be granted asylum in the United States. Although the Kasinga decision has now paved the way for that to happen, more must be done. Below, are specific recommendations for dealing with women fearing persecution based on female circumcision and other forms of gender-based persecution.109

A. Recommendations

It has long been my intention that before the United States, or any world government, enacts laws that will recognize gender-based persecution, the United Nations General Assembly must act first. This can be done in one of two ways: 1) the Convention on the Status of Refugees must be amended to

108 Bashir, supra note 11, at 447-48 (footnotes omitted).
109 This article has dealt specifically with the practice of female circumcision as a form of persecution. However, there are other forms of persecution that also warrant the granting of asylum to women -- among them: rape, forced sterilization, domestic violence, and patriarchal morality codes.
include gender as a category of persecution or 2) a new protocol must be put into force that specifically addresses gender-based persecution.

Once the amendment to the Convention is approved by the U.N. General Assembly, Congress must next work to amend the Refugee Act of 1980 to incorporate gender as one of the enumerated forms of persecution that warrant asylum. The current U.S. Gender Guidelines can be taken into account when drafting this new legislation. In the meantime, it is imperative that immigration judges and the Board of Immigration Appeals begin using the Gender Guidelines with more force and consistency than are now being used. The Guidelines should be considered every time a gender-based claim comes before an immigration judge or the Board of Immigration Appeals.

Once Congress does amend the Refugee Act of 1980 to include gender, the laws should be codified as quickly as possible. This will enable immigration judges, the Board of Immigration Appeals, and the federal courts to have a uniform system of considering gender-based persecution claims. This will also give the United States a true commitment to the protection of women within our borders who face this type of persecution.

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110 For a more detailed explanation of this option, including proposed language for the Refugee Convention, see Gregory A. Kelson, Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins, supra note 75.

111 This option, however, would not be my first choice. Invoking another protocol would give countries a way to avoid dealing with this issue by not becoming a party to the protocol. The United States never became a party to the 1951 Refugee Convention because of "[skepticism] of pledging unlimited support to refugees." Kathryn M. Bockley, Comment, A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise, 21 N.C.J. INT'L. & COM. REG. 253, 278 (1995). First Lady Eleanor Roosevelt, who was the United States representative to the United Nations at the time of the Convention's adoption, "emphasized the limits of American generosity and warned against an "increasing tendency to drive the United Nations into the field of international relief and to use its organ as the source and center of expanding appeals for funds." Id. at 278 n.253 (citing GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 41 (1986)). However, bowing to international pressure, the United States acceded to the 1967 Protocol with the Senate ratifying the agreement in 1978. See id. at 278-79. My fear is that many other nations, including the United States, will not become parties to this new protocol simply to control the number of immigrants to enter the country and to control possible "floodgates."
B. Coda

The case of Fauziya Kasinga brings more fuel to the debate as to whether the United States should grant political asylum based on persecutions that can only occur to a person because they are of a certain sex. This is a recognition that is long overdue. These types of persecutions have been occurring for years and continue on a daily basis. Now is the time for the United States to take the lead in protecting women against gender-based persecutions, such as female circumcision, worldwide.