

# CRS Report for Congress

## **Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?**

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# Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?

## Summary

Female genital mutilation (FGM) encompasses a wide range of procedures which involve the removal or alteration of a woman's and girl's genitalia. The federal courts and the Board of Immigration Appeals (BIA) have classified FGM as a form of persecution, a showing of which can act as a basis for a successful asylum or withholding of removal claim. However, there was a split between the federal courts and the BIA over the treatment of applicants who have already been subjected to FGM. The federal courts that have addressed this issue have held that a past infliction of FGM creates a presumption of a well-founded fear of future persecution, which is a prerequisite for refugee status, and also a clear probability of future harm, a requirement for obtaining withholding of removal. The BIA, on the other hand, has rejected this position in *In re A-T-*, arguing that FGM can be inflicted only once, which means that an applicant cannot have a well-founded fear or present a clear probability of FGM happening again in the future. Thus, under the BIA interpretation, the past infliction of FGM, a form of past persecution, rather than creating a presumption of a well-founded fear of future persecution, rebuts the presumption. The BIA has stated, however, that while a past infliction of FGM cannot act as a basis for a well-founded fear of future persecution, a past infliction of FGM, if sufficiently severe, can act as a basis for an asylum claim on humanitarian grounds.

Although the BIA has ruled that a past infliction of FGM cannot act as the basis for a well-founded fear of persecution, a federal court of appeals has rejected this holding. The Federal Court of Appeals for the Second Circuit has ruled that the BIA misapplied the regulatory framework governing past persecution, holding that the BIA was in error when it determined that a past infliction of FGM rebutted the presumption of a well-founded fear of future persecution. The Second Circuit's holding, while it does not grant per se refugee status to women who have suffered a past infliction of FGM, does allow that past infliction to act as a basis for an asylum or withholding of removal claim.

The Attorney General has since vacated the BIA decision in *In re A-T-*, holding that a past infliction of FGM can be the basis for a well-founded fear of future persecution. The BIA's holding in *In re A-T-* no longer controls future FGM asylum claims.

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# Female Genital Mutilation as Persecution: When Can It Constitute a Basis for Asylum and Withholding of Removal?

## Introduction

Female genital mutilation (FGM) encompasses a wide range of surgical procedures which remove or alter a woman's or girl's external genitalia.<sup>1</sup> Although it is a cultural practice prevalent among some African, Asian and Middle-Eastern ethnic groups,<sup>2</sup> it is widely considered a human rights violation by most international organizations and Western nations.<sup>3</sup> This viewpoint is reflected in American law, which classifies FGM as a form of persecution which can act as a basis for refugee status.<sup>4</sup>

Before exploring how FGM affects an applicant's asylum application, this report shall explore the basic statutory and regulatory framework that governs asylum law. This entails an outline of the requirements an applicant must meet in order to obtain relief under asylum law and a discussion about the differences between the two main forms of relief for aliens facing removal from the United States: asylum and withholding of removal. It will then examine several important issues and controversies concerning FGM and its effect on asylum law.

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<sup>1</sup> The World Health Organization defines FGM as "all procedures which involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons." See World Health Organization Factsheet on Female Genital Mutilation, [<http://www.who.int/mediacentre/factsheets/fs241/en/index.html>] (last visited June 12, 2008).

For additional information on FGM, see CRS Report RS21923, *Female Genital Mutilation (FGM): Background Information and Issues for Congress*, by Tiaji Salaam-Blyther, Erin D. Williams, and Ruth Ellen Wasem.

<sup>2</sup> *Id.* See also Female Genital Mutilation (FGM) or Female Genital Cutting (FGC): Individual Country Reports, [<http://www.state.gov/documents/organization/10222.pdf>] (last visited June 12, 2008).

<sup>3</sup> World Health Organization Factsheet on Female Genital Mutilation, [<http://www.who.int/mediacentre/factsheets/fs241/en/index.html>] (last visited June 12, 2008). FGM has been formally condemned by several international organizations, such as the World Health Organization, the United Nations Children's Fund, and the United Nations Population Fund. *Id.*

<sup>4</sup> In re Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996).

## General Background on Asylum and Withholding of Removal

Aliens<sup>5</sup> often come to the United States in order to escape persecution and political turmoil in their native lands. Some aliens arrive at a U.S. port of entry seeking admission into the country, while others manage to effect entry illegally. Both groups are subject to removal back to their countries of origin.<sup>6</sup> Immigration law, however, provides these aliens recourse to three ways in which to stay removal: asylum, withholding of removal, and the United Nations Convention Against Torture (CAT).<sup>7</sup> This report will focus primarily on asylum and withholding of removal. These two mechanisms are substantively similar in many ways, but they do differ in some important respects.

### Asylum

Asylum is a means for aliens who have suffered persecution in their countries of origin to enter or remain within the United States. Potential “asylees” apply for asylum either upon arrival at a U.S. port of entry or as a defense during a removal proceeding. In order to obtain asylum, the burden of proof is on the applicant to demonstrate that she meets the eligibility requirements for asylum: namely that he or she is a refugee.<sup>8</sup> The applicant must also show, by clear and convincing evidence, that she filed her application within one year of arriving in the United States.<sup>9</sup> Even if an applicant satisfies the necessary eligibility requirements, asylum is discretionary and may still be denied (usually because of the alien’s criminal background). Individuals who obtain asylum are allowed to remain within the United States and may adjust their status to permanent residence at a later date.<sup>10</sup> Through derivative asylum, an asylee may have her spouse and minor children accompany her into the country or follow and join her after she has effected entry.<sup>11</sup>

The term “refugee” has two distinct senses. Refugees usually refer to a large number of displaced individuals located outside the United States who receive leave

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<sup>5</sup> The term “alien” is defined by the Immigration and Nationality Act (INA) as “any person not a citizen or national of the United States.” INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). Some view this term to be pejorative and use either “immigrant” or “migrant” in its stead. This report views “alien” as a legal term and uses it in the sense as defined in the INA.

<sup>6</sup> This report will use the term “country of origin” to mean either an applicant’s country of nationality, or, if stateless, the applicant’s last country of habitual residence.

<sup>7</sup> CAT relief is usually implemented by granting withholding of removal to a person who shows she would suffer “torture” if returned to her home country. *See* 8 C.F.R. § 208.16(c).

<sup>8</sup> 8 C.F.R. § 208.13(a), 8 C.F.R. § 1208.13(a) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.”).

<sup>9</sup> INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B).

<sup>10</sup> 8 C.F.R. § 209.2, 8 C.F.R. § 1209.2.

<sup>11</sup> INA § 208(b)(3)(A); 8 C.F.R. § 208.21, 8 C.F.R. § 1208.21.

from the President to enter into the country as a group.<sup>12</sup> Although asylum refers to the statutory definition of “refugee” in order to determine who may obtain relief, asylum, in contrast to the refugee admission process, is geared toward individuals already in or at the border of the United States, and is typically adjudicated before Immigration Judges on a case-by-case basis.<sup>13</sup> Thus, the way in which a group of refugees obtains admission into the United States from overseas and the process by which an individual refugee is permitted to stay within the United States once reaching its shores are distinct. This report will focus on the latter sense of “refugee;” namely refugees who undergo the asylum process.

## Withholding of Removal

Withholding of removal<sup>14</sup> allows an applicant to stay deportation if the applicant demonstrates that her “life or freedom would be threatened” if returned to her country of origin.<sup>15</sup> Although asylum requires the applicant to be threatened by “persecution,” while withholding of removal requires a threat to her life or freedom, the federal courts appear to view these two concepts interchangeably, at least with regards to the *type* of harm the two concepts signify.<sup>16</sup> On the other hand, withholding of removal does differ from asylum in several important respects. For example, unlike asylum, withholding of removal can only be used as a defense during a removal proceeding. It is also a mandatory form of relief: if the alien qualifies for withholding of removal, it must be granted.<sup>17</sup> However, withholding of removal merely grants the applicant the right not to be removed to her country of origin rather than an affirmative right to stay within the United States.<sup>18</sup> Thus, someone who remains within the United States because of withholding of removal cannot adjust status to permanent

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<sup>12</sup> See INA § 207, 8 U.S.C. § 1157 (authorizing the President to allow refugees into the United States for a period not exceeding 12 months when the admission of the refugees is justified by grave humanitarian concerns or is otherwise in the national interest).

<sup>13</sup> INA § 208, 8 U.S.C. §1158 (authorizing the grant of asylum to those who qualify under the statutory definition of refugee).

<sup>14</sup> Although the statute refers to this mechanism as “restriction on removal,” it is more commonly called “withholding of removal” in case law, regulations and legal scholarship. In international law and treaties, withholding of removal is often referred to as “nonrefoulement.”

<sup>15</sup> INA § 241(b)(3), 8 U.S.C. §1231(b)(3).

<sup>16</sup> Although there appears to be no difference between the types of harm that “persecution” and “a threat to life or freedom” signify, there is a difference between the two standards with regard to the likelihood of future harm an applicant must demonstrate in order to obtain the sought after relief. More on the difference between “a well-founded fear of persecution” and “a threat to life or freedom” with regards to the evidentiary burden will be discussed below.

<sup>17</sup> INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A)) (“the Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country....”) (emphasis added).

<sup>18</sup> *Id.* The statute states that “the Attorney General *may not remove*,” not that the alien has a right to stay within the country.

residence.<sup>19</sup> Furthermore, obtaining withholding of removal instead of asylum would preclude the applicant's spouse or minor children from entering the country through derivative asylum.<sup>20</sup> Although asylum provides more rights, an applicant can be barred from obtaining asylum on procedural or discretionary grounds. If an applicant is barred from applying for asylum, she would have to pursue withholding of removal in order to stay removal.<sup>21</sup>

## **The Statutory Requirements For Asylum or Withholding of Removal**

In order for an individual alien to claim either asylum or withholding of removal, the alien must satisfy certain statutory requirements. While the statutory requirements for asylum and withholding of removal are similar in many ways, they do differ with regards to the burden of proof that an applicant must bear when trying to establish the likelihood of being subjected to future persecution. An applicant petitioning for asylum must establish that she is a refugee, which requires a well-founded fear of persecution.<sup>22</sup> Someone seeking withholding of removal, on the other hand, must show a "clear probability" of future persecution.<sup>23</sup> When applying for asylum, an applicant is also automatically deemed by regulations to be seeking withholding of removal.<sup>24</sup> Because the statutory requirements for refugee status and withholding of removal are substantively similar, this report will proceed by first outlining the statutory and regulatory framework of refugee status and will then discuss the ways in which it differs from withholding of removal.

**The Definition of Refugee.** "Refugee" is statutorily defined in INA § 101(a)(42), which states that:

The term "refugee" means (A) any person who is outside any country of such person's nationality, or, in the case of a person having no nationality, 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

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<sup>19</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 n. 6 (1987).

<sup>20</sup> *But see* 8 C.F.R. § 208.16(e), 8 C.F.R. § 1208.16(e) (reopening an asylum claim denied on discretionary grounds if the applicant obtains withholding of removal and seeks to keep her spouse or minor children in the country with her).

<sup>21</sup> For cases in which an asylum claim was barred on procedural or discretionary grounds, but where the applicant was nevertheless able to obtain withholding of removal, *see* *Ivanshivili v. U.S. Dep't of Justice*, 433 F.3d 332 (2d Cir. 2006); *Zheng v. Gonzales*, 409 F.3d 804 (7th Cir. 2005).

<sup>22</sup> INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

<sup>23</sup> *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). *See also* INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)) (mandating that the Attorney General not remove aliens whose life or freedom is threatened in their native country because of the aliens' race, religion, nationality, membership in a particular social group, or political opinion). Although the statute refers to a threat to an alien's life or freedom, case law still usually refers to the evidentiary standard for a withholding of removal claim as a "clear probability of persecution."

<sup>24</sup> 8 C.F.R. § 208(b)(3).

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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such persons' nationality, or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>25</sup>

For purposes of most asylum claims, in order to establish “refugee” status, an applicant must show three things: (1) she has a “well-founded fear of persecution,” (2) the persecution was “on account of” a protected ground, and (3) she belongs to the protected ground, namely a race, religion, nationality, membership in a particular social group, or political opinion. The particulars of each element will be examined in turn.

## First Element: Well Founded Fear of Persecution

**Persecution.** Persecution is not defined by statute and is determined on a case-by-case basis by the courts. The Seventh Circuit, for example, defined persecution as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.”<sup>26</sup> However, not all bad acts necessarily rise to the level of persecution. As the Seventh Circuit later stated, “the conduct in question need not necessarily threaten the petitioner’s life or freedom; however, it must rise above the level of mere harassment to constitute persecution.”<sup>27</sup> Persecution is rather “an extreme concept that does not include every sort of treatment our society regards as offensive.”<sup>28</sup> It is therefore difficult to establish a bright line between conduct that clearly rises to the level of persecution and conduct that falls short. A single incident of imprisonment or violence coupled with a death threat may constitute persecution;<sup>29</sup> multiple beatings that require the victim to receive hospitalization may not.<sup>30</sup>

**Well-Founded Fear.** Well-founded fear is another concept left undefined by statute. “Well-founded fear” appears to originate from Article 1 of the United Nations Convention Relating to the Status of Refugees, which characterized the basis of a refugee claim as “persecution or a well-founded fear of persecution.” The

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<sup>25</sup> INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

<sup>26</sup> *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995).

<sup>27</sup> *Sofinet v. INS*, 196 F.3d 742, 746 (7th Cir. 1999).

<sup>28</sup> *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995).

<sup>29</sup> *See Corado v. Ashcroft*, 384 F.3d 945 (8th Cir. 2004); *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004).

<sup>30</sup> *See Bocova v. Gonzales*, 2005 U.S. App. LEXIS 12421, at \*9-\*11 (1st Cir. June 24, 2005).



Convention, however, does not address the parameters of a well-founded fear.<sup>31</sup> Because of the term's ambiguous nature, the Supreme Court has observed that "'well-founded fear' ... can only be given concrete meaning through a process of case-by-case adjudication."<sup>32</sup> At the same time, the Court made clear that a well-founded fear does not require more than 50% certainty.<sup>33</sup>

Regulations promulgated by the Department of Homeland Security and the Department of Justice find a well-founded fear to be established if

- the applicant has a fear of persecution in his or her country of nationality, or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political belief (i.e., the subjective component);<sup>34</sup>
- there is a reasonable possibility of suffering such persecution if he or she were to return to that country (i.e., the objective component);<sup>35</sup> and
- he or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.<sup>36</sup>

Well-founded fear contains a subjective and an objective component.<sup>37</sup> First, the applicant must genuinely fear persecution.<sup>38</sup> Second, the fear must be objectively "well-founded," or in other words, a reasonable person in the applicant's position would fear persecution.<sup>39</sup> A showing of only one component is insufficient to establish well-founded fear.<sup>40</sup>

<sup>31</sup> July 28, 1951, 19 U.S.T. 6223, 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150. *See also* H.R. Conf. Rep. No. 96-781, at 19 (1980).

<sup>32</sup> *Cardoza-Fonseca*, 480 U.S. at 448 (1987).

<sup>33</sup> *Id.* at 431 ("That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a 'more likely than not' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

<sup>34</sup> 8 C.F.R. § 208.13(2)(A), 8 C.F.R. § 1208.13(2)(A).

<sup>35</sup> 8 C.F.R. § 208.13(2)(B), 8 C.F.R. § 1208.13(2)(B).

<sup>36</sup> 8 C.F.R. § 208.13(2)(C), 8 C.F.R. § 1208.13(2)(C).

<sup>37</sup> *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004) ("The asylum applicant must show (1) that she has a genuine, subjective fear of persecution and (2) that her fear is objectively reasonable."); *Sofinet*, 196 F.3d at 746 (7th Cir. 1999); *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986) ("The objective component ensures that the alien's subjective fear is well-founded in fact and not in fantasy.... What is critical is that the alien prove that his fear is subjectively genuine and objectively reasonable.").

<sup>38</sup> *Bolanos-Hernandez v. INS*, 909 F.2d 1277 (9th Cir. 1985).

<sup>39</sup> *See Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

<sup>40</sup> *See Blanco-Comarribas v. INS*, 830 F.2d 1039, 1041 (9th Cir. 1987) (holding that (continued...))

In order to establish the objective component of a well-founded fear, the applicant must establish four things:<sup>41</sup>

- the applicant possesses a characteristic or belief which motivates the persecutor to inflict harm on the applicant (though the persecutor need not be motivated by a “punitive” or “malignant” intent);<sup>42</sup>
- the persecutor is aware, or could become aware, that the applicant possesses this belief or characteristic;<sup>43</sup>
- the persecutor has the capability to inflict harm on the applicant; and
- the persecutor has the inclination to harm the applicant.<sup>44</sup>

Although an applicant may establish the objective component of a well-founded fear by demonstrating that she has been specifically targeted for persecution or has already suffered harm, such an individualized showing is unnecessary. A showing of persecution inflicted on individuals similarly situated to the applicant is sufficient to establish the objective component.<sup>45</sup> Regulations have adopted this approach by allowing the objective component of a well-founded fear to be met if the applicant establishes that (1) there is a pattern or practice in the applicant’s country of origin to persecute groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (2) the applicant is included in and identifies with such groups so that his or her fear is reasonable.<sup>46</sup>

**Withholding of Removal Requires a Clear Probability of Persecution.** If asylum is not available to an applicant, she may alternatively pursue withholding of removal. Although the statutory and regulatory requirements for establishing persecution are similar to those underlying asylum, an applicant who chooses this course must shoulder a heavier evidentiary burden. Instead of showing a well-founded fear of persecution, an applicant must demonstrate a “clear probability” of persecution.<sup>47</sup> The Supreme Court has held that “clear probability” means “more likely than not,” which is to say that it is the equivalent to the

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<sup>40</sup> (...continued)

evidence of oppressive conditions in applicant’s country of origin is relevant, but not sufficient to establish a well-founded fear of persecution); *Balazoski v. INS*, 932 F.2d 648 (7th Cir. 1991) (finding that the applicant only had a subjective fear and lacked the objective fear of political persecution required for refugee status).

<sup>41</sup> Charles Gordon, et. al. *Immigration Law and Procedure* § 33.04[1][b], p. 33-21 (rev. ed. 2007).

<sup>42</sup> *Kasinga*, 21 I. & N. Dec. 357.

<sup>43</sup> *Mogharrabi*, 19 I. & N. Dec. at 446 (BIA 1987).

<sup>44</sup> *See, e.g., Hartooni v. INS*, 21 F.3d 336, 341 (9th Cir. 1994).

<sup>45</sup> *Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004).

<sup>46</sup> 8 C.F.R. § 208.13(b)(2)(iii), 8 C.F.R. § 1208.13(b)(2)(iii).

<sup>47</sup> *Id. See also Cardoza-Fonseca*, 480 U.S. 421.

preponderance of the evidence standard.<sup>48</sup> Although “well-founded” fear is left largely undefined, the federal courts treat it as a less demanding evidentiary standard than “more likely than not.”<sup>49</sup>

**Past Persecution.** “Persecution,” a “well-founded fear of persecution,” and a “clear probability of persecution,” are prospective standards. This means that asylum and withholding of removal are primarily forward looking measures that are better understood as mechanisms to protect individuals from future harm rather than as remedies to cure past harm. Despite the prospective nature of asylum and withholding of removal, past persecution still serves a role in this framework. First, past persecution plays a regulatory rather than statutory role in the asylum and withholding of removal framework, which means its role in the federal scheme was prescribed by agencies rather than Congress. Second, and more importantly, past persecution, in many instances serves as evidence that the applicant may suffer future persecution and does not, *in itself*, warrant asylum or withholding of removal.<sup>50</sup> In other words, asylum or withholding of removal is usually granted because of the risk of perspective harm, not because the applicant is a victim of past harm.

The Department of Homeland Security and the Department of Justice have promulgated regulations in which a showing of past persecution can serve as a substitute for a showing of a well-founded fear or clear probability of persecution so long as the persecution was committed on account of a protected ground and the applicant is unable or unwilling to avail herself of the protection of her country of origin owing to the persecution.<sup>51</sup> This demonstration of past persecution creates a presumption of both a well-founded fear of persecution<sup>52</sup> and a clear probability of persecution.<sup>53</sup> At this point, the burden shifts to the government to prove by a preponderance of the evidence<sup>54</sup> either that the applicant can avoid the persecution (1) by relocating within her home country and it would be reasonable to expect her

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<sup>48</sup> *Stevic*, 467 U.S. at 429. “Preponderance of the evidence” means that the factfinder in a judicial proceeding must find for the party that, on the whole, has the stronger evidence, however slight the edge may be. Black’s Law Dictionary 1201 (7th ed. 1999). In other words, the assertion is more than 50% likely to be true.

<sup>49</sup> See *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990) (suggesting that a well-founded fear can be established if there is a one in ten chance of being persecuted).

<sup>50</sup> But see 8 C.F.R. § 1208.13(b)(1)(iii)(A) (permitting asylum for those individuals who cannot demonstrate a well-founded fear of persecution but nonetheless have a compelling reason not to return to their countries of origin due to the severity of their past persecution).

<sup>51</sup> 8 C.F.R. § 208.13(b)(1), 8 C.F.R. § 1208.13(b)(1); 8 C.F.R. § 208.16(b)(1), 8 C.F.R. § 1208.16(b)(1).

<sup>52</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(1), 8 C.F.R. § 1208(13)(b)(1).

<sup>53</sup> 8 C.F.R. § 208.16(b)(1), 8 C.F.R. § 1208.16(b)(1).

<sup>54</sup> 8 C.F.R. § 208.13(b)(1)(ii), 8 C.F.R. § 1208.13(b)(1)(ii); 8 C.F.R. § 208.16(b)(1)(ii), 8 C.F.R. § 1208.16(b)(1)(ii).

to do so,<sup>55</sup> or (2) because circumstances have changed that negate the well-founded fear of the applicant<sup>56</sup> and the clear probability of persecution.<sup>57</sup> In most cases, changed circumstances involve the changed circumstances of the applicant's country of origin.<sup>58</sup>

Even if the government establishes changed circumstances, asylum may still be granted through the exercise of the adjudicator's discretion if the applicant demonstrates compelling reasons for being unwilling or unable to return to her country of origin due to the severity of her past persecution<sup>59</sup> or the applicant establishes that there is a reasonable possibility that she may suffer other serious harm upon removal to that country.<sup>60</sup> On the other hand, in a withholding of removal claim, if the applicant's future fear of persecution is unrelated to her past experience of persecution, the applicant retains the burden to show that it is more likely than not that she will suffer future persecution.<sup>61</sup>

## **Second Element: "On Account Of" a Protected Ground**

Persecution is only the first element an applicant must establish in order to obtain asylum or withholding of removal. The applicant must next establish that the persecution was conducted "on account of" a ground protected under the refugee statute.<sup>62</sup>

The primary difficulty with the term "on account of" is its vagueness. As mentioned earlier, the refugee definition was largely taken from the United Nations Convention Relating to the Status of Refugees, where instead of using the term "on account of," the treaty uses "for reasons of."<sup>63</sup> The term also appears largely undefined in the case law. The only Supreme Court case to address its meaning did

<sup>55</sup> 8 C.F.R. § 208.13(b)(1)(i)(B), 8 C.F.R. § 1208.13(b)(1)(i)(B).

<sup>56</sup> 8 C.F.R. § 208.13(b)(1)(i)(A), 8 C.F.R. § 1208.13(b)(1)(i)(A).

<sup>57</sup> 8 C.F.R. § 208.16(b)(1)(i)(A), 8 C.F.R. § 1208.16(b)(1)(i)(A).

<sup>58</sup> *See Fergiste v. INS*, 138 F.3d 14, 19 (1st Cir. 1998) (general evidence of changed country conditions was insufficient to rebut well-founded fear presumption when applicant had evidence about his specific circumstances); *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1240 (9th Cir. 1996) (administrative notice of changed country condition was insufficient to rebut the presumption of well-founded fear).

<sup>59</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A), 8 C.F.R. § 1208.13(b)(1)(iii)(A).

<sup>60</sup> 8 C.F.R. § 208.13(b)(1)(iii)(B), 8 C.F.R. § 1208.13(b)(1)(iii)(B).

<sup>61</sup> 8 C.F.R. § 208.16(b)(1)(iii), 8 C.F.R. § 1208.16(b)(1)(iii).

<sup>62</sup> INA § 101(a)(43), 8 U.S.C. § 1101(a)(42).

<sup>63</sup> July 28, 1951, 19 U.S.T. 6223, 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

so only in passing, where it assumed it meant “because of.”<sup>64</sup> However, the precise standard of causality to be used is disputed.<sup>65</sup>

Although the precise nature of “on account of” is disputed, what is clear is that there must be some type of relationship between the persecution and the protected ground, or in other words, a “nexus.” The federal courts have also agreed that the protected ground need not be the sole reason for the persecution, but rather, under the “mixed motive” doctrine, it has to be only part of the motive for the persecution.<sup>66</sup>

### Third Element: Belonging to a Protected Ground

In order to obtain either asylum or withholding of removal, an applicant must show not only that she has suffered persecution, but that it was inflicted “on account of” race, religion, nationality, membership in a particular social group, or political opinion.<sup>67</sup> Thus, in order to obtain either asylum or withholding of removal, an applicant must show that she belongs to one of the protected grounds.<sup>68</sup> Applicants who seek to obtain asylum or withholding of removal through an FGM claim generally must show they belong to a particular social group. Thus, this report focuses on the law governing the particular social group ground.

**Membership in a Particular Social Group.** Congress inserted the term “membership in a particular social group” into the refugee statute in order to have it conform with the United Nations Convention and Protocol Relating to the Status of Refugees.<sup>69</sup> The term is otherwise left undefined in the relevant statutes, legislative history, treaties, and negotiating history.<sup>70</sup> Because of this, case law has been the primary means by which “membership in a particular social group” has been construed.

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<sup>64</sup> *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (“Elias-Zacarias still has to establish that ... the guerrillas will persecute him *because of* that political opinion[...]”) (emphasis in original). It is important to stress that the Supreme Court did not render a holding on the definition of “on account of.”

<sup>65</sup> See James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 Michigan J. Internat’l L. 207 (2002).

<sup>66</sup> See, e.g., *Mohideen v. Gonzales*, 416 F.3d 567 (7th Cir. 2005).

<sup>67</sup> INA § 101(a)(42), 8 U.S.C. § 1101(a)(42); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)).

<sup>68</sup> Political opinion differs from the other protected grounds in some respects because an applicant may still obtain asylum or withholding of removal because of an “imputed political opinion,” i.e., a political opinion a persecutor erroneously believes the applicant holds. See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992).

<sup>69</sup> See H.R. Conf. Rep. No. 96-781, p. 19 (1980). See also Charles Gordon, et. al. *Immigration Law and Procedure* § 33.04[2][d], p. 33-40.1 (rev. ed. 2007).

<sup>70</sup> See *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993).

The most frequently cited construction of “membership in a particular social group” is found in *Matter of Acosta*.<sup>71</sup> In that case, the Board of Immigration Appeals (BIA), after noting the dearth of legislative history and statutory guidance, used the doctrine of *ejusdem generis* in construing “membership in a particular social group” by comparing it with the other enumerated grounds in the statute.<sup>72</sup> The common trait the BIA elucidated among the enumerated protected grounds was immutability; in other words, all persons who belonged to a protected ground shared a “common, immutable characteristic.”<sup>73</sup> The BIA elaborated on this notion by stating that, in order to obtain asylum under the particular social group ground, the persecution must be aimed at a common, immutable characteristic that is shared by all members of the particular social group.<sup>74</sup> The immutable characteristic “may be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership,” but “whatever the common characteristic that defines the group, it 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.”<sup>75</sup> Most of the federal appellate courts have adopted this construction.<sup>76</sup>

**Gender as a Particular Social Group.** While *Acosta* contained language that appeared to recognize gender as an immutable characteristic, courts have been disinclined in practice to recognize social groups defined solely by gender.<sup>77</sup> The closest a court has come to acknowledging gender as sufficient in itself to constitute a social group was when the Third Circuit in *Fatin v. INS* stated in dicta that while gender could be used as the sole characteristic to link the members of a particular social group, to do so would require the applicant to also show that sex was the sole reason for the persecution.<sup>78</sup> Although using gender as the sole characteristic of a social group has proved unsuccessful, courts have been far more sympathetic to social groups defined only in part by gender.<sup>79</sup> In FGM cases, for example, courts

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<sup>71</sup> 19 I. & N. Dec. 211 (1985).

<sup>72</sup> *Id.* at 233.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990); *Fatin*, 12 F.3d at 1240; *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir. 2005) (en banc). But see *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (providing an alternative definition to “particular social group” by defining it as a “voluntary associational relationship”).

<sup>77</sup> See, e.g., *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

<sup>78</sup> 12 F.3d at 1240.

<sup>79</sup> See, e.g., *In re A-N-*, File No. A73 603 840 (IJ December 22, 2000) (Philadelphia, Pa.) (Grussendorf, IJ) (finding that the applicant belonged to a particular social group of “married, educated career-oriented” Jordanian women and that she had been persecuted and feared future persecution on account of her membership in that group), *reported at* 78 (continued...)

have appeared to treat the “particular social group” requirement as satisfied when it is defined by a combination of the applicant’s gender and the applicant’s tribal membership.<sup>80</sup>

## **Withholding of Removal Under the Convention Against Torture**

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) is an international treaty that specifically targets torture.<sup>81</sup> Although the Senate ratified CAT in 1990, it was not until 1998 that Congress passed the necessary implementing legislation.<sup>82</sup> The treaty is relevant for most asylum applicants because the Department of Homeland Security promulgated regulations which allow applicants to obtain withholding of removal under the auspices of CAT.<sup>83</sup> A claim under CAT differs from traditional withholding of removal in that it only requires a “more likely than not” probability (i.e., clear probability) that the applicant would be tortured if returned to her country of origin.<sup>84</sup> Thus, while CAT arguably covers a narrower category of conduct than traditional withholding of removal, the applicant need not show that the torture was conducted “on account of” a protected ground. In the context of FGM, CAT has limited salience because most applicants have little trouble establishing “a particular social group” if they are truly at risk of suffering from FGM if sent back to their countries of origin. However, it is important to mention that at least one circuit has indicated that FGM could constitute torture and could provide a colorable basis for relief under CAT.<sup>85</sup>

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<sup>79</sup> (...continued)

Interpreter, Releases 409 (February 26, 2001).

<sup>80</sup> *See, e.g.,* Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2007).

<sup>81</sup> U.N.G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

<sup>82</sup> Foreign Affairs, Reform and Restructuring Act of 1998, P.L. 105-277, 112 Stat. 2681, Div. G, § 2242 (October 21, 1998).

<sup>83</sup> 8 C.F.R. § 208.16(c), 8 C.F.R. § 1208.16(c).

<sup>84</sup> 8 C.F.R. § 208.16(c)(2), 8 C.F.R. § 1208.16(c)(2).

<sup>85</sup> *Nwaokolo v. INS*, 314 F.3d 303 (7th Cir. 2002).

## **Female Genital Mutilation as a Basis for an Asylum or Withholding of Removal Claim**

Female genital mutilation (FGM), also called female genital cutting (FGC), female genital alteration, or female circumcision, encompasses a wide range of surgical procedures which involve the removal or alteration of a woman's or girl's external genitalia.<sup>86</sup> The World Health Organization (WHO) estimates that currently 100 to 140 million women in the world have undergone FGM, with approximately 3 million girls in Africa at risk annually.<sup>87</sup> Although it is a cultural practice prevalent in western, eastern, and northwestern Africa, and in some Asian and Middle-Eastern nations,<sup>88</sup> it is widely considered a human rights violation by most international organizations and Western countries.<sup>89</sup> This viewpoint is reflected in American law: a federal criminal statute states that any individual who "knowingly circumcises, excises, or infibulates" the genitalia of a woman under 18 years of age is subject to

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<sup>86</sup> The World Health Organization (WHO) defines FGM as "all procedures which involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons." *See* World Health Organization Factsheet on Female Genital Mutilation, [<http://www.who.int/mediacentre/factsheets/fs241/en/index.html>] (last visited June 12, 2008). The WHO classifies the various surgical procedures into four categories:

- Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).
- Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).
- Type III: Narrowing of the vaginal orifice with the creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).
- Type IV: All other harmful procedures to the female genitalia for non-medical purposes: pricking, piercing, incising, scraping, and cauterization.

*See* Eliminating Female Genital Mutilation: An Interagency Statement, [[http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement\\_2008.pdf](http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf)] (last visited June 12, 2008).

<sup>87</sup> World Health Organization Factsheet on Female Genital Mutilation, [<http://www.who.int/mediacentre/factsheets/fs241/en/index.html>] (last visited June 12, 2008).

<sup>88</sup> *Id.* *See also* Female Genital Mutilation (FGM) or Female Genital Cutting (FGC): Individual Country Reports, [<http://www.state.gov/documents/organization/10222.pdf>] (last visited June 12, 2008).

<sup>89</sup> World Health Organization Factsheet on Female Genital Mutilation, [<http://www.who.int/mediacentre/factsheets/fs241/en/index.html>] (last visited June 12, 2008). FGM has been formally condemned by several international organizations, such as the World Health Organization, the United Nations Children's Fund, and the United Nations Population Fund.



both fine and imprisonment.<sup>90</sup> Federal law also classifies FGM as a form of persecution that can act as a basis for refugee status.<sup>91</sup>

Ever since the BIA declared FGM to be a form of persecution in *In re Kasinga*,<sup>92</sup> there has been a growing corpus of case law published by both the BIA and the federal circuits governing FGM-based asylum and withholding of removal claims. Generally, in order to obtain FGM-based asylum, an applicant must demonstrate that she has a well-founded fear of FGM or, in the case of withholding of removal, a clear probability of FGM, and is unable to avail herself of the protection of her country of origin. The applicant must also establish that the FGM was committed “on account of” the applicant’s membership in a particular social group, usually defined by a combination of the applicant’s gender and ethnic or tribal affiliation. This section of the report will explore the many issues affecting an FGM-based claim by first discussing which characteristics typically comprise the “particular social group” an applicant must establish in order to obtain either FGM-based asylum or withholding of removal. It will then proceed to focus on the role FGM plays in establishing either future or past persecution.

## Gender and Tribal Affiliation as a Particular Social Group

As mentioned above, gender alone, as a practical matter, is almost never sufficient to act as a protected ground for an asylum claim.<sup>93</sup> Although gender satisfies the immutability criterion of *Acosta*, gender-based claims rarely prevail in courts because the applicant must show that she suffered persecution solely because she was female.<sup>94</sup> Courts have been more willing to recognize social groups defined by gender in conjunction with other characteristics. For example, in *In re Kasinga*, the court upheld the applicant’s FGM-based asylum claim by defining her particular social group as one constituting “young women of the Tchamba-Kunsuntu tribe who have not had [FGM], as practiced by that tribe, and who opposed the practice.”<sup>95</sup> Thus, at the time of this case, it appeared that the BIA considered this particular social group to be defined by this combination of traits: (1) women (2) who personally opposed FGM, (3) did not undergo FGM, and (4) who belonged to a particular tribe that (5) practiced FGM. However, most federal appellate courts do not appear to require a showing that the social group include personal opposition to FGM or that group consist of women who had not undergone FGM. They instead

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<sup>90</sup> 18 U.S.C. § 116 (“whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minor or clitoris of another person who has not attained the age of 18 years shall be fined or imprisoned for not more than 5 years, or both.”).

<sup>91</sup> *Kasinga*, 21 I. & N. Dec. at 365.

<sup>92</sup> *Id.*

<sup>93</sup> *See Gomez*, 947 F.2d at 664; *Fatin*, 12 F.3d 1233.

<sup>94</sup> *See Fatin*, 12 F.3d at 1240 (requiring that an asylum applicant defining a particular social group based solely on gender must also show that “she would suffer or that she has a well-founded fear of suffering ‘persecution’ based solely on her gender.”).

<sup>95</sup> *Kasinga*, 21 I. & N. Dec. at 365.

define the social group solely through the applicant's (1) gender combined with her (2) ethnicity, nationality, or tribal affiliation.<sup>96</sup>

## Female Genital Mutilation As Future Persecution

As mentioned above, asylum and withholding of removal are prospective forms of relief. That is, these remedies are meant to prevent future persecution and harm rather than to protect people already inflicted with persecution. In *In re Kasinga*, the applicant had never suffered FGM. Rather, she was granted asylum because she was threatened with FGM upon returning to her country of origin. Thus, while *Kasinga* does categorize FGM as persecution, it does not necessarily entail that someone who has already suffered FMG in the past is entitled to asylum. The BIA would later emphasize this distinction by ruling in a subsequent case that a past infliction of FGM could not serve as a basis for asylum.

**FGM Categorically Defined as Persecution.** While *Kasinga*'s holding is of limited scope, it did clarify many questions about FGM when it served as a basis for a prospective asylum application. As discussed earlier, the types of harm which rise to the level of persecution are not defined by statute and are usually determined on a case-by-case basis. In *Kasinga*, the BIA categorically held that FGM as practiced by the applicant's tribe was a form of persecution.<sup>97</sup> The type of FGM at issue in *Kasinga* was described as "an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period."<sup>98</sup> Other forms of FMG, which involve the cutting away of portions of the female genitalia and the practice of suturing the vagina partially closed, were also discussed.<sup>99</sup> After describing the particulars of these procedures, the BIA held that the level of harm these forms of FGM inflict on women "can constitute 'persecution' within the meaning of [INA §101(a)(42)(A)]."<sup>100</sup> It then characterized FGM as a form of "sexual oppression ... to ensure male dominance and exploitation," practiced in order to "overcome sexual characteristics of young women ... who have not been, and do not wish to be, subjected to FGM."<sup>101</sup> Prior to *Kasinga*, there were some questions as to whether FGM rises to the level of persecution, but most federal circuits now recognize that FGM is a form of persecution.<sup>102</sup>

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<sup>96</sup> See *Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding that persecution was on account of applicant's membership in a social group comprising of the young women of the Tchamba-Kunsuntu Tribe); *Niang*, 422 F.3d at 1200 (holding that for purposes of FGM, a particular social group can be defined by both gender and tribal membership). See also *Acosta*, 19 I. & N. Dec. at 233.

<sup>97</sup> *Kasinga*, 21 I. & N. Dec. at 365.

<sup>98</sup> *Id.* at 361.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 365.

<sup>101</sup> *Kasinga*, 21 I. & N. Dec. at 366-367.

<sup>102</sup> See, e.g., *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) ("Forced female genital mutilation involves the infliction of grave harm constituting persecution...."); *Barry v.* (continued...)

As a practical matter, in order to raise a successful FGM-based asylum claim, an applicant only has to establish the likelihood of the harm (e.g., whether there is a well-founded fear or a clear probability the FGM will occur) without having to argue whether the gravity of harm that the FGM poses is severe enough to merit either asylum or withholding of removal relief. Thus, it would appear that all forms of FGM will qualify as persecution so long as the applicant is genuinely threatened with it if she returns to her country of origin.<sup>103</sup>

**Daughters Threatened With FGM.** Some asylum applicants have successfully argued that they can claim asylum in their own right because they have a well-founded fear of persecution based on the fear that a minor daughter, currently within the United States with the applicant, will suffer FGM upon arrival at the applicant's country of origin.<sup>104</sup> Several federal circuits seem to at least implicitly accept this proposition.<sup>105</sup> However, the Sixth Circuit has asserted that asylum will not be granted to an applicant whose daughter is already located inside the applicant's country of origin and threatened with FGM at the time the asylum claim was filed.<sup>106</sup> Furthermore, the Seventh Circuit has held that if an applicant's daughter can avoid constructive deportation by remaining in the United States with her other parent, the applicant cannot use the threat of FGM against her daughter as a basis for her asylum claim.<sup>107</sup> The BIA has also rejected an argument proposed by a childless

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<sup>102</sup> (...continued)

Gonzales, 445 F.3d 741, 745 (4th Cir. 2006) ("We recognize as an initial matter that FGM constitutes persecution...."); *Abankwah v. INS*, 185 F.3d 18, 23 (2d Cir. 1999) ("That FGM involves the infliction of grave harm constituting persecution under [INA § 101(a)(42)(A)] is not disputed here."); *Balogun*, 374 F.3d at 499 ("the Agency does not dispute, at least with any force, that the type of FGM which Ms. Balogun has alleged is 'persecution.'"); *Niang*, 422 F.3d at 1197.

<sup>103</sup> See Charles Gordon, et. al. *Immigration Law and Procedure* § 33.04[2][d], p. 33-48 (rev. ed. 2007) ("While the [BIA] failed to make a blanket statement concerning female genital persecution in general, we believe that the [BIA] would be hard-pressed to find a case of female genital mutilation that would not constitute persecution.").

<sup>104</sup> See *Abay*, 368 F.3d at 641. The reason derivative asylum was not pursued was because the regulations governing derivative asylum limit its availability to spouses and minor children. See 8 C.F.R. § 208.21, 8 C.F.R. § 1208.21.

<sup>105</sup> See *Nwaokolo*, 314 F.3d at 308 (stating that the BIA should have considered, when denying asylum to an applicant, the risk of FGM the applicant's children would be exposed to if they were to be constructively deported with their mother back to her country of origin); *Barry*, 445 F.3d at 745 (stating in dicta that "[t]o the extent that ... the Attorney General does not contest ... the fact that Barry's daughter will likely be subject to FGM if she is removed to Guinea, Barry has made out a prima facie case of persecution that would have entitled her to asylum....").

<sup>106</sup> *Bah v. Gonzales*, 462 F.3d 637, 642-43 (6th Cir. 2006).

<sup>107</sup> *Olowo v. Ashcroft*, 368 F.3d 692, 701 (7th Cir. 2004). Indeed, the applicant is under the obligation to leave her child with the other parent even if the applicant is removed to her country of origin. See *id.* at 703-04 (directing the Clerk of the Court to notify certain state authorities that the applicant was endangering her daughter by asserting that she would bring her daughter with her if removed to her country of origin).

applicant who based her asylum claim on the fear that her future, unborn daughters may suffer FGM, classifying this fear as too speculative to be well-founded.<sup>108</sup>

## Female Genital Mutilation as Past Persecution

When an applicant petitions for asylum status, she usually must show that she has a “well-founded fear” of persecution. An asylum applicant can create a rebuttable presumption of a “well-founded fear” of persecution if she can show: (1) a past incident that rises to the level of persecution; (2) that is on account of race, religion, nationality, membership in a social group, or political opinion; and (3) is committed by the government or by forces the government is either unable or unwilling to control.<sup>109</sup> A similar test exists for those seeking to establish a clear probability of persecution when applying for withholding of removal.<sup>110</sup> This presumption may be rebutted if the government can show that “there has been a fundamental change in circumstances,” such that the applicant no longer has either a well-founded fear (asylum context) or clear probability of persecution (withholding of removal context) in her country of origin.<sup>111</sup>

**Continuing Harm Theory.** The leading federal appellate case on the treatment of FGM as past persecution is *Mohammed v. Gonzales*.<sup>112</sup> In this case, the asylum applicant was a woman from Somalia who had already been subject to FGM.<sup>113</sup> The applicant claimed that the FGM constituted past persecution which warranted the presumption that she had a well-founded fear of future persecution.<sup>114</sup> The government contended that the past infliction of FGM was a fundamental change in circumstances which should have rebutted the presumption because, having already suffered FGM, the applicant would not be faced with the procedure in the future.<sup>115</sup> The Ninth Circuit rejected this argument. The court instead analogized FGM to forced sterilization, which had been classified in a previous case as a “continuing harm that renders a petitioner eligible for asylum, without more.”<sup>116</sup> Therefore, like forced sterilization, a past infliction of FGM was judged to constitute a “continuing harm,” thus creating a presumption of a well-founded fear of persecution that the government could not rebut. Although the Eighth Circuit agreed that a showing of FGM is sufficient to create a presumption of a well-founded fear

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<sup>108</sup> In re A-T-, 24 I. & N. Dec. 296, 302 (BIA 2007).

<sup>109</sup> Navas v. INS, 217 F.3d 646, 655-656 (9th Cir. 2000). *See also* 8 C.F.R. § 208.13(b)(1), 8 C.F.R. § 1208.13(b)(1); 8 C.F.R. § 208.16(b)(1), 8 C.F.R. § 1208.16(b)(1).

<sup>110</sup> 8 C.F.R. § 208.16(b)(1), 8 C.F.R. § 1208.16(b)(1).

<sup>111</sup> 8 C.F.R. § 208.13(b)(1)(i)(A), 8 C.F.R. § 1208.13(b)(1)(i)(A).

<sup>112</sup> 400 F.3d 785 (9th Cir. 2005).

<sup>113</sup> *Id.* at 789-790.

<sup>114</sup> *Id.* at 791.

<sup>115</sup> *Id.* at 799.

<sup>116</sup> *Id.* *See also* Qu v. Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005) (characterizing forced sterilization as a form of permanent and continuous persecution which creates an irrebuttable presumption of a well-founded fear of persecution).

or persecution, it differs from the Ninth Circuit by leaving the presumption rebuttable.<sup>117</sup>

**Rebuttable Presumption Theory.** Alternatively, the Ninth Circuit stated that even if FGM only created a rebuttable presumption of a well-founded fear, the presumption would be difficult to rebut because of the risk of violence and gender persecution, as evidenced by the applicant's FGM, if the applicant was removed to her home country.<sup>118</sup> This alternative theory has been endorsed by the Eighth Circuit in *Hassan v. Gonzales*, which held that a showing of past FGM would be sufficient to create a presumption of a well-founded fear of future persecution because, even though the risk of future FGM would be negligible, the applicant could still suffer from forms of future persecution other than FGM.<sup>119</sup> Thus, this theory maintains that the past infliction of FGM does not constitute a fundamental change in circumstances, and the presumption of a well-founded fear of future persecution is left preserved.

**The BIA Argument Against Continuing Harm.** The BIA has rejected both the continuing harm theory and the rebuttable presumption theory. In *In re A-T-*, the BIA ruled that if the government shows that the asylum applicant has already suffered FGM, the presumption of a well-founded fear of persecution is rebutted.<sup>120</sup> The BIA argued that FGM is a one-time procedure limited to permanently removing parts of the female genitalia. Therefore, once completed, the procedure cannot be inflicted upon the applicant in the future because the relevant parts of the female genitalia the FGM aims to remove have already been excised.<sup>121</sup> Furthermore, the BIA rejected the theory that FGM constitutes a "continuing harm" which creates an irrebuttable presumption of future persecution.<sup>122</sup> The BIA claimed that the only reason forced sterilization is given "continuing harm" status is because of a statutory provision that expressly states that forced sterilization provides a basis for asylum.<sup>123</sup> Absent such a statutory endorsement from Congress, the BIA concluded that FGM should not be treated the same as forced sterilization.<sup>124</sup> Therefore, the BIA determined that the Ninth Circuit was incorrect in holding that FGM merited "continuing harm" status.

The Ninth Circuit, anticipating the BIA's objection, had written in its analysis that the "continuing harm" concept arose out of case law and not from the statute. According to that court, the statutory provision regarding forced sterilization is unrelated to the "persecution" element of an asylum claim. Rather, the statute only

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<sup>117</sup> *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

<sup>118</sup> *Mohammed*, 400 F.3d at 800.

<sup>119</sup> 484 F.3d at 518.

<sup>120</sup> 24 I. & N. Dec. at 299.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 300. *See also* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

<sup>124</sup> *A-T-*, 24 I. & N. Dec. at 300.

created a *per se* nexus between a past forced sterilization and the political opinion ground, thereby automatically satisfying the “on account of” element in an asylum claim once a showing of past forced sterilization is made.<sup>125</sup> Therefore, the Ninth Circuit reasoned, if “continuing harm” originated from case law rather than statute, courts are not constrained by statute and could extend “continuing harm” status to FGM.

**The BIA Argument Against the Rebuttable Presumption.** The BIA also rejected the notion that a showing of FGM can create a rebuttable presumption of a well-founded fear of future persecution.<sup>126</sup> This approach, suggested by the Ninth Circuit in *Mohammed* and adopted by the Eighth Circuit in *Hassan*, was dismissed by the BIA as a deviation from regulatory procedures.<sup>127</sup> Specifically, the BIA held that although FGM is persecution, regulations mandate that a past infliction of FGM be deemed a fundamental change in circumstances. This fundamental change in circumstances would negate the presumption of a well-founded fear of persecution that an act of persecution normally creates.<sup>128</sup> Furthermore, the BIA cited a regulation which states that, “If the applicant’s fear of future persecution is unrelated to past persecution, the applicant bears the burden of establishing that the fear is well-founded.”<sup>129</sup> The BIA, in essence, appears to require that a showing of past persecution must create a well-founded fear of identical future persecution.<sup>130</sup> If the past persecution renders an identical form of persecution in the future impossible, then the past persecution will not create a rebuttable presumption of a well-founded fear.<sup>131</sup> Therefore, according to the BIA, because FGM involves the permanent alteration or removal of female genitalia, it can only be performed once, and thus the very act of persecution itself effects a fundamental change in circumstances that negates the possibility of future persecution.

**Second Circuit Response to *In re A-T*.** The Second Circuit has been the only appellate court to date that has addressed *In re A-T*. In *Bah v. Mukasey*, the Second Circuit held that the BIA committed “significant error in its application of its own regulatory framework” when reviewing the FGM-based withholding of removal claims of the petitioners.<sup>132</sup> Principally, the Second Circuit found the reasoning the BIA applied in *A-T* with regard to the rebuttable presumption theory was flawed.

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<sup>125</sup> See *Mohammed*, 400 F.3d at 800, fn. 22.

<sup>126</sup> *A-T*, 24 I. & N. Dec. at 304.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 299. See also 8 C.F.R. § 208.13(b)(1), 8 C.F.R. § 1208.13(b)(1); 8 C.F.R. § 208.16(b)(1), 8 C.F.R. § 1208.16(b)(1).

<sup>129</sup> *Id.* See also 8 C.F.R. § 208.13(b)(1), 8 C.F.R. § 1208.13(b)(1).

<sup>130</sup> *A-T*, 24 I. & N. Dec. at 304.

<sup>131</sup> *Id.*

<sup>132</sup> *Bah v. Mukasey*, 2008 U.S. Ap. LEXIS 12407, 3 (2d Cir. 2008).

First, the court held that the BIA mischaracterized FGM as a “one-time” act.<sup>133</sup> It stated that there are many types of FGM which can be repeated: notably the sewing shut of a woman’s vagina, which is only opened for purposes of sexual intercourse with her husband, and then subsequently re-sewn (i.e., infibulation).<sup>134</sup> Furthermore, the Second Circuit stated that the BIA erred when it assumed that FGM was the only form of possible future harm relevant in the analysis.<sup>135</sup> The court stated, “Nothing in the regulation suggests that the future threats to life or freedom must come in the same *form* or be the same *act* as the past persecution.”<sup>136</sup> In order to demonstrate changed circumstances, which would rebut the petitioners’ presumption of suffering future harm, the government cannot rely solely on showing that “a particular act of persecution suffered by the victim will not recur.”<sup>137</sup> The court noted that other types of harm could befall the petitioners once arriving at their countries of origin, notably domestic abuse, rape, and sex trafficking.<sup>138</sup>

In a concurring opinion, Judge Straub wrote that he would also uphold the petitioners’ continuing harm theory.<sup>139</sup> Although the majority opinion declined to address the continuing harm issue, the Straub concurrence concluded that the similarities between FGM and forced sterilization were too similar to ignore; that is, the reason why both forms of persecution were only inflicted once was because they only need to be inflicted once in order to cause a lasting form of persecution. He rejected the argument that forced sterilization was only given continuing harm status because Congress statutorily defined it as a form of persecution. Rather, he concluded that the only reason Congress enacted the statute was to reverse an earlier BIA decision that had rejected forced sterilization as a form of persecution. In other words, all Congress did was establish for forced sterilization what the BIA did for FGM in *Kasinga*, which was to establish their basic qualifications for asylum and withholding of removal claims without altering the larger regulatory framework governing such claims.<sup>140</sup> Therefore, since the continuing harm status of forced sterilization was not a product of the statutory enactment, the similarities between the types of harm that forced sterilization and FGM inflict on their victims should militate a conclusion that both inflicted forms of continuing harm.<sup>141</sup> However, it is also important to stress that the majority opinion specifically declined to reach the merits of this theory, and that Judge Sotomayor, in a separate concurrence, emphasized that it would be imprudent for the court to address this issue when the administrative agency had yet to determine whether there were other grounds, besides the petitioners’ past infliction of FGM, which could rebut the presumption that the

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<sup>133</sup> *Id.* at 43.

<sup>134</sup> *Id.* at 44.

<sup>135</sup> *Id.* at 46.

<sup>136</sup> *Id.* (emphasis in original).

<sup>137</sup> *Id.* at 46-47.

<sup>138</sup> *Id.* at 50.

<sup>139</sup> *Id.* at 53-54 (Straub, J., concurring).

<sup>140</sup> *Id.* at 67.

<sup>141</sup> *Id.*

petitioners were likely to suffer future harm in their countries of origin if removed there.<sup>142</sup>

**Attorney General Opinion on *Matter of A-T*.** The Attorney General has the regulatory authority to review the decisions of the BIA.<sup>143</sup> *In re A-T* has undergone review under this authority and has been vacated and remanded to the BIA for further proceedings.<sup>144</sup> This means that the BIA's holding in *In re A-T*—that a past infliction of FGM constitutes a changed circumstance rebutting the presumption of a well-founded fear or clear probability of future persecution—no longer controls in future BIA deliberations. Thus, a past infliction of FGM can now serve as a basis for either asylum or withholding of removal claims.

The Attorney General's reasoning was similar to that of the Second Circuit. He noted that FGM was not necessarily a “one-time” act as characterized by the BIA. Because FGM is capable of repetition, the Attorney General concluded that “there was no basis for the Board's legal conclusion that the past infliction of female genital mutilation by itself rebuts ‘[a]ny presumption of future [female genital mutilation] persecution.’”<sup>145</sup> Similarly, the Attorney General also found that the BIA was wrong in focusing on whether the asylee applicant would suffer “identical” future harm. The appropriate focus of the inquiry, according to the Attorney General, is whether future harm would be conducted “on account of the *same statutory ground*,” i.e., whether harm would be inflicted on account of the applicant's social group.<sup>146</sup> Because the BIA failed to determine which “social group” the applicant belonged to, but rather focused on the type of harm the applicant suffered, the BIA erroneously concluded that the applicant's presumption of future persecution was rebutted. In other words, in order to determine whether there is a changed circumstance such that the presumption of future harm is rebutted, the BIA should not have focused on whether FGM would recur, but rather should have determined whether the applicant, if repatriated to her country of origin, was still threatened with any type of sufficiently severe future harm on account of being a member of a social group.<sup>147</sup>

**The BIA's Humanitarian Ground Theory.** The BIA has ruled in *Matter of S-A-K- and H-A-H-* that a prior infliction of FGM can alternatively serve as a basis for an asylum claim on humanitarian grounds.<sup>148</sup> Regulations found under 8 C.F.R. §§ 208.13 and 1208.13 permit a grant of asylum for those who have suffered past persecution but lack a well-founded fear of future persecution if the applicant demonstrates “compelling reasons for being unwilling or unable to return to the

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<sup>142</sup> *Id.* at 79 (Sotomayor, J., concurring).

<sup>143</sup> 8 C.F.R. § 1003.1(h)(1)(i).

<sup>144</sup> *Matter of A-T*, 24 I. & N. Dec 617 (A.G. 2008).

<sup>145</sup> *Id.* at 622.

<sup>146</sup> *Id.* (emphasis in original).

<sup>147</sup> *Id.*

<sup>148</sup> *Matter of S-A-K- and H-A-H-*, 24 I. & N. Dec. 464, 465-466 (BIA 2008).



country arising out of the severity of the past persecution....”<sup>149</sup> The BIA specifically cites *Matter of Chen* as an example of past persecution whose severity rises to the level required to qualify as a basis for asylum without a well-founded fear of future persecution.<sup>150</sup> In that case, the Chinese Red Guard had subjected the applicant and his family to stoning, burning, and other forms of persecution on account of their religious beliefs.<sup>151</sup> Because of his persecution, the applicant suffered loss of hearing and many psychological ailments.<sup>152</sup> By the time of the applicant’s deportation proceeding, however, China had liberalized many of its policies, thus making it unlikely that the applicant would suffer the same level of persecution if deported. Normally, such changes in circumstances would rebut the presumption of a well-founded fear of persecution. But, regardless of this, the BIA held that the past persecution was so severe that, standing alone, it was sufficient to establish an asylum claim even without the well-founded fear.<sup>153</sup> It appears that, by citing *Matter of Chen*, the BIA now views FGM to be a similar situation: past persecution, so severe that it results in continuing physical harm and discomfort, which can act, standing alone, as a basis for asylum even without a well-founded fear of future persecution.<sup>154</sup> However, because of the Attorney General’s vacatur of *In re A-T*-, it would now appear that a prior infliction of FGM can create a presumption of a well-founded fear of future persecution in asylum cases.

## Conclusion

Asylum and withholding of removal based on FGM are no longer limited to only prospective threats. With respect to past infliction, proof of having suffered FGM can create a rebuttable presumption of either a well-founded fear or clear probability of persecution. This presumption can still be rebutted, however, and a claim for asylum or withholding of removal denied upon a demonstration that the applicant is no longer threatened with future harm on account of her social group. Consequently, the controlling factor in previous cases, i.e., the distinction between whether the FGM has already occurred in the past or is instead a prospective threat, will most likely play an ancillary role in future FGM asylum cases. In its place, it would seem far greater emphasis will be placed on how the social group is defined in these claims.

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<sup>149</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A), 8 C.F.R. § 1208.13(b)(1)(iii)(A).

<sup>150</sup> 20 I. & N. Dec. 16 (BIA 1989).

<sup>151</sup> *Id.* at 19-20.

<sup>152</sup> *Id.* at 20.

<sup>153</sup> *Id.* at 21.

<sup>154</sup> *Matter of S-A-K- and H-A-H-*, 24 I. & N. Dec. at 465.