# Refugees Themselves: The Asylum Case for Parents of Children at Risk of Female Genital Mutilation

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## INTRODUCTION

If a woman or girl arrives in the United States and fears persecution in her home country in the form of female genital mutilation[1] ("FGM"), she will likely qualify for asylum. Asylum for women and girls threatened by FGM is well established and internationally accepted when they can satisfy the elements of the refugee definition in the 1951 United Nations ("U.N.") Convention Relating to the Status of Refugees ("Convention").[2]

Unfortunately, the legal status of the parents of these girls and young women is far less settled. Currently, if a deportable parent fears returning to her country of origin because of her daughter's likely mutilation, no consistently applied basis for legal relief supports her claim. In the United States, she would stand on shaky ground when applying for asylum, withholding of removal, or Convention Against Torture[3] ("CAT") relief.[4]

Commentators who suggest that the United States should offer the parents of potential FGM victims derivative relief because they do not qualify for asylum do this area of law a great disservice. These parents seeking refuge in the United States *can* have independent asylum claims, and the case law that denies their claims is the product of theoretical confusion. The international norms on which U.S. asylum law is founded—some U.S.

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1. Female genital mutilation is also known as female genital surgery ("FGS"), female circumcision, and female genital cutting ("FGC"). I will refer to the procedure by the term FGM because "mutilation" is the only word that properly conveys the trauma, brutality, and disfigurement that result.

2. Convention Relating to the Status of Refugees art. 1, *opened for signature* July 28, 1951, 189 U.N.T.S. 150.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture or CAT].

4. This paper examines only the eligibility of parents for asylum, although a discussion of potential withholding of removal and CAT relief would contain significant overlap.

asylum cases, as well as the practices of other states party to the Convention—make clear that asylum relief is and should be available to parents who have a well-founded fear that their child will be mutilated.

## I. BACKGROUND: FGM AND ASYLUM

The nature and incidence of FGM throughout the world is staggering. The World Health Organization ("WHO") defines FGM as "all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons."[5] According to WHO estimates, "between 100 and 140 million girls and women worldwide have been subjected [to FGM]."[6] Although FGM is practiced throughout the world, the six countries of Egypt, Ethiopia, Kenya, Nigeria, Somalia, and Sudan "account for 75 percent of all cases of FGM."[7] Additionally, approximately fifteen percent of all women on whom FGM has been performed have undergone the most severe form, infibulation.[8]

The reasons why FGM exists are many, and depend on the unique cultures of the communities that perform it on their girls and young women. Despite the differences, the rationale behind FGM has some unifying traits. First and foremost, FGM "represents society's control over women"[9] and is a "manifestation of gender inequality that is deeply entrenched in social, economic and political structures."[10] FGM, on its most fundamental level, is a way to "manipulate women's sexuality, ensure their subjugation and control their reproductive functions."[11] The most common reason that practitioners cite for FGM is that it "is required for marriage and honour."[12]

The United States was not the first country to interpret its asylum statute to protect women hoping to escape mutilation.[13] In 1994, Canada decided the first case of this kind[14] and granted refugee status to Khadra

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5. WORLD HEALTH ORGANIZATION, ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT— OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO 4 (2008), *available at* http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf [hereinafter WHO, ELIMINATING].

6. *Id.*

7. HEAVEN CRAWLEY, REFUGEES AND GENDER—LAW AND PROCESS 176 (2001).

8. *Id.* "Infibulation," also known as "Type III" mutilation, refers to the "[n]arrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris." WHO, ELIMINATING, *supra* note 5, at 4.

9. WHO, ELIMINATING, *supra* note 5, at 5.

10. *Id.* at 6.

11. CRAWLEY, *supra* note 7, at 179.

12. *Id.*

13. In the United States, the relevant statute is the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

14. However, in 1991, France "became the first country to establish that female genital mutilation is a form of persecution and that the threat of it is sufficient grounds to grant a woman refugee status." Clyde Farnsworth, *Canada Gives Somali Mother Refugee Status*, N.Y. TIMES, July 21, 1994, at A14, *availa-*

Hassan Farah, a mother who fled Somalia with her 10-year-old daughter because she feared that her daughter would be forcibly mutilated.[15] The Canadian Immigration and Refugee Board concluded that Farah and her daughter faced three kinds of persecution: "(1) undue denial of child custody because of the trauma that may follow and the feeling of inability to protect one's child undergoing harmful physical pain, particularly genital mutilation; (2) female genital mutilation; and (3) denial of a child's right of the care and nurture of a mother."[16] The *Farah* decision demonstrated a faithful interpretation of the Convention, containing reasoning that still provides guidance over a decade later.

Although the United States had decided its first FGM-based case only months before *Farah*, the Board of Immigration Appeals ("Board"), the highest administrative authority interpreting asylum law, had not yet ruled on the issue. In March of 1994, an immigration judge in Portland, Oregon, had decided that a Nigerian woman would not be deported because her two daughters would probably be subjected to FGM if they returned with her.[17] Without directly granting asylum,[18] Immigration Judge Kendall Warren ruled that Lydia Oluloro, who herself was forced to undergo FGM at age four, could remain in the United States in order to prevent the mutilation of her citizen children.[19]

The Board's definitive acceptance of FGM as the basis of an asylum claim in the United States came two years later, in *In re Kasinga*.[20] Since neither the Convention nor its implementing statute in the United States contains a definition of the term "persecution," it has been necessary for the Board and other courts to interpret on a case-by-case basis whether certain serious harms rise to the level of persecution. The *Kasinga* Board stated plainly that the "characterization of FGM as persecution is consistent with our past definitions of that term."[21] With this acknowledgement, and the accept-

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*ble at* http://query.nytimes.com/gst/fullpage.html?res=9D03E1DB143EF932A15754C0A962958260&sec=&spon=&partner=permalink&exprod=permalink.

15. Khadra Hassan Farah et al. (Immigration and Refugee Board of Canada, May 10, 1994), *available at* http://www.unhcr.org/refworld/country,,IRBC,CASELAW,SOM,456d621e2,3ae6b70618,0.html.

16. Won Kidane, *An Injury to the Citizen, a Pleasure to the State: A Peculiar Challenge to the Enforcement of International Refugee Law*, 6 CHI.-KENT J. INT'L & COMP. L. 116, 138 (2006) (quoting Kris Ann Balser Moussette, *Female Genital Mutilation and Refugees in the United States—A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 378–79 (1996)).

17. Matter of Oluloro, No. A72 147 491 (oral decision) (U.S. Dept. of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994).

18. Judge Warren suspended the pending deportation order against Oluloro. Note that the term "removal" now generally replaces the term "deportation" to signify expulsion from U.S. territory.

19. *Nigerians Spared Deportation*, N.Y. TIMES, Mar. 24, 1994, at A19, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A02E1D8133CF937A15750C0A962958260&sec=&spon=&partner=permalink&exprod=permalink.

20. *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996), *available at* http://www.uniset.ca/naty/maternity/21INDec357.htm.

21. *Id.* at 365.

ance of Kasinga's membership in a particular social group[22] that was targeted for persecution, the Board officially opened the U.S. asylum system to women fleeing the risk of FGM in their countries of origin.

Immediately following *Kasinga*, immigration judges properly applied asylum law to the claims of parents fearing that their daughters would be mutilated upon return to their home countries. In *In re Adeniji*, a father was granted withholding of removal[23] on the basis that his citizen daughters would be forced to undergo FGM if he was returned to Nigeria.[24] The immigration judge determined that if the father were deported, his daughters would be "de facto" removed and subjected to FGM.[25] In another 1998 case, *Matter of Konate*, a mother received asylum as a result of the persecution she would face because her "opposition to gender norms, demonstrated in part by her attempts to protect her daughter from FG[M], constituted a political opinion."[26]

A third early case, *Matter of Dibba*, recognized that persecution would result for a mother if she was forced to return to Gambia, where her daughter would face the threat of FGM. This time, the Board concluded that the psychological harm to the mother caused by her daughter's mutilation would be "mental suffering sufficient to constitute persecution."[27] Thus, the Board correctly recognized the independent asylum claim of the parent, finding that the harms she would personally experience—exposing her child to torture or forced abandonment of her child—would rise to the level of persecution.

It is tragic that if Farah, Oluloro, Adeniji, Konate, or Dibba were to arrive in the United States with their daughters today, the current immigration system could deny them asylum and fail to recognize them as refugees. This is in part because the statute granting derivative asylum only benefits spouses and children of refugees. The Immigration and National-

22. The formulation of Kasinga's particular social group did not include all women at risk of FGM but rather "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Id.* In *Kasinga*, both parties "urge[d] the Board to adopt only that definition of social group necessary to decide this individual case." *Id.* Therefore, *Kasinga* made it possible for women at risk of FGM to present their asylum cases, but not necessarily to prevail on risk alone.

23. Withholding of removal is granted according to a standard very similar to asylum except that when an alien meets the withholding criteria, the remedy is mandatory, whereas asylum grants are always discretionary. *Compare* 8 U.S.C. § 1253(h)(1) *with* 8 U.S.C.A § 1158(b)(1)(A). Also, the withholding of removal standard requires a showing of a greater probability of harm (more likely than not) than does the asylum standard (reasonable possibility). *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 423, 440 (1987).

24. *In re* Adeniji, No. A41 542 131 (oral decision) (U.S. Dept. of Justice, Immigration Court, York, Pa., Mar. 10, 1998), *discussed in* Bah v. Gonzales, 462 F.3d 637, 642 (6th Cir. 2006).

25. Marcelle Rice, *Protecting Parents: Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, IMMIGR. BRIEFINGS, Nov. 2004, at 1, 2.

26. *Id.* at 15 n.12. *See* Matter of Konate (U.S. Dept. of Justice, Immigration Court, Boston, Mass., Feb. 19, 1998).

27. Matter of Dibba, No. A73 541 857 (B.I.A. 2001), *discussed in* Rice, *supra* note 25; *see also* Bah v. Gonzales, 462 F.3d 637, 642 (6th Cir. 2006).

ity Act ("INA") states, "In general, a spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien."[28] Parents of asylees are not offered "derivative" status, but must themselves be refugees according to the U.S. law.[29]

Many observers have called for amendment of the INA to provide derivative status to parents who want to protect their refugee children from FGM.[30] This is a worthy congressional initiative. However, what numerous courts and commentators have overlooked is that many, if not all, parents seeking asylum in the United States in order to prevent the mutilation of their daughters are refugees themselves. Although an amendment of the INA to extend the statutory derivative benefit to the parents of minor asylee children would be an important improvement in effectuating the humanitarian purpose of asylum law, it obscures the larger problem at hand. The early cases got it right; the refugee definition already accommodates the claims of parents who fear that their removal will result in the mutilation of their daughters. By blurring the theoretical underpinnings of asylum law, judges and commentators are suggesting that no relief is available for individuals who, in reality, *are* refugees within the meaning of the Convention and INA.

## II. Parents Can Satisfy the Elements of the Refugee Definition

A "refugee" is a person "who is unable or unwilling to return to" her country of origin "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."[31] It is important to remember that in the United States, the grant of asylum is not mandatory for all refugees; asylum is available only at the discretion of the Attorney General.[32] Under existing law, parents in the United States who fear that their daughters will be subjected to FGM if the family is deported can satisfy the elements of the refugee definition that an applicant must fulfill in order to qualify for this discretionary relief.

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28. 8 U.S.C. § 1158(b)(3)(A) (2006).

29. *Id.* Note that only spouses and children qualify for derivative status.

30. *See, e.g.*, Alida Lasker, Note, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents*, 32 Brook. J. Int'l L. 231 (2006); Wes Henricksen, Note & Comment, Abay v. Ashcroft: *The Sixth Circuit's Baseless Expansion of INA § 101(a)(42)(A) Revealed a Gap in Asylum Law*, 80 Wash. L. Rev. 477, 502 (2005); Kimberly Blizzard, Note, *A Parent's Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation*, 91 Cornell L. Rev. 899, 921–22 (2006); Dree Collopy, Note, *Incorporating a Hardship Factor in Asylum Claims Based on Female Genital Mutilation: A Legislative Solution to Protect the Best Interests of Children*, 21 Geo. Immigr. L.J. 469, 498 (2007).

31. 8 U.S.C. § 1101(a)(42)(A) (2006).

32. 8 U.S.C. § 1158(b)(1)(A) (2006).

### *A. Establishing a Well-Founded Fear*

The first element of the definition requires the applicant to demonstrate either a well-founded fear of future persecution or an incidence of past persecution. The applicant must show both a subjective and objective apprehension of harm. In *INS v. Cardoza-Fonseca*, the Court explained the interaction between the subjective and objective components:

> 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.[33]

The immigration judge must confirm that the applicant genuinely fears returning to his or her country of origin. In addition to ascertaining the applicant's subjective fear, the immigration judge must also find that this fear is well-founded. Evidence of past persecution creates a rebuttable presumption[34] that fear of future persecution is well-founded.[35]

For a parent of a child at risk of FGM, it is unlikely that showing subjective fear will ever be an obstacle.[36] Instead, the more complicated task is to show that this fear is objectively reasonable. To meet this burden, a parent could show the incidence of FGM of similarly situated individuals in her home country, as well as the specific targeting of her daughter for the procedure. In some regions, the rate of incidence will speak for itself—in seven countries the prevalence reaches near-universality and is over 85%.[37] Furthermore, a parent can explain the basis of her objection to FGM and any possible consequences that her society imposes on parents who refuse to let their children be mutilated. Finally, a parent applying for asylum will need to show that it is impossible, without asylum, to maintain the intactness of the family unit.

A parent can have a well-founded fear of her child's mutilation only if it is accompanied by an inability to prevent the FGM or the forced separation of the family.[38] This is not a "more likely than not" standard, but if the parent has the power to prevent her daughter from being subjected to FGM, this will negate the well-founded fear. However, given the severity of the persecution that FGM and the forced abandonment of a child pose, a

33. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

34. 8 U.S.C. § 1101(a)(42)(A) (2006).

35. 8 C.F.R. § 208.13(b)(1) (2006).

36. Note that the child's subjective fear is not a relevant issue in the independent asylum claim of the parent.

37. *See* WHO, ELIMINATING, *supra* note 5.

38. Although a parent who is able to prevent her daughter's mutilation could not have a well-founded fear of her daughter being subjected to FGM, such a parent could have a well-founded fear of the persecution that would result from refusal to permit the daughter's mutilation.

mere chance that a parent *might* be able to stop his child's would-be mutilators should not be enough to defeat the well-founded fear.[39]

In short, the parent must show that her removal will force either the abandonment or the return and mutilation of her daughter. These facts, when properly presented, can support a well-founded fear separate from the well-founded fear held by the daughter herself. Given the extremely high incidence of FGM in some countries, the likely mutilation of all women in such regions should provide an adequate basis for a reasonable fear.[40]

### *B. Persecution*

The applying parent must also show that the harm she fears rises to the level of persecution. On this point, *Farah* correctly implemented the Convention and properly conceptualized persecution. The harm to parents includes the psychological trauma of having one's child being mutilated, or in the alternative, of being forced to abandon one's daughter.[41] In general, an adjudicator can properly assess whether harm rises to the level of persecution by considering whether such harm will deny the person a fundamental human right.[42] This basic guidepost indicates that parents who confront the mutilation or forced abandonment of their children experience harms that are sufficiently grave as to constitute persecution.

The U.N. High Commissioner for Refugees ("UNHCR") 1979 Handbook on Determining Refugee Status ("Handbook")[43] confirms the proposition that "[o]ther serious violations of human rights," beyond threats to life and freedom, "also constitute persecution."[44] The Universal Declaration of Human Rights ("UDHR") provides an enumeration of the most

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39. This is a reflection of the view that a well-founded fear is a function of the severity of harm threatened and its probability, as opposed to a mere assessment of likelihood. This principle is rooted in the notion that the well-founded fear analysis should reflect whether "a reasonable person in [the applicant's] circumstances would fear persecution if she were to be returned to her native country." *Guevara-Flores v. INS, 786 F.2d 1242,* 1249 (5th Cir. 1986). Thus, rather than a simple function of likelihood, well-founded fear accounts for all the circumstances surrounding the applicant's feared persecution. *See also* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

40. For example, survey evidence has shown the rates of FGM prevalence in the following countries: Djibouti (93.1%), Egypt (95.8%), Guinea (95.6%), Mali (91.6%), Sierra Leone (94%), Somalia (97.9%), Northern Sudan (90%). WHO, ELIMINATING, *supra* note 5, at 29. The rates of incidence do not have to be this high to produce a well-founded fear, but these statistics alone are strong evidence in support of the claims of women fleeing these particular countries.

41. Commentaries questioning whether severe psychological harm can constitute persecution lack a foundation in the theoretical basis of U.S. asylum law and do not adequately grasp the proper basis for interpreting persecution, which is discussed at length below. *See, e.g.*, Lasker, *supra* note 30, at 250–52.

42. State acts "may be considered persecutory *per se* where they punish the exercise of a fundamental, internationally protected human right." DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 202 (Paul T. Lufkin ed., 3d ed. 1999).

43. U.N. HIGH COMM'R ON REFUGEES [UNHCR], HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992), *available at* http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf.

44. *Id.* ¶ 51.

fundamental rights.[45] The human right to be free from torture and psychological persecution is basic. The UDHR also stipulates, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[46] The Convention Against Torture provides the following definition: "torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."[47] This is not to suggest that every infliction of severe mental suffering constitutes torture within the meaning of CAT. CAT requires the participation, knowledge, or acquiescence of public officials. However, CAT language is instructive because it identifies as torture in the form of severe mental suffering the psychological experience of a parent when his or her daughter is mutilated.

CAT jurisprudence in the United States supports the proposition that torture encompasses the "severe mental suffering that accompanies witnessing the torture of a relative."[48] The U.S. statute implementing CAT defines torture as an act that inflicts "*severe physical or mental pain or suffering*," which is defined as "prolonged mental harm caused by or resulting from . . . [among other things] the *threat that another person will imminently be subjected to* death, [or] *severe physical pain or suffering*."[49] While persecution is not required to rise to this level, parents of children at risk of FGM do meet the U.S. legal definition of torture.

As a result, it is both disturbing and incorrect for any commentator to argue that psychological harm cannot rise to the level of persecution.[50] For decades, U.S. asylum law has recognized that mental and emotional harms can, when sufficiently grave, independently constitute persecution.[51] Of particular relevance to the cases of parents fearing the mutilation of their daughters, "courts have found persecution based in significant part on the person's presence during beatings of and threats against family members."[52]

An additional cause of serious psychological harm may be found in cases where mothers seek to protect their daughters from being subjected to FGM in part because they themselves have been forced to undergo this

45. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* http://www.unhchr.ch/udhr/lang/eng.htm.

46. *Id.* at art. 5.

47. Convention Against Torture, *supra* note 3, at art. 1; *see also* Marissa Farrone, Comment, *Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law*, 50 ST. LOUIS U. L.J. 661, 668 (2006) (emphasizing that mental pain and suffering can constitute torture according to the CAT).

48. Rice, *supra* note 25, at 10.

49. *Id.* (emphasis added) (citing 18 U.S.C. § 2340 (2006)).

50. Further, it is misleading to state that in order for psychological harm to rise to the level of persecution, it must be accompanied by sufficiently serious physical harm. *See, e.g.*, Henricksen, *supra* note 30, at 498 ("mental injury . . . could not rise to the level of persecution because there was no showing that Abay would be physically harmed").

51. *See* Kovac v. INS, 407 F.2d 102, 106–07 (9th Cir. 1969) (concluding that persecution can result from either physical or mental suffering and that Congress directly intended this result when it deleted the adjective "physical" from the statute's definition of persecution in 1969).

52. ANKER, *supra* note 42, at 216 (citing Alarcon-Mancilla v. INS, No. 97-70619, 1998 U.S. App. LEXIS 10758, at 5 (9th Cir. May 27, 1998) and Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997)).

terrible procedure. In these cases, the mother would experience psychological trauma not just from witnessing her child being mutilated but also because she would be forced to undergo a re-enactment of her own torture. As one adult asylum seeker explained as she described her mutilation to the Immigration and Refugee Board of Canada,

> They took me into an empty room and tying my arms behind my back. Two pairs of women grabbed my legs and spread them wide open. They hold my legs very tight so that I would not be able to move them. Then, another lady started to get a new blade and took the cover off of it. She was holding the blade in her hand when she disappeared between my legs. She inserted her fingers into my inside to search for my clitoris. She got a good grip of my clitoris and started to pull it out, and I felt the pain and started to scream. She cut off my clitoris with the blade and I screamed more and more. This did not deter her nor did it make her to stop cutting my body any further. She continued slicing away my labia minor at which point, I lost consciousness. Subsequently, she scraped raw the wall of my vulva and bound them together with thorns. She place a stick between the raw walls of my vulva so that I would have barely sufficient means to expel my bodily waste. I woke up in the middle of the night and realized that my legs were tied together to restrain me from any movement. . . . *Even though this event took place over twenty years ago, I can still easily visualize the scene and feel the pain and trauma all over again when I start to talk about it.*[53]

For these mothers, the psychological harm resulting from the mutilation of their daughters is a multilayered and complex form of persecution, to which adjudicators and advocates should be especially sensitive.

The second form that the persecution of parents can take is the forced abandonment of their children. The rights to form a family and to live with and protect one's children are fundamental. When the state forces a parent to abandon her child because it is complicit in or unable to stop the persecution of the child, the parent suffers persecution. The UDHR states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[54] In fact, the UDHR addresses the distinct associational rights to which all people are entitled when they form a family: the parent has the right of freedom to live and associate with the members of his or her family without state interference.[55]

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53. (Typed as per original with errors and/or omissions) (emphasis added) Khadra Hassan Farah et al., Immigration and Refugee Board of Canada, May 10, 1994, *available at* http://www.unhcr.org/refworld/country,,IRBC,CASELAW,SOM,456d621e2,3ae6b70618,0.html.

54. Universal Declaration of Human Rights, *supra* note 45, at art. 16(3).

55. *Id.*

The parent's right not to be forced to abandon her child reaches beyond the UDHR and is rooted in other U.N. human rights documents. The International Covenant on Economic, Social and Cultural Rights states: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."[56] Indeed, the Board addressed this issue, although not directly, when it found that a father would suffer persecution as a result of the conscription of his underage children.[57] Further, a parent's right to maintain custody of her child and the intactness of her family are understood as fundamental rights by the U.S. courts and the international community.[58] The International Covenant on Civil and Political Rights recognizes the special associational rights attached to the formation and maintenance of the family.[59] These documents establish that the right to found and associate with one's family is basic, as is the right to freedom from unlawful interference with one's family. An arbitrary and discriminatory violation of these rights that forces the abandonment of one's child in order to avoid her torture is violative of the basic guarantees of human dignity that the Convention sought to protect.

Without compelling doctrine to the contrary, the Handbook's definition of persecution is highly persuasive authority to courts implementing the Refugee Act and the Convention. In *INS v. Cardoza-Fonseca*, the Supreme Court recognized that although the Handbook is not legally binding, it "provides significant guidance in construing the Protocol, to which Congress sought to conform."[60] In *INS v. Aguirre-Aguirre*, the Court again explained that "the U.N. Handbook provides some guidance in construing the provisions added to the INA by the Refugee Act" and can serve as a "useful interpretative aid."[61] Therefore, the Handbook's guidance on the interpretation of "persecution" should illuminate the evaluation of parents' claims based on the mutilation of their daughters. It thus follows that because the Handbook defines persecution as the violation of basic human rights, and international treaties identify both the forced abandonment of a child and the psychological harm caused by the torture of one's child as

56. International Covenant on Social, Economic and Cultural Rights, art. 10, Dec. 16, 1966, 999 U.N.T.S. 3.

57. *See In re* C-H-P-, (Atlanta, Ga., BIA Nov. 20, 1987) (unpublished opinion).

58. In the context of U.S. constitutional law, it is telling that the right to maintain the intactness of one's family unit was deemed a right fundamental to free association guaranteed by the First Amendment and the substantive due process of the Fifth Amendment. *See* Moore v. City of Cleveland, 431 U.S. 494 (1977).

59. *See* International Covenant on Civil and Political Rights, art. 23 (addressing creation and maintenance of the family unit) and art. 22 (addressing the rights of association), Dec. 19, 1966, 999 U.N.T.S. 171.

60. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n. 22 (1987).

61. INS v. Aguirre-Aguirre, 526 U.S. 415, 429 (1999).

violations of inviolable human rights, these harms should rise to the level of persecution according to U.S. law.

In fact, these two separate, direct psychological harms already rise to the level of persecution according to U.S. asylum law. The psychological harm experienced by parents upon the mutilation of their children is persecution for the purposes of the refugee definition, comporting with the basic definition that persecution is the infliction of serious harm.[62]

Further, the Board of Immigration Appeals and the First, Third, Sixth, Seventh, Eighth and Ninth Circuits have all recognized that persecution encompasses "threats to freedom" and/or the "significant deprivation of liberty."[63] The forced abandonment of one's child threatens a parent's freedom and deprives her of liberty; these harms are on the extreme end of persecution. Acts that do not rise to this level of harm can also constitute persecution. It should not be debatable that parents fearing the mutilation of their children are apprehending a harm that rises to the level of persecution. Unfortunately, courts and commentators that grossly misunderstand the theoretical framework of asylum label these serious harms as "derivative" or "indirect," which is in complete contradiction of the Convention, the Handbook, international human rights norms, and even U.S. case law.[64]

### C. *Harms Suffered on Account of Group Membership*

Parents who will be forced to either abandon their children or watch them undergo mutilation suffer these serious harms "on account of" their membership in a particular social group. To be a refugee is more than to be persecuted. A refugee must demonstrate a nexus between the persecution and her membership in a category recognized by the Convention as grounds for refugee status.[65] On the point of nexus, U.S. law unfortunately departs from UNHCR guidance and the practices of other states parties.[66] The

62. This harm is sufficiently serious if, as CAT jurisprudence directs, it constitutes torture.

63. Suharyadi v. Attorney General, No. 06-2314, 2008 U.S. App. LEXIS 6369, at 8 (3d Cir. Mar. 26, 2008); Bi Hua Weng v. Mukasey, No. 06-3862, *2007 U.S. App. LEXIS 29635, at 9* (6th Cir. Dec. 19, 2007); Evelyne v. Keisler, No. 06-2314, 2007 U.S. App. LEXIS 23685, at 7 (1st Cir. Oct. 5, 2007); Pavlovich v. Gonzales, 476 F.3d 613, 616 (8th Cir. 2007); Roman v. INS, 233 F.3d 1027, 1034 (7th Cir. 2000); Alfaro v. INS, No. 95-70493, 1997 U.S. App. LEXIS 2503, at 4–5 (9th Cir. Feb. 12, 1997); Matter of Acosta, 19 I. & N. Dec. 211, 223–24 (B.I.A. 1985).

64. *See, e.g.*, Blizzard, *supra* note 30, at 912–13 (concluding that "parents do not suffer persecution" and labeling the extension of asylum to parents' individual claims as a distortion of the legal standard for refugee status).

65. 8 U.S.C. § 1101(a)(42)(A) (2006).

66. For UNHCR guidance on nexus, see U.N. High Comm'r on Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 21, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR, *Gender-Related Persecution*], and U.N. High Comm'r on Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article IA(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 22, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR, *Social Group Guidelines*]. For examples of the practices of other state parties, see Islam (A.P.) v. Sec'y of State for the Home Dep't, (1999) 2 All E.R. 545 (H.L.) (U.K.), Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah, (1999) 2 A11 E.R. 545 (H.L.)

United States requires a showing that the persecutor is motivated by the race, religion, nationality, social group, or political opinion of the applicant.[67] The applicant "must provide *some* evidence of [the persecutor's motivation], direct or circumstantial."[68] This "motive of the persecutor" standard is not in keeping with the spirit of the Convention.[69] Instead, it would be more proper for U.S. courts to employ a bifurcated nexus analysis, which permits applicants to show a causal nexus either between the persecutor's actions and a Convention ground, or between the country of origin's withholding of protection and a Convention ground.[70] Unfortunately, until the United States adopts an improved interpretation of nexus, including a bifurcated analysis, this is the standard by which asylum seekers in the United States must prove their cases.[71]

Even under the current U.S. interpretation of nexus, the motive of the persecutor need not be malicious, it must only be effectuated in order to "punish" or "overcome" the characteristic that forms the basis of the victim's Convention ground membership.[72] A "subjectively benign intent" can satisfy the nexus requirement for the persecutor's motive, whether or not the persecutor intends the act as harmful, as long as the persecutor intends to accomplish the act that inflicts the harm.[73] In the case of parent applicants, the persecutors who intend to mutilate their children have an actual, purposive objective of carrying out this act. The fact that some persecutors may subjectively understand the act of mutilation to benefit the child is irrelevant—only the persecutor's intention to carry out the act that ultimately brings about objective harm to the child can affect the case's disposition. Likewise, the severe psychological trauma experienced by a parent as a result of the mutilation of her daughter and the potential forced abandonment of her child constitute foreseeable consequences of the purposive act of mutilation. An analogous situation would be the execution of a family member by a persecutor attempting to restore honor to surviving relatives, yet causing them severe psychological harm. The persecutor di-

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(U.K.); Sec'y of State for the Home Dep't v. K (FC), [2006] UKHL 46 (H.L.) (U.K.); Minister for Immigration and Multicultural Affairs v. Khawar, [2000] F.C.A. 1130 (Austl.); Refugee Appeal No. 71427/99 [2000] N.Z.A.R. 545 (New Zealand Refugee Status Appeals Authority).

67. *See* INS v. Elias-Zacarias, 502 U.S. 478 (1992).

68. *Id.* at 483.

69. *See* G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 50 (2d ed. 1996) ("[N]owhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status.").

70. In other words, a bifurcated analysis of nexus permits an applicant to establish the required causal link between persecution and a Convention ground by either: (1) evidence of the reasons why persecution has or will arise, or (2) evidence of the reasons why the applicant's country of origin has or will withhold effective protection. For the UNHCR's articulation of bifurcated nexus, see UNHCR, *Gender-Related Persecution*, *supra* note 66, and UNHCR, *Social Group Guidelines*, supra note 66.

71. For more on a proper conceptualization of the nexus requirement, see James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT'L L. 207 (2002).

72. Matter of Bennett, 19 I. & N. Dec. 21, 24–26 (B.I.A. 1984).

73. *In re* Kasinga, 21 I. & N. Dec. 357, 366–67 (B.I.A. 1996).

rects his act to all members of the family, not just the murdered victim, for they all suffer as foreseeable victims to an act of extreme violence against a family member.

## III. Qualifying Under a Convention Ground: Membership in a Particular Social Group

Parents who fear the genital mutilation of their daughters belong to a particular social group, a Convention ground incorporated into the U.S. refugee definition.[74] According to the Handbook, a particular social group comprises "persons of similar background, habits or social status."[75] Another basis of a particular social group can be when the persecutor holds members to be "an obstacle to [his] policies" and objectives.[76]

U.S. asylum law aligns with the UNHCR guideline that states that the social group must "share a common characteristic other than their risk of being persecuted."[77] The Board of Immigration Appeals in *Matter of Acosta* set out the basic standard for membership in a particular social group: the common characteristic shared "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."[78]

In past cases unrelated to FGM, parents of persecuted children have qualified as members of a particular social group, and these precedents should not be disturbed.[79] In a broader sense, the Board has long recognized that a family satisfies the definition of a particular social group when sufficiently tied by kinship.[80] The UNHCR strongly supports the position that a family relationship can be the basis for membership in a particular social group. For example, the UNHCR Social Group Guidelines explicitly recognize families as social groups.[81] Such published guidelines[82] supplement and update the Handbook, so U.S. courts should consider them as persuasive as

74. 8 U.S.C. § 1101(a)(42)(A) (2006).

75. UNHCR, Handbook, *supra* note 43, ¶ 77.

76. *Id.* ¶ 78.

77. UNHCR, *Social Group Guidelines*, *supra* note 66, ¶ 11.

78. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

79. *See* Mgoian v. INS, 184 F.3d 1029, 1036 (9th Cir. 1999) (parents of Burmese student dissidents); Tchoukhrova v. Gonzales, 404 F.3d 1181, 1184 (9th Cir. 2005) (vacated and remanded on account of Gonzales v. Thomas, 547 U.S. 183 (2006) (requiring an agency finding that the group presented the kind of kinship ties that constituted a particular social group)).

80. *See* Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005) (en banc) (unanimously holding that "a family *may* constitute a social group for the purposes of the refugee statutes") (emphasis added), *vacated and remanded*, 547 U.S. 183 (2006) (vacating and remanding to permit an agency determination of whether the kinship ties in the case established particular social group status); Lukwago v. Ashcroft, 329 F.3d 157, 178–79 (3d Cir. 2003) (kinship); Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985) (kinship ties).

81. UNHCR, *Social Group Guidelines*, *supra* note 66, ¶ 6 ("Families, for example, can constitute a particular social group within the meaning of Article 1A(2).").

82. There are several dealing with different components of the refugee definition and the implementation of asylum systems.

the Handbook itself. The UNHCR Social Group Guidelines explain that family can be the basis of a particular social group under both the "immutable characteristic" and the "social perception" approaches on which states party to the Convention rely.[83]

Therefore, in the broadest sense, a parent of a genitally intact girl, in a country with nearly universal incidence of FGM, will always be a member of a particular social group based on an immutable characteristic—something that he or she should not have to change based on principles of inherent human dignity. In some situations, this social group definition may be more narrow and dependent upon the family's ethnicity, religion, or political beliefs. Parents who hold progressive attitudes about gender and sex equality are liable to be at an increased risk, especially if the defense of their daughters will likely bring violent repercussions. Not all parents of intact daughters belong to a particular social group; only those for whom this characteristic bears social significance. For many parents, however, their nonconformity with prevailing communal norms—maintaining their daughters' genital intactness—will be a conspicuous and dangerous social statement that substantiates their membership in a particular social group.

## IV. Three Kinds of Parental Asylum Claims

Parents of daughters at risk of FGM who apply for asylum in the United States will generally fall into one of three categories of claims: 1) parents applying simultaneously with their alien daughters, 2) parents applying independently from their legal permanent resident ("LPR") or citizen daughters, and 3) parents applying independently from their alien daughters who are not present in the United States. Each circumstance raises specific legal issues, but none should preclude the availability of asylum relief.

First, a parent who applies simultaneously with her alien daughter forms a prototypical asylum case based on the threatened mutilation of the child. Beside the task of reinforcing the way in which her claim comports with the theoretical framework for asylum relief, she faces additional legal hurdles due to this procedural posture. At least one commentator has suggested that U.S. cases may be read to support the argument that such parents do not have valid individual asylum claims because they will no longer be refugees when their children are granted asylum.[84]

This is faulty logic for two separate and independently sufficient reasons. First, the government should not challenge the validity of an individual's refugee status based on a hypothetical, independent intervening act by that

83. UNHCR, *Social Group Guidelines*, *supra* note 66, ¶ 6.

84. For an example of this offensive and poorly developed logic, see Henricksen, *supra* note 30, at 500–01 (citing *Abebe v. Ashcroft*, 379 F.3d 755, 759 (9th Cir. 2004); *Olowo v. Ashcroft*, 368 F.3d 692, 697–98 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003); *Osigwe v. Ashcroft*, 77 Fed. Appx. 235, 235 (5th Cir. 2003)).

government. This would be akin to challenging a refugee's asylum claim based on the possibility that another government actor could grant an alternate form of relief. No judge should tolerate such a poor and procedurally inappropriate line of reasoning. The immigration judge weighs the evidence before her and determines whether it supports a grant of relief to the applicant. Although the immigration judge may have a proper role in developing the record and introducing evidence,[85] this responsibility is limited to contributions of fact, not conjecture. Precedent nowhere permits the consideration of factual contingencies as a proper basis for decision. Second, this logic also fails because, when assessing the parent's well-founded fear of persecution, it considers only the psychological harm resulting from the mutilation of the child. This rationale ignores a concomitant threat of persecution: the forced abandonment of one's child on the basis of an impermissible Convention ground.

The second type of applicant, a parent applying independently from her LPR or citizen daughter, faces an extra hurdle in proving her claim. She will likely have difficulty demonstrating persecution based on her daughter's risk of FGM because her daughter has a legal right to remain in the United States.[86] Instead, she can establish persecution because of her fear of the forced abandonment of her child on the basis of an impermissible Convention ground. Courts adjudicating asylum claims have inadequately considered this second form of persecution. The advocates of these parents must emphasize that the forced abandonment of the applicant's child *is* a serious harm, and one that the child and parent's would-be persecutors impose upon them (without the protection of the state) because of their social group membership.

The third type of applicant, a parent applying independently from her alien daughter who is not present in the United States, should not be treated any differently from the first type. When such a parent is returned to her country of origin, she is subject to the very same harms that would exist were her children traveling with her. In these circumstances, if a parent must return, she would likely witness her daughter's mutilation and suffer extreme psychological trauma. The derivative status that her daughter would receive upon a grant of asylum should not factor into the legal analysis. However, all applicants with family-based particular social group claims face this reality and, often, derivative status *does* substitute for the individual asylum claims of family members. This does not mean that the applicant parent is circumventing the asylum system, but rather, that she is asserting her independent and personal case for being recognized as a refu-

85. *See* 8 U.S.C. § 1229a (b)(1) (2008); *In re* S-M-J-, 21 I. & N. Dec. 722, 726 (B.I.A. 1997).

86. Such parents may argue that their daughters will be de facto removed with them and thus are not protected from the threat of FGM. This argument is especially persuasive when no guardian or family member remains in the United States. See the discussion of *Hassan v. Gonzales*, *infra* at 94.

gee. Courts should take these claims seriously and consider them on the merits separate from the daughter's claims.

## V. The Cases That Got It Right

Like most particular social group cases, the claims of parents who fear the mutilation of their children pose conceptually difficult problems and exist at the frontier of asylum jurisprudence. Fortunately, there have been cases, both domestically and in other states party to the Convention, that apply the refugee definition correctly. These cases have been rigorously criticized by individuals with a poor understanding of asylum law, and such weak criticisms, in fact, often validate the conclusions that result from appropriate application of the law.

### *A. Domestic Judicial Precedent*

The Sixth Circuit case *Abay v. Ashcroft* recognized the asylum claims of parents with a well-founded fear of the mutilation of their daughters.[87] In *Abay*, both a mother and daughter applied for asylum on the basis that if they returned to Ethiopia—a country with "nearly universal" FGM—the daughter would be genitally mutilated and her mother would experience severe psychological harm.[88] The mother acknowledged her ineligibility for derivative asylum, and instead argued an independent eligibility for asylum based upon fear of the torture of a close family member.[89] The court noted that in *Matter of C-Y-Z-*, the Board acknowledged this independent form of persecution.[90] The court also referenced *Matter of Adeniji*, *Matter of Oluloro*, and *Matter of Dibba* as instructive.[91] In a conclusion that has proven controversial, the court stated that these cases "suggest a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm."[92] This governing principle acknowledged that Abay's forced subjection "to witness[ing] the pain and suffering of her daughter" would itself constitute persecution.[93] As discussed above, this conclusion follows precedent and aligns with the language of the refugee definition.

87. Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004).
88. *Id.* at 640.
89. *Id.* at 641.
90. *Id.*
91. *Id.* at 642 (citing *Matter of Dibba*, No. A73 541 857 (B.I.A. 2001), *In re Adeniji*, No. A41 542 131 (oral decision) (U.S. Dept. of Justice, Immigration Court, York, Pa., Mar. 10, 1998), and *Matter of Oluloro*, No. A72 147 491 (oral decision) (U.S. Dept. of Justice, Immigration Court, Seattle, Wash., Mar. 23, 1994)).
92. *Id.*
93. *Id.*

The important Eighth Circuit case *Hassan v. Gonzales* addressed an immigration judge's illogical invalidation of a mother's asylum claim on the grounds that she could leave her daughters in the United States instead of bringing them back with her to Somalia to avoid FGM.[94] The Circuit rejected the assumption that the mother should leave her children behind and questioned the immigration judge's conclusion that the mother's own FGM "is the only form of persecution" to which she could be subjected in Somalia.[95] Although *Hassan* did not specifically address the forms of persecution facing parents of children threatened with FGM (the Eighth Circuit has specifically declined to address this issue)[96] it importantly rejected the faulty and biased reasoning that prevents these parents from presenting their claims in the first place.

In *Nwaokolo v. INS*, the Seventh Circuit considered a request for a stay of removal by a mother fearing that she could not return to Nigeria because her four-year-old U.S. citizen daughter would be mutilated.[97] To consider the motion, the circuit evaluated Nwaokolo's likelihood of success, and acknowledged that the applicant had a valid claim for discretionary relief.[98] Although the court did not conduct an in-depth analysis of Nwaokolo's claim, it took judicial notice of the widespread practice of FGM on Nigerian women "from a few days after birth to a few days after death."[99] In the end, the court granted the stay, noting a compelling interest in preventing the forced exile and torture of U.S. citizens and the Board's new ability to consider family FGM-based claims.[100]

### *B. Foreign Cases*

Apart from the Sixth Circuit in *Abay v. Ashcroft*, other state parties to the Convention have done a better job of faithfully applying the refugee definition to the cases of parents fearing the mutilation of their children. The recent Canadian case *Ndegwa v. Canada* dealt with this very type of claim and properly dispelled the argument that the parent's harm was "indirect" and thus did not rise to the level of persecution.[101] The Federal Court of Canada explained that "there was a sufficient nexus between the applicant's

94. Hassan v. Gonzales, 484 F.3d 513, 515–16, 519 (8th Cir. 2007).

95. *Id.* at 518.

96. *See* Gumaneh v. Mukasey, 535 F.3d 785, n.3 (8th Cir. 2008) ("Gumaneh, however, does not argue that she is eligible for withholding of removal based upon any psychological harm to herself, and we decline to address this issue.").

97. Nwaokolo v. INS, 314 F.3d 303 (7th Cir. 2002).

98. *Id.* at 307.

99. *Id.* at 308.

100. *Id.* at 310. Another case that got it right, *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004), addressed the denial of a Nigerian mother's motion to reopen deportation hearings based on her fear that her U.S. citizen daughter, like herself, would be subjected to FGM upon return to the country. The Circuit affirmed the denial of the motion to reopen based on untimeliness, but remanded for consideration whether the mother was eligible for relief based on the CAT.

101. Ndegwa v. Canada (Minister of Citizenship and Immigration), [2006] F.C. 847 (Can.).

claim and his wife and daughter's persecution" and that the Canadian Immigration and Refugee Board erred by "not considering whether the applicant would be persecuted as a member of his family."[102] The court concluded: "This is not a case of indirect persecution. The applicant is not just an 'unwilling spectator of violence' against other members of his family . . . [h]e himself may be at risk . . . .The [Canadian Immigration and Refugee Review] Board should have considered this in its analysis."[103] This proper application of the Convention addressed the errors of the lower courts and exemplifies what the United States has been lacking from its highest Court.

In 1993, the Canadian Board correctly decided a similar case when granting asylum to a Somali woman based on her fear of the direct harm possible if she could not prevent the FGM of her daughters.[104] Also, Canadian adjudicators have granted humanitarian-based asylum relief to two other mothers based on their fear of the mutilation of their daughters.[105]

Recent case law from the United Kingdom reinforces the theoretical basis for granting asylum to parents with children at risk of FGM. In one case, the Asylum and Immigration Tribunal awarded a mother asylum relief because she feared her daughters would be subjected to FGM upon a return to Sudan.[106] The 2006 case *Fornah v. Secretary of State* confirmed the availability of asylum relief in the United Kingdom for applicants persecuted "for reasons of their family group."[107] In such cases, it does not matter whether the persecutor intended to punish the parent but that the persecution results from "their membership of a particular social group."[108] The House of Lords concluded that whether the persecutor's motives were benign or punitive had no relevance.[109] This holding is consistent with a third U.K. case wherein the Immigration Appeal Tribunal granted a father and mother relief based on the harm they would experience from their inability to prevent the mutilation of their daughter.[110]

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102. *Id.* ¶¶ 9–10.

103. *Id.* ¶ 11.

104. Khadra Hassan Farah et al., Immigration and Refugee Board of Canada, May 10, 1994, *available at* http://www.unhcr.org/refworld/country,,IRBC,CASELAW,SOM,456d621e2,3ae6b70618,0.html.

105. *See* Obasohan v. Canada (Minister of Citizenship & Immigration), [2001] F.C.T. 92 (Can.) and the case of Oumou Toure, who was granted asylum without opinion by the Canadian Department of Citizenship and Immigration. Theresa Braine, *Guinea Woman Savors Victory in Hard-Won FGM Case*, WOMEN'S ENEWS, July 29, 2007, *available at* http://www.womensenews.org/article.cfm/dyn/aid/3257/context/archive.

106. FM (FGM) Sudan v. Sec'y of State for the Home Dep't, [2007] UKAIT 00060 (U.K. Asylum and Immigration Tribunal), *available at* http://www.bailii.org/uk/cases/UKIAT/2007/00060.html.

107. Fornah v. Sec'y of State, [2006] UKHL 46, [2007] 1 A.C. 412, 416 (U.K.).

108. Fornah, [2006] UKHL 46 ¶¶ 20–21.

109. *Id.*

110. M.H. & Others v. Sec'y of State for the Home Dep't, [2002] UKIAT 02691 (U.K. Asylum and Immigration Tribunal), *available at* http://www.bailii.org/uk/cases/UKIAT/2002/02691.html.

Like Canada and the United Kingdom, Australia has properly recognized the refugee status of parents who fear the mutilation of their daughters. In an Australian Refugee Review Tribunal decision, the court recognized a mother fearing the FGM of her daughter as a refugee and granted her asylum.[111] The tribunal explicitly acknowledged the mother's fear that her daughter would be subjected to FGM as a basis for satisfying the element of well-founded fear.[112] By doing so, the Australian tribunal joined those foreign and United States courts that have correctly applied the refugee definition according to the Convention, and demonstrated that a parent with a well-founded fear that she will be forced to abandon or witness the mutilation of her child is entitled to asylum.

## VI. The Cases That Got It Wrong

Several Circuit Courts of Appeals in the United States have erroneously focused on the unavailability of derivative asylum benefits for parents and obscured the reality that parents can have independently valid asylum claims. The Fourth and Seventh Circuits have been especially problematic in their poor application of asylum law to these cases. The Fourth Circuit's treatment of these cases is the most troubling because it has incorrectly concluded, as a matter of law, that persecution "cannot be based on a fear of psychological harm alone."[113] This clear error should not be permitted to stand. The petitioner in that case presented one of the most well-articulated claims of a parent to date, arguing that "the psychological harm she will suffer if her daughter accompanies her to Senegal and is there subjected to FGM" would rise to the level of persecution.[114] This case presented an unfortunate setback and resulted from a clear misunderstanding of the refugee definition.

Recently, the First Circuit joined the Fourth Circuit in this mistaken application of asylum law in *Kechichian v. Mukasey*, asserting, "This circuit has not considered a parent's claim of psychological harm based solely on a child's potential persecution, but the BIA has foreclosed on such claims."[115] The First Circuit's basis for citing an unavailability of relief was an unfortunate reading of *In re A-K-*, a BIA case that should not be interpreted to

111. RRT Reference N97/19046 (Refugee Review Tribunal of Austl. Oct. 16, 1997), *available at* www.austlii.edu.au/au/cases/cth/RRTA/1997/4090.html.

112. *Id*; *see also* Rice, *supra* note 25, at 10. *But see* Migration Legislation Amendment Act (No. 6) 2001 (Cth), which amended Australia's refugee statute by revising the definition of persecution. This new definition omits any mention of psychological harm rising to the level of serious harm, and denies relief when the reason for an individual's fear is the persecution of another family member. *See also* Leanne McKay, *Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act (NO 6) 2001 (Cth)*, 2003 Melb. J. Int'l. L. 4.

113. Niang v. Gonzales, 492 F.3d 505, 512 (4th Cir. 2007).

114. *Id.* at 509.

115. Kechichian v. Mukasey, 535 F.3d 15, n. 13 (1st Cir. 2008) (citing *In re A-K-*, 24 I. & N. Dec. 275, 278 (B.I.A. 2007)).

foreclose on the claims of parents who have a well-founded fear of the psychological anguish they will experience at witnessing the mutilation of their daughters.[116] However, there remains hope that the First Circuit can remedy this statement because it stopped short of rejecting *Abay v. Ashcroft* and the possibility of an independent parental asylum claim. The First Circuit stated instead that the Sixth Circuit case was "factually distinguishable from Kechichian's case, and in any event, does not bind this circuit."[117]

In *Oforji v. Ashcroft*, the Seventh Circuit considered the application of a Nigerian woman who feared that her two citizen daughters would be mutilated if she was forced to return with them to Nigeria.[118] She also testified that in her tribe the punishment for refusing to mutilate one's daughter was death.[119] The court correctly recognized that persecution is the "infliction of substantial harm or suffering," but it improperly rejected the possibility that Oforji could have an independent claim for asylum.[120] In large part, the failure of Oforji's application also falls on the shoulders of her advocates, who grounded her application on the theories of "derivative asylum" and "constructive deportation" instead of her independent status as a refugee.[121]

However, this does not absolve the Seventh Circuit of its error in deviating from a proper analysis of persecution by summarily labeling the "separation of a child from its mother" as mere "hardship" and the abandonment of Oforji's children as an "unpleasant dilemma."[122] In considering only the potential for derivative asylum or relief based on constructive deportation, the Seventh Circuit flagrantly ignored the individual persecution that Oforji claimed she would suffer and declined to remand the matter for the Board's consideration of these claims. Judge Posner problematically claimed in his concurrence, "our hands . . . are tied,"[123] neglecting to realize that nothing in the refugee definition bound the court in the way he described. *Oforji v. Ashcroft* tragically exemplifies both poor advocacy and judicial short-sightedness, since a potentially bona fide refugee was, in violation of the principle of *non-refoulement*, returned to an area where she

116. *In re* A-K-, 24 I. & N. Dec. 275 (B.I.A. 2007). The Board denied withholding of removal and CAT relief to a father who feared his citizen daughters would be mutilated if forced to return to Senegal. The case turned on the facts, with the Board deciding that internal relocation was possible, and that the government did not knowingly acquiesce to the torture. Although the case did not consider asylum eligibility, it did importantly decide that the harassment that would result from the father's opposition to FGM did not rise to the level of persecution. The case did not establish Board precedent on the asylum claims of parents.

117. 535 F.3d at n.13.

118. Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003).

119. *Id.* at 612.

120. *Id.* at 613. The case is riddled with other problems, such as the unfortunate and illogical conclusion that once a woman has undergone FGM she is safe in her native society, an inference that is not only offensive but not based on the record.

121. *Id.* at 615.

122. *Id.* at 618.

123. *Id.* at 621.

might again be subjected to persecution, on account of the poor articulation of her claims.

The Seventh Circuit applied the unfortunate logic of *Oforji* in *Olowo v. Ashcroft* when a mother applied for asylum based on her fear that a return to Nigeria with her two LPR daughters would result in their mutilation.[124] The immigration judge, Board, and circuit court denied Olowo's claim for asylum on the basis that she herself did not fear future genital mutilation.[125] The circuit court summarily overlooked the possibility that Olowo would be subject to personal persecution in the form of extreme psychological harm and automatically assumed that hers was a "derivative asylum" claim based on "constructive deportation."[126] The court focused only on the potential harms to the children, completely disregarding any independent claims by the mother.

The Seventh Circuit's treatment of asylum claims based on fear of psychological trauma caused by the forced abandonment or mutilation of a child represents a mistaken analysis of these types of cases.[127] Fortunately, *Olowo* and *Oforji* should and can be limited by their application to children with a legal permanent right to remain in the United States and by their lack of consideration for the independent asylum claims of a mother based on the persecution imposed upon her by the forced abandonment of her child. Nothing prevents an advocate from properly presenting a claim in the Seventh Circuit based on a more complete and compelling legal theory.

In the troubling case of *Abebe v. Ashcroft*,[128] the Ninth Circuit at first appeared to go the way of the Seventh Circuit, just as the Fifth Circuit did in *Osigwe v. Ashcroft*.[129] A majority of the Circuit, however, voted to rehear the case en banc.[130] Upon rehearing,[131] the Ninth Circuit recognized that the question of whether parents could independently qualify for asylum based on the persecution that would result if they resisted the likely mutilation of their daughters was a matter in the first instance for the Board to consider[132] and thus subject to remand.[133] The circuit court properly recog-

124. Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. 2004).

125. *Id.* at 698.

126. *Id.* at 701.

127. *See also* Obazee v. Ashcroft, 79 F. App'x 914, 917 (7th Cir. 2003) (failing to recognize any serious harm to a mother forced to abandon her child in the United States based on her fear that, should the child return to Nigeria, she would be tortured with FGM).

128. 379 F.3d 755, 758–60 (9th Cir. 2004) (risk that asylum seeker's daughter would be subjected to FGM does not establish a well-founded fear of future persecution where both parents wished to prevent the procedure, and Ethiopian women were typically capable of protecting their daughters from FGM yet risked social ostracism).

129. 77 F. App'x 235 (5th Cir. 2003) (remanding to the Board for consideration of a humanitarian grant of asylum, but neglecting to recognize the possibility that parents fearing the genital mutilation of their citizen child upon removal to Nigeria could have an independent basis for asylum).

130. Abebe v. Gonzales, 400 F.3d 690 (9th Cir. 2005).

131. Abebe v. Gonzales, 432 F.3d 1037 (9th Cir. 2005).

132. 432 F.3d at 1043.

133. 432 F.3d at 1043 (citing INS v. Ventura, 537 U.S. 12 (2002) (directing that it is inappropriate for a circuit to interpret the refugee definition before the Board has spoken on the matter)).

nized that these independent asylum claims had not been considered by the Board and therefore required a separate investigation.

It is possible that the Sixth Circuit will follow the Ninth Circuit's example and avoid adopting the Seventh Circuit's troubling and erroneous reasoning. The Sixth Circuit's two cases dealing with the claims of parents, *Bah v. Gonzales*[134] and *Diallo v. Mukasey*,[135] do not preclude relief entirely. Unfortunately, *Bah v. Gonzales* refused relief to a mother who was seeking asylum based upon fear that her daughters, who were not present in the United States, would be subjected to FGM. However, Judge Lawson, concurring in part and dissenting in part, appropriately noted that the mother's theory was novel and warranted a remand for reconsideration.[136] The view of the dissent—which applied the holding in *INS v. Ventura*[137] that a circuit cannot interpret the refugee definition before the Board has spoken on the matter—will hopefully prevail eventually. *Diallo v. Mukasey* reached a proper conclusion, merely holding the basis of asylum on the future mutilation of potential daughters to be too speculative to support a claim.[138] Without a definitive rejection of asylum relief for parents, the Sixth Circuit may not foreclose these claims as other circuit courts have.

## Conclusion

Parents of children at risk of FGM have a well-founded fear of persecution resulting from the threatened mutilation of their daughters. While it would be easy to take a pessimistic view of the future of their asylum claims, such a view is not necessary. Although critics of *Abay v. Ashcroft* present it as a lone outlier in the face of a plethora of contrary cases,[139] this is a mischaracterization.[140] Only the Fourth Circuit has definitively rejected the possibility that these parents have valid, independent asylum

134. 462 F.3d 637 (6th Cir. 2006).

135. 268 F. App'x 373 (6th Cir. 2008).

136. Bah v. Gonzales, 462 F.3d at 645.

137. 537 U.S. 12 (2002).

138. Diallo v. Mukasey, 268 F. App'x at 377–81.

139. Such statements mischaracterize and manipulate the facts to give a false impression that it is an aberration when these parents are granted asylum. *See* Henricksen, *supra* note 30, at 497 (claiming that apart from the Sixth Circuit, "other circuits that have addressed the issue have uniformly denied asylum to mothers like Abay").

140. The following cases, often cited in support of the conclusion that these parents cannot be granted asylum, were rejected on procedural or unrelated grounds and therefore cannot support the proposition that these parental claims must necessarily fail. *See* Akpojiyovwi v. Gonzales, 224 F. App'x 361 (5th Cir. 2007) (one-year bar); Barry v. Gonzales, 445 F.3d 741 (4th Cir. 2006) (denied motion to reopen); Axmed v. U.S. Att'y Gen., 145 F. App'x 669 (11th Cir. 2005) (denied motion to reopen); Jalloh v. Gonzales, 423 F.3d 894 (8th Cir. 2005) (denied motion to reopen); Gichema v. Gonzales, 139 F. App'x 90 (10th Cir. 2005) (internal relocation reasonable); Kawu v. Ashcroft, 113 F. App'x 732 (8th Cir. 2004) (denied motion to supplement); Swiri v. Ashcroft, 95 F. App'x 708 (5th Cir. 2004) (denied motion to reopen); Alade v. Ahscroft, 69 F. App'x 771 (7th Cir. 2003) (failure to raise); Key v. INS, 64 F. App'x 891 (4th Cir. 2003) (denied motion to reopen); Ayinde v. Ashcroft, No. 02-2353, 2003 U.S. Dist. LEXIS 15655 (S.D.N.Y. Sept. 10, 2003) (failure to exhaust).

claims based on serious psychological harm. Other circuits lack a clear and cogent articulation of how these claims fit into the theory of U.S. asylum law.

The Handbook, persuasive authority to U.S. courts, directs that international human rights norms should inform the definition of persecution. The mental anguish of a parent that results from the mutilation of her child violates basic human rights and, according to the United States' own decisions, constitutes torture. Therefore, this form of severe harm absolutely rises to the level of persecution. Further, the forced separation of a parent and child also rises to the level of persecution, both through the emotional suffering inflicted on the parent and the violation of fundamental associational rights within the family. No theoretical basis for the claim that these parents cannot be refugees within the meaning of the U.S. Refugee Act exists. There has been no lack of legal grounds to treat these claims with the proper degree of analytical seriousness and intellectual integrity that they deserve at the Board and circuit court level, but rather a deficit of understanding and will. Only a combination of more rigorous advocacy, well-informed commentary, leadership by the Board and the Supreme Court of the United States, and judicial responsibility will lead to a definitive recognition of the asylum eligibility of these bona fide refugees.