

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:)
)
FAUZIYA KASINGA,) File: A73-476-695
) Newark District
Applicant,)
)
In Exclusion Proceedings)
-----)

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GOVERNMENT'S BRIEF IN RESPONSE TO APPLICANT'S APPEAL
FROM DECISION OF IMMIGRATION JUDGE

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ISSUES PRESENTED

1. Whether the Board of Immigration Appeals should recognize that, in some cases, fear of being subjected to female genital mutilation may be a basis for asylum.
2. Whether the Immigration Judge was correct in determining that applicant had not met her burden of proof of presenting credible evidence that she had a well-founded fear of persecution on account of one of the enumerated grounds if she were to be returned to Togo.

STATEMENT OF THE CASE

The Immigration and Naturalization Service responds to applicant's appeal from the decision of the Immigration Judge (IJ) dated August 25, 1995, which denied applicant's applications for asylum and withholding of deportation pursuant to sections 208(a) and 243(h) respectively of the Immigration and Nationality Act, as amended.

Exclusion proceedings were instituted against applicant by issuance of a Notice to Applicant for Admission Detained for Hearing before the Immigration Judge (Form I-122) dated December 17, 1994. *See*, Decision of the IJ, dated 8/25/95 (Dec.) at 1-2; Tr. at 1-2; Exhibits 1, 3. The I-122 charged that applicant was excludable pursuant to section 212(a)(6)(C)(i) for procuring a visa or other documentation by fraud and pursuant

to section 212(a)(7)(A)(i)(1) as an intended immigrant not in possession of a valid immigrant visa. Dec. at 1-2; Exhibit 1.

At a hearing held before the IJ on January 9, 1995, applicant denied the allegation which charged her with excludability due to fraud pursuant to section 212(a)(6)(C)(i). Dec. at 1-2; Tr. at 2-3. Applicant admitted the allegation which charged her for inadmissibility as an intended immigrant without an immigrant visa pursuant to section 212(a)(7)(A)(i)(1). *Id.* At that same hearing, applicant requested the relief of asylum and withholding of deportation as to Togo. Dec. at 3; Tr. at 2-5. Applicant's claim was based upon an alleged fear of female genital mutilation (FGM) in her native tribe in Togo. Dec. at 3; Tr. at 16, 61; *See*, Exhibit 3.

An evidentiary hearing was held on applicant's claim before the IJ on August 25, 1996. At the conclusion of the hearing, the IJ rendered his oral decision. The IJ found that the applicant was incredible. Dec. at 10-11. The IJ further held that even if applicant were credible, applicant had failed to establish that she had been persecuted within the meaning of the Act. *Id.*, at 12-14. The IJ denied applicant's application for asylum and withholding of deportation. *See*, IJ's Dec. The applicant appealed the IJ's decision to the Board of Immigration Appeals (BIA). The Service's timely response to applicant's appeal follows.

STATEMENT OF THE FACTS

Applicant is an eighteen (18) year old native and citizen of Togo. Dec. at 1, 6; Tr. at 5, 15; Exhibit 3. Applicant claimed that she practices the Islamic religion, and that she is a member of the Tchamba Kunsuntu tribe which is found primarily in the northern part of Togo. Dec. at 6; Tr. at 15, 17, 58; Exhibit 3. Applicant testified that for hundreds of years all the women of her tribe had been circumcised at the age of fifteen (15). Dec. at 7; Tr. at 26-28. Applicant stated the women in her tribe are circumcised because it is believed to be a part of the “culture.” Tr. at 24. Applicant alleged that she feared returning to her native country because she would be forced to marry an old man and be circumcised. Dec. at 9; Tr. at 16, 61; Exhibit 3.

Applicant testified that her father, who owned a truck company and was wealthy, died in July, 1993. *See*, Dec. at 7; Tr. at 20-21. Applicant alleged that she avoided circumcision while her father was alive, but that after his death, she did not have the right to refuse. *Id.*; Tr. at 28, 44-45. Applicant added that her father was the only one who could protect her from circumcision because he did not have to depend on the tribe for anything. *Id.*; Tr. at 27-29, 32, 45. Applicant claimed her mother, who is a member of the Bandi tribe in neighboring Benin, had not been circumcised because her older sister had died due to circumcision. Tr. at 18; 25-26. Applicant contended that after her father’s death, her aunt sent her mother away from the family because that is part of the tribal tradition. Dec. at 7; Tr. at 18-20. Applicant added that her aunt had control over her and

most of her father's estate after her father died because that is the tribal custom. *Id.*; Tr. at 18-22, 33. Applicant alleged that although her aunt knew where her mother was in Togo and often talked to her about her plans for applicant, applicant did not know where her mother was. Dec. at 7-8, 10; Tr. at 37-38. Applicant testified at the time of the hearing that her aunt and sisters knew where her mother was, and that her mother continued to send her money and letters through her sister, but that applicant still did not know where her mother was. Dec. at 7; Tr. at 61-69.

Applicant stated that she had four sisters and two brothers who are living in Togo. Dec. at 7; Tr. at 21. Applicant contended that her four sisters who are married had not been circumcised because their father prevented it. *Id.*; Tr. at 23-24. Applicant testified that her father did not force her four sisters to marry anyone they did not like. *Id.*; Tr. at 29. Applicant added that her father encouraged her four sisters to marry outside the Tchamba Kunsuntu tribe because men from other tribes do not demand their wives be circumcised. *Id.*; Tr. at 25.

Applicant claimed that she was a student and had studied in Ghana prior to her departure from Togo. Dec. at 8; Tr. at 15, 34. Applicant added that she had two years left to complete high school. *Id.* Applicant testified that her aunt, who made all the decisions for her after her father's death, stopped her from attending school because she wanted her to be circumcised and married. Dec. at 7-8; Tr. at 16, 34-37. Applicant

contended that she was forced to marry a man who was forty-five (45) years old,¹ and had three other wives. Dec. at 8; Tr. at 16-17, 37, 72; Exhibit 3. Applicant testified that although her mother told her aunt to allow applicant to finish school, applicant's aunt stated that there was no need to waste money on school. *See, id.*; Tr. at 37-38. Applicant claimed that her aunt had the power to stop her from attending school because her aunt paid the fees. *See, id.*; Tr. at 35. Applicant claimed that her aunt was aware that applicant and her immediate family were against circumcision and that her other four sisters had not been circumcised. Tr. at 39-40. Applicant testified that her aunt had been circumcised, and that she was trying to get applicant circumcised because applicant's husband demanded it. Tr. 27, 38, 40-41, 78-79. Applicant alleged that the police and government in Togo cannot prevent her circumcision because it is common and because they have been doing it for a long time. Tr. at 59; Exhibit 3. Applicant indicated that her mother and sisters could not protect her. Tr. at 33.

Applicant alleged that although she had been formally married, the tribe made an exception in her case and did not circumcise her prior to the wedding ceremony. Dec. at 8-9; Tr. at 40; 79. Applicant testified that according to the Islamic religion, once a female is married, no matter where she lives, she is considered married to her husband. Tr. at 40, 79. Applicant added that her tribe knew that once she is married, she cannot leave her husband. *Id.* Applicant contended that she had not yet slept with her purported husband,

¹ In her asylum application, applicant indicates that she will be forced to marry an old man who has many wives. Exhibit 3. By contrast, during her testimony applicant presented a purported marriage certificate which she had not signed and alleged that she was already married to this older man. Dec. at 8; Tr. at 39-40, 42, 44; Exhibit 3 (marriage certificate dated 7/10/94).

as he demanded that she be circumcised first. Tr. at 40, 79. Applicant testified that tools such as knives are used for the circumcision, and that the females had to wait forty (40) days after the circumcision before sleeping with their husband. Tr. at 30-31, 41. Applicant added that there is bleeding after the circumcision, and that she knew four (4) girls who had bled to death. Tr. at 30-31.

Applicant alleged the main rationale behind circumcision at the age of fifteen (15) is that when the female starts to have her period, she is not supposed to have sex. Tr. at 26-27. Applicant added that females are not supposed to have sex until they marry, and if they do have sex, they will die. Tr. at 27. Applicant later testified she did not know the main reason for circumcision. Tr. at 78. Applicant initially alleged that an older man who belongs to the tribe does the circumcision. Tr. at 24. Later, applicant contended that in her family an older lady, her aunt, does it. Tr. at 31-32. Applicant then claimed that a lady who is an official circumcisor does the circumcision for all the families because that is her job. *Id.*

Applicant alleged that she escaped the circumcision with the help of her sister. Dec. at 9; Tr. at 42, 82-83. Applicant claimed that her sister came to visit her two days after her marriage ceremony and before she had been circumcised, and she drove applicant to Accra, Ghana. *Id.*; Tr. at 43, 82-83. Applicant contended that she only had her student ID with her and not her passport. *Id.*; Tr. at 45-46, 83. Applicant testified that she used her Togo ID to fly to Germany because the European countries accept that

ID and because that was the only place available at the moment. *Id.*; Tr. at 45-46. Applicant indicated that because she had her student ID with her at the airport in Germany, and because she said she was on school vacation, the airport officials let her enter the country. *Id.*; Tr. at 47-48. Applicant alleged that at the airport in Germany, she met a German woman, a complete stranger, and asked her if she knew any other Africans. *Id.*; Tr. at 48-51. Applicant alleged that this woman, named Rudina Gergs, invited applicant to live with her. *Id.*; Tr. at 50-51. Applicant claimed that for two months she lived with this woman in Bocum, Germany, and helped her with her cooking and cleaning. *Id.*

Applicant alleged that while in Germany, she met a Nigerian named “Charlie” in a train. Dec. at 9; Tr. at 51-54. Applicant claimed that she related her story to Charlie, and that Charlie helped her. *Id.* Applicant testified that Charlie sold her his sister’s British Passport for one thousand British “marks.” *Id.* Applicant alleged that her sister had given her money that she had received from their mother before applicant had left Togo. *Id.* Applicant testified that Charlie purchased applicant’s ticket to the United States with that money. *Id.* Applicant claimed that when she arrived at the airport in the United States, she was questioned by an immigration officer. Dec. at 9; Tr. at 55-57. Applicant admitted that she told that immigration inspector that she knew she had used a fraudulent passport, and that she wanted to apply for political asylum. *Id.*² Applicant indicated that after she left Togo, her family reported her as missing and the police are looking for her.

² Indeed, applicant admitted that it was Charlie, the same person who gave her a fraudulent passport, who told her to request asylum at the airport in the United States. Tr. at 57.

Tr. at 86-87. Applicant alleged that if she is forced to return to Togo, she will be handed over to the police who will take her to her family. Tr. at 61-65, 73. Applicant testified that she will have to return to her husband, a respected man and a good friend of the police in Togo, and will be forced to be circumcised. Dec. at 9; Tr. at 41-42, 65, 73, 87. Applicant indicated that she could not move to another part of Togo because it is a small country and they would know where she is. Tr. at 74. Applicant claimed generally that she did not seek asylum in Ghana or Germany because she could not continue her education in those countries, and because she did not have relatives there. Dec. at 9; Tr. 75, 83-84.

ANALYSIS

The applicant bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under Section 234(h), or asylum under Section 208 of the Act. *Matter of Acosta*, Interim Decision 2986 (BIA 1985), modified by *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987); 8 CFR. Sections 208.5, 242.17(c) (1988).

An alien who is seeking withholding of deportation to any country must show that his “life or freedom would be threatened in such country on account of race, religion, national origin, membership in a particular social group, or political opinion.” Section 243(h)(1) of the Act. In order to make this showing, the alien must establish a “clear

probability” of persecution on one of the enumerated grounds. *INS v. Stevic*, 467 U.S. 407, 413 (1984). This clear probability standard requires a showing that it is more likely than not that an alien would be subject to persecution. *Id.*, at 429-30.

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he is a “refugee” within the meaning of Section 101(a)(42)(A) of the INA. *See*, Section 208 of the INA. That definition includes the requirement that an alien demonstrate that he is unwilling, or unable, to return to his 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. Sections 101(a)(42)(A) and 208 of the INA. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207 (1987).

The applicant for asylum has established a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution for one of the five enumerated grounds specified in the Act. *Matter of Mogharrabi*, *supra*. Furthermore, unlike withholding of deportation, asylum may be denied as a matter of discretion to an alien who qualifies for the relief. *Id.* *See also*, *INS v. Cardoza-Fonseca*, *supra*.

ARGUMENT

I. Introduction

This case asks the Board to venture into new and difficult territory, exploring issues increasingly raised in political asylum cases. For this case requires the Board to apply the asylum and withholding provisions of the INA to cultural practices that may have broad application in the country of origin but which are offensive, even shocking, to American judgment and sensibility. There is no doubt that most such practices are validly the object of vigorous human rights protest. The more difficult question, and the question presented here, is the extent to which such customs give rise to valid asylum claims. These issues are potentially posed by a wide variety of practices: initiation rites of certain ethnic groups, mandatory clothing requirements such as the veil required of women in some cultures, imposition of arranged marriage on unwilling individuals, restrictions limiting professions or activities such as driving automobiles based on gender or caste, and many others.

Here the practice at issue is one of the most extreme within this description: the imposition of female circumcision or female genital mutilation in accordance with tribal custom. This is an ancient practice in certain parts of the world, dating from around the fifth century BC. The custom is currently observed by Muslims, Christians, and adherents of traditional religions in Africa and Asia. Taba, A.H., "Female Circumcision" *World Health* (Geneva: World Health Organization, May 1979). As practiced in various

countries and tribal areas, FGM ranges from a relatively mild form, the cutting of the prepuce or hood of the clitoris, to the removal of the clitoris, the whole of the labia minora and often the whole of the medial part of the labia majora. It is performed on infants, girls, and adult women, usually with unsterilized instruments (such as razor blades, broken glass, and knives) and without anesthesia. Dorkenoo, Efua; Elworthy, Scilla, *Female Genital Mutilation: Proposals for Change* (London: Minority Rights Group, April 1992), p. 12-13. It is estimated that over eighty million females have been subjected to FGM. These practices have serious and often fatal consequences. Immediate consequences can include excruciating pain, hemorrhage, tetanus, rupture of the vaginal walls, septicemia and death. Long term consequences can include scarring, infertility, painful sexual intercourse, long and obstructed labor, chronic uterine and vaginal infections, HIV infection from contaminated instruments, bladder incontinence, dysmenorrhea, and obstruction of menstrual flow. During childbirth, the risks of maternal death, stillbirths, hemorrhage, and infection are greatly increased. World Health Organization, *Female Genital Mutilation: World Health Assembly Calls for the Elimination of Harmful Traditional Practices* (Geneva: WHO Office of Information. Press Release WHA/10, 12 May 1993), p. 1. FGM has been condoned on the basis of religion, culture, and tradition.

Particularly in its most extreme forms, FGM is deeply objectionable to most of the world community. It is increasingly the subject of condemnation and direct action on the international plane. United Nations General Assembly, *Declaration on the Elimination of Violence Against Women* (Geneva: UN General Assembly,

"A/RES/48/104," 23 February 1994), article 2, p. 3. United Nations General Assembly, *Vienna Declaration and Programme of Action, Note by the Secretariat*, 12 July 1993, "A/CONF. 157/23," p. 18-20; United Nations Committee on the Elimination of Discrimination Against Women, "Female Circumcision," *General Recommendation No. 14*, Ninth Session, 1990, p. 80; United Nations Population Fund, *Report of the Round Table on Women's Perspectives on Family Planning, Reproductive Health and Reproductive Rights, Ottawa, Canada, 26-27 August 1993* (New York: International Conference on Population and Development, 1994), pp. 2, 4-5. Many governments in the regions where the practice exists have pledged renewed efforts to outlaw FGM and punish its practitioners, although these efforts have achieved highly uneven results to date. Dorkenoo and Elworthy, *supra*, at 11-12.

There is no indication that in enacting INA §§ 208 and 243(h) Congress considered application of these sections to broad cultural practices of the type involved here. Nor is there much guidance to be had on these issues from the deliberations that led to the adoption of the Convention and Protocol relating to the Status of Refugees, upon which these US provisions are based. Instead, the application of the asylum and withholding provisions to these practices must be informed by analogy, by attention to the language of the statutes, and by reflection on the underlying purposes of the asylum system. Those purposes are twofold, and they are unavoidably in tension. Those adopting the provisions intended (as indeed do most Americans today) (1) to provide real protection for those seriously jeopardized if returned to their home countries, but (2) to sustain the broad fabric of governmental immigration control that has been a common

feature of international relations for well over a century. See, Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in *Refugee Policy: Canada and the United States* 30, 34-35 (H. Adelman ed. 1991). In this light, the Board's interpretation in this case must assure protection for those most at risk of the harms covered by the statute, but it cannot simply grant asylum to all who might be subjected to a practice deemed objectionable or a violation of a person's human rights. Careful application is necessary for the asylum system to remain true to the intentions of its creators and also to sustain the public support that is necessary if it is to continue to perform its important, but focused, humanitarian office.

In this light, we believe that certain potential victims of FGM may indeed establish eligibility for asylum and withholding of deportation, but that this class does not consist of all women who come from the parts of the world where FGM is practiced, nor of all who have been subjected to it in the past. We outline our proposed framework of analysis below. We then suggest that it may be appropriate to remand this case to the immigration judge for further factual development in light of any new conceptual analysis adopted by the Board.

II. Persecution

The first question for investigation is whether the practice at issue amounts to persecution. Neither the Convention refugee definition nor its analogue in US law offers clarification of what is meant by "persecution." The Ninth Circuit has written:

"Persecution" occurs only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.

Hernandez Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985). The Seventh Circuit considers persecution to be "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.) in a manner condemned by civilized governments." *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986) (quoting language adopted by the House Judiciary Committee in a related context, considering a bill that eventually added the deportation ground aimed at Nazi persecutors, now INA § 241(a)(4)(D)). Later the Seventh Circuit offered a more concise definition in *Osaghae v. INS*, 942 F.2d 1160, 1163 (7th Cir. 1991): "'Persecution' means, in immigration law, punishment for political, religious, or other reasons that our country does not recognize as legitimate."

These definitions suggest that ordinarily an action that amounts to persecution entails the subjective intention of the actor to "inflict harm" or to "punish" the victim. The persecutor's intent is normally to visit a bad outcome on the persons who are regarded as different in a way that must be corrected or eradicated. If malignant or punitive intent on the part of the actor were always required before persecution is found, then FGM would rarely be considered persecution. Presumably most of its practitioners believe that they are simply performing an important cultural rite that bonds the individual to the society.

We support the notion that ordinarily any action that constitutes persecution is taken with an intent to do harm to the victim. But in some circumstances, the intention of the actor pales in significance in the face of evidence about the nature of the practice itself. Such occasions should be rare, but they occur when the practice, visited upon a resisting recipient, is so extreme as to shock the conscience of the society from which asylum is sought. We submit that FGM, at least in its more severe forms, is such a practice. FGM shocks the conscience because it amounts to an extreme bodily invasion, an extreme that is compounded when it is imposed under crude and unsanitary conditions as is often the case. It is imposed "for reasons that our country does not recognize as legitimate," *Osaghae, supra*. Likewise, it is inflicted "in a manner condemned by civilized governments," *Schellong, supra*, as reflected in the increasing activism shown by the international community, including the United Nations General Assembly, to condemn the practice and seek practical measures to curb it and eventually eliminate it. Indeed the very governments of the countries where the practice occurs have generally joined in at least formal condemnation of FGM. Female genital mutilation therefore can amount to persecution even if the subjective intention of the one who would perform the circumcision is ostensibly benign.

Three further limitations should be observed, however, in deciding whether an objectionable cultural practice amounts to persecution under this approach. First, not all bodily invasions would necessarily cross the "shock the conscience" threshold.

Relatively minor actions, such as body scarring known in some societies and subcultures, or male circumcision as usually practiced, do not shock the conscience.

Second, even if severe, bodily invasion shocks the conscience only when inflicted on an unconsenting or resisting individual. For example, surgery with consent is not persecution, even if it results in the amputation of a limb. For this reason, persons who were subjected to FGM in the past, at a time when they consented or at least acquiesced (as in the case of FGM practiced when the woman was a small child), have not experienced persecution and therefore cannot use that event as the foundation for a claim of past persecution. *Matter of Chen*, Interim Decision No. 3104 (BIA 1989). 8 CFR § 208.13(b)(1)³ This conclusion bespeaks no condoning of the practice; human rights initiatives should continue in every possible forum to end the practice no matter when or where it occurs. Instead, this conclusion simply means that the refugee definition does not apply. Asylum on this ground focuses on those who credibly establish a well-founded fear that they would be subjected to FGM in the future and also meet the other requirements of the definition.

Third, the focus must be on the risk that the asylum claimant herself, upon return, would actually be seized and subjected to FGM. Merely being subjected to social or family pressure or to reduced wages, for example, for refusing to undergo the procedure is not persecution. If the individual has a choice, albeit a burdensome one, that allows her

³ This point is reinforced by the fact that a woman once circumcised cannot ordinarily be subjected to FGM a second time.

to escape FGM, then she does not face the requisite risk of persecution -- unless of course the other choices are themselves inherently persecutive. The home society persecutes if it forcibly subjects uncircumcised women to the knife. It does not necessarily persecute if it simply subjects such persons to ostracism or economic pressures. In cases of this sort, it is also important for the factfinder to pay close attention to whether internal flight alternatives exist, particularly in light of increasing efforts in many countries where the custom has prevailed in the past to curtail the practice of FGM.

III. "On Account of . . . Membership in a Particular Social Group or Political Opinion"

Merely establishing that one risks persecution on return does not necessarily qualify the applicant for asylum. It must also be shown that the persecution would be on account of one of the five grounds specified in the statute. Here the grounds assertedly available are membership in a particular social group or political opinion. We believe that the former may apply, but we urge the Board to apply the "particular social group" analysis carefully and narrowly.

The applicant suggests that the claimed persecution here would qualify because it is being applied to an individual who opposes it. She asserts that she is a member of a particular social group made up of young women of the Tchamba Kunsuntu tribe who are opposed to FGM. This is apparently a claim that combines both "political opinion" and "particular social group" reasoning. But the Board has rejected a similar claim in *Matter of Chang*, Interim Decision No. 3107 (BIA 1989), which applied US asylum law to

claims about coercive family planning practices in the Peoples Republic of China. Although it acknowledged that selective application of the Chinese policy only to political opponents could give rise to a valid claim, the Board ruled: "This does not mean that all who show that they opposed the policy, but were subjected to it anyway, have demonstrated that they are being "punished" for their opinions." When a similar assertion was made on the basis of the "particular social group" rubric, the Board responded: "Such a showing cannot be made by arguing that there is a "particular social group" made up of those persons who "actually" oppose the policy of "one couple, one child," and that the evidence that this "group" is persecuted is simply the fact that the policy is applied to them despite their opposition to it."

Nor does it generally bring these matters within the "on account of" branch of asylum analysis to observe that the practices may play a deeper political role or help perpetuate a system of male domination. These assertions may reflect important sociological insight -- but analysis at that level cannot be what was intended by the drafters of the statutory provisions at issue here. For nearly all distinctions in treatment or outcome, on virtually any social or economic basis in any country of the world, could be recast as instruments of political control or domination. It could be claimed, for example, that economic suffering inevitably reflects deliberate political decisions by the ruling authorities (*see, e.g., HRC v. Civiletti*, 503 F.Supp. 442, 509 (S.D.Fla. 1980),

modified sub nom. HRC v. Smith, 676 F.2d 1023 (5th Cir. 1982)).⁴ And yet it is quite clear that economic suffering, by itself, does not give rise to a valid claim to asylum, even if supplemented by a showing of political manipulation or corruption by the ruling elite that deepened the economic deprivation.

Instead, analysis in cases of this sort should address straightforwardly whether the practice is imposed on the basis of group characteristics as set forth in *Matter of Acosta*, *supra*, such as innate characteristics or shared past experiences. "[W]hatever 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." In the present case, it may well be possible, if the other elements of proof are established, for the applicant to show that the persecution here would be imposed on the basis of her membership in the following group: young women of the Tchamba Kunsuntu people who have not been circumcised in accordance with tribal custom. No broader definition of the particular social group should be necessary.

Here the IJ rejected the asylum and withholding claims in significant part because he found the applicant not credible. On appeal, the applicant seeks to offer new evidence that bears on her credibility. Should the Board decide that this evidence warrants consideration, the appropriate course is not for the Board itself to evaluate the applicant's

⁴ The district court, speaking of a class of Haitian applicants, asserted that "[m]uch of Haiti's poverty is a result of Duvalier's efforts to maintain power.... Their economic situation is a political condition." 503 F.Supp. at 509. This view clearly has not gained acceptance.

credibility, but to remand the case to the IJ to examine the evidence and determine credibility. *See, Matter of Guevara*, Interim Decision No. 3143 (BIA 1991). In that exercise, we believe that it would also be appropriate for the Board to direct the IJ to conduct further inquiry into specific aspects of the applicant's credibility that are not addressed by the new evidence. For example, the IJ found implausible the applicant's account of her encounter with Rudina Gergs in Germany, and the Board could direct her to furnish an affidavit from Ms. Gergs to support her account. *Matter of Dass*, Interim Decision No. 3122 (BIA 1989) (while in some cases an applicant can establish eligibility for asylum through her testimony alone, she should submit supporting evidence if it is reasonably available). Inconsistencies in the record evidence submitted by the applicant to the IJ⁵ would also be appropriate subjects of inquiry into credibility on remand.

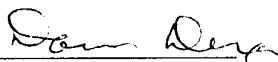
The new evidence that the applicant seeks to present also bears on other factual findings that in part supported the IJ's decision to deny asylum. For example, the IJ determined that the applicant could have relocated to another area to avoid being subjected to FGM, and that because of the applicant's failure to seek help from the government of Togo to prevent circumcision there was no evidence that the state would not have protected her. Dec. at 12-13. If the Board decides that these issues warrant further consideration, we again urge that the case be remanded for the IJ to make the appropriate findings of fact.

⁵ As noted in the recitation of facts, for example, there is an inconsistency between the applicant's asylum application and her testimony before the IJ with respect to whether she is already married or would be forced to marry if returned to Togo. As also noted, the applicant gave conflicting testimony about who performs the FGM procedure in her tribe.

CONCLUSION

Here the IJ rejected the asylum and withholding claims in significant part based on his adverse credibility finding and on other factual findings. If the Board were to agree with the framework of analysis described above (or a similar framework), the INS submits that the case should be remanded to the IJ for further consideration in light of what is bound to be important Board guidance on novel legal issues of great importance.

Respectfully submitted,


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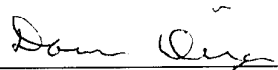
Shilpa Khagram
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Dated: Feb. 28, 1996

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing brief of the Immigration and Naturalization Service was mailed to:

Prof. Karen Musalo
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for Shilpa Khagram
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Dated: Feb 26, 1996