

In re Kasinga

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the constitutional issues on the merits, leaving a void in which the district court's reasoning remained unreviewed.<sup>12</sup>

Citing *Lobue*, prospective extraditees throughout the country have raised constitutional challenges to the extradition statute. Numerous district courts have been called upon to decide whether to follow *Lobue*, without the benefit of a circuit court decision addressing the constitutional issues.<sup>13</sup> The Second Circuit has now effectively filled the void created by the D.C. Circuit and has refuted the district court's reasoning in *Lobue*.

The only weakness in the Second Circuit's opinion is its conclusion, with very little analysis, that the decision of the extradition magistrate is subject to "revision" by the Executive. Petitioner contended that this violates the separation of powers. The court, however, extrapolated from the executive power of "revision" that the extradition magistrate's determination could not have been an exercise of Article III power, and concluded that there was no constitutional infirmity in the statute.

The court was too quick to assume that the Executive has the power of "revision" over the extradition magistrate's decision. A ruling by the extradition magistrate in favor of the accused never reaches the Executive. Only a decision adverse to the accused reaches the Executive, who then decides whether to exercise discretion and forgo its right to surrender the accused. This distinguishes the early Supreme Court decisions involving executive revision cited by the court.<sup>14</sup> In those cases, statutes were ruled invalid where even a judge's determination *favorable* to the individual could be overturned by the Executive. Because an extradition magistrate's determination only reaches the Executive if it is *adverse* to the accused, nothing in those Supreme Court cases compels a finding that the Executive has the power of "revision" (in a constitutional sense) over an extradition magistrate's determination.

Moreover, in light of the court's conclusion, on historical, textual and other grounds, that extradition magistrates do not exercise Article III power, it was not necessary to reach the issue of whether the Executive has the power of "revision" over the extradition magistrate's decision.

Nevertheless, the Second Circuit's opinion is welcome. It properly puts *Lobue* to rest, and should allow judges and magistrate judges in other circuits to dispose quickly of any constitutional challenges to the extradition statute.

JACQUES SEMMELMAN  
*Curtis, Mallet-Prevost, Colt & Mosle*

*Immigration—Refugee Act of 1980—resistance to female circumcision as grounds for political asylum in the United States*

*IN RE KASINGA*. Interim Decision 3278, 1996 Westlaw 379826, 35 ILM 1145 (1996).  
Board of Immigration Appeals, June 13, 1996.

Fauziya Kasinga appealed an immigration judge's decision of August 25, 1995, denying her political asylum, which she had claimed on the grounds that she would be forced to undergo female circumcision in her own country. The Board of Immigration Appeals (Board) reversed, granted asylum, and ordered her admitted to the United States as an

<sup>12</sup> See, e.g., *In re Sidali*, 899 F.Supp. 1342, 1350 (D.N.J. 1995) (declining to decide the constitutionality of the extradition statute "in favor of a full appellate review of *Lobue*").

<sup>13</sup> See, e.g., *Sandhu v. Bransom*, 932 F.Supp. 822, 826 (N.D. Tex. 1996); *In re Marzook*, 924 F.Supp. 565, 570–72 (S.D.N.Y. 1996); *In re Lin*, 915 F.Supp. 206, 211–15 (D. Guam 1995); *In re Sutton*, 908 F.Supp. 631 (E.D. Mo. 1995); *In re Lang*, 905 F.Supp. 1385 (C.D. Cal. 1995); *Carreno v. Johnson*, 899 F.Supp. 624 (S.D. Fla. 1995). Every district court that has decided the constitutional issues has declined to follow *Lobue*.

<sup>14</sup> See *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852).

asylee. The Board held: (1) that the practice of female genital mutilation (FGM)<sup>1</sup> can be the basis for a claim of persecution; (2) that young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM as practiced by that tribe, and who oppose that practice, are recognized as members of a particular “social group” within the definition of the term “refugee” under section 101(a)(42)(A) of the Immigration and Nationality Act (8 U.S.C. §1101(a)(42)(A)); and (3) that Kasinga had established that a reasonable person in her circumstances would fear countrywide persecution in Togo on account of her membership in this recognized social group, justifying an award of political asylum.

*In re Kasinga* was brought before the Board of Immigration Appeals for hearing en banc in an unusual posture. In its first hearing en banc, the general counsel of the Immigration and Naturalization Service (Service or INS) argued for a broader formulation of political asylum based on FGM than did counsel for the applicant. Counsel for applicant argued her client’s position within “traditional principles of asylum jurisprudence,”<sup>2</sup> narrowly tailoring the grounds for asylum to the specific facts of the case. In contrast, the general counsel proposed a framework of analysis for all asylum petitions premised on the practice of female genital mutilation. The result is a narrowly written majority decision that seems deliberately minimalist to deemphasize its significance, with two concurring opinions joined by three Board members and one dissent without opinion. Given the Service’s acknowledgment that FGM could be grounds for asylum, the majority claimed it need only address whether this particular applicant was entitled to asylum on the basis of the record.<sup>3</sup>

Kasinga, a nineteen-year-old native of Togo, is a member of the Tchamba-Kunsuntu Tribe of northern Togo. Young women of that tribe normally undergo female genital mutilation “of an extreme nature causing permanent damage” at age fifteen.<sup>4</sup> Kasinga’s influential father protected her from the practice until his death. On his death, however, her father’s sister became the family authority figure under tribal custom and her mother was driven from the home. The aunt arranged a polygamous marriage to a man, and with him she planned to force Kasinga to submit to the procedure before consummation of the marriage. After fleeing to Ghana and Germany, Kasinga sought asylum in the United States where she had other relatives. Her aunt had reported her to the Togolese police, who were looking for her.<sup>5</sup>

The Board evaluates asylum cases on their merits only if it first finds that the facts asserted by an asylum applicant are true by a preponderance of the evidence. Thus, the Board’s comprehensive review of the initial asylum hearing began with an independent inquiry into the credibility of Kasinga and her factual claims. Although the immigration judge had found Kasinga irrational, unpersuasive and inconsistent, the Board, in a lengthy discussion, found Kasinga rational, plausible and consistent.<sup>6</sup>

<sup>1</sup> This practice has also been termed “female circumcision,” “traditional female genital surgery” (FGS), and “Irua.” The nomenclature alone is a controversial subject. See Hope Lewis, *Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 2–3 (1995). In *In re Kasinga*, the court uses the term “FGM.” For purposes of consistency, this note will use the same terminology.

<sup>2</sup> 1996 WL 379826, L. Rosenberg, Concurring, at 1.

<sup>3</sup> 1996 WL 379826; L. Filppu & M. Heilman, Concurring, at 1.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 2–3.

<sup>6</sup> 1996 WL 379826, Board at 8. Kasinga’s story was subsequently corroborated by her family in Togo. See Cindy Shiner, *Persecution by Circumcision: Woman Who Fleed Togo Convinced U.S. Court but Not Town Elders*, WASH. POST, July 3, 1996, at A1. Her mother, who had given her almost all of her own \$3,500 inheritance, eventually had to ask the family patriarch to forgive her and allow her to live in his home. Celia W. Dugger, *A Refugee’s Body is Intact but her Family is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1.

The INS sought a remand in part based on credibility determinations. The majority had little difficulty dispensing with these issues because they were based on purported inconsistencies in the applicant’s statements that did not affect the issues to be resolved. The opinion also emphasized that a remand was not necessary

The Board next considered whether Kasinga's factual claims met the statutory criteria for asylum under 8 U.S.C. §1101(a)(42)(A). The Board found that Kasinga feared "persecution," her fear was well-founded, her "persecution" was "on account of" her membership in a specific "social group," and she was unable to return to her country of nationality.

With little discussion, the Board found Kasinga's fear that she would be forcibly circumcised to be well-founded. Several documents, including a report by a sociologist who had studied the various cultures of Togo and a memorandum prepared by the Department of State on FGM in Togo, confirmed that the traditions and mores of Kasinga's tribe mandate the mutilation of women intending to marry. Mutilation rates in Kasinga's tribe range from 85 to 98 percent.

The Board devoted somewhat more discussion to the first of the two central questions in this case: whether or not FGM as practiced by Kasinga's tribe constitutes "persecution." This question has sparked fierce debate among academics and activists. Universalists argue that fundamental human rights norms transcend culture; cultural relativists argue that defining FGM as "persecution" challenges the cultural autonomy of the nations in central Africa and the Arabian Peninsula that practice FGM. The World Health Organization, among other organizations, takes a universalist position, proclaiming FGM a form of violence against women and girls that violates "universally recognized human rights standards."<sup>7</sup>

Kasinga's case extensively documented the effects of female genital mutilation, its international condemnation, and the poor human rights record of Togo, particularly with respect to women. In describing female genital mutilation and finding that the described level of harm constituted persecution, the majority relied heavily on the *FGM Alert* prepared by the INS Resource Information Center<sup>8</sup> and a memorandum of May 26, 1995, from Phyllis Coven in the Office of International Affairs of the INS on the 1995 gender guidelines.<sup>9</sup> The opinion also noted two State Department reports on human rights abuses in Togo.

The court, implicitly adopting the universalist approach, accepted the position shared by Kasinga and the Service that there is no legitimate reason for FGM. Documents in the Board proceeding accurately defined FGM as the partial or total removal of the prepuce, clitoris, and inner and outer labia. In Togo, the practice involves clitorrectomy, usually performed with crude instruments and without anesthetic. A State Department research report conducted and compiled by the Demographic Research Unit in the record of the Board's proceeding indicated that most Togolese excisors interviewed perform mutilations with razor blades, claiming that surgical knives are expensive and too difficult to clean. Girls in Kasinga's tribe are typically mutilated at fifteen years of age; mutilation just prior to marriage would not be uncommon.<sup>10</sup>

The Board defined persecution as "the infliction of harm or suffering by a government, or person a government is unwilling or unable to control, to overcome a characteristic of the victim."<sup>11</sup> Intent to punish is not a necessary element of persecution. Kasinga

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given the length of time her application had been pending. 1996 WL 379826, Board at 7-8. The applicant spent eight months in INS detention in several facilities, including one closed by a riot. Questioning this long-term detention in light of the applicant's age, the novel issue presented by her case, and the lack of any known criminal record, the majority members suggested that "[t]he Commissioner and the General Counsel might well wish to review the policy should future cases of this type arise." *Id.* at 9.

<sup>7</sup>In addition to condemnation by international governmental organizations, the International Federation of Gynecology and Obstetrics, the Council on Scientific Affairs, the International Medical Association, and the American Medical Association have also condemned FGM. 1996 WL 379826, Board at 11.

<sup>8</sup>*Id.* at 6.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 5, 11.

<sup>11</sup>*Id.* at 10 (citing *In re Acosta*, 19 I & N Dec. 211 (B.I.A. 1985), *modified on other grounds, In re Moghrabi*, 19 I & N Dec. 439 (B.I.A. 1987)).

clearly established both harm and suffering: if circumcised, she could expect severe pain, shock, hemorrhage, tetanus or sepsis, urine retention, ulceration of the genital region and injury to adjacent tissue. These effects alone might prove fatal; assuming her survival of the procedure, long-term consequences could include cysts and abscesses, keloid scar formation, damage to the urethra resulting in urinary incontinence, dyspareunia, and a severely compromised, if not eradicated, capacity to experience sexual pleasure.

The Board never addressed the second element of persecution: whether the harm or suffering was inflicted by a government or persons a government is unable to control. Yet this statutory element lies at the core of feminist critique of asylum law, as most torture experienced by women—including FGM—is inflicted by private, rather than public, agents. Indeed, persecution within the meaning of 8 U.S.C. §1101(a)(42)(A) has been difficult to establish in FGM cases because the perpetrators are often private citizens acting in a private capacity—usually, as here, relatives—operating without express state authority. Here, as is typical, the government does not perform the mutilations, and did not threaten to do so in Kasinga’s case. At most, the Board had documents noting that no laws in Togo specifically outlaw FGM. The Board presumably accepted this as proof that the Togolese Government is unable or unwilling to control the agents of persecution.

The Board then turned to the second central question: whether FGM, once designated persecution, is persecution against a protected group. The Refugee Convention<sup>12</sup> and the Refugee Act of 1980 confer refugee status only upon those persons who can show persecution on the basis of their membership in one of five statutorily defined groups.<sup>13</sup> Gender—the group in which Kasinga would most logically claim membership—is not among them.<sup>14</sup> Like all women seeking asylum on the basis of forms of persecution that exclusively or predominantly affect women (e.g., rape, FGM), Kasinga had to establish that she was a member of a “social group” singled out for persecution by persons whom her government was unable or unwilling to control.

Kasinga relied upon, and the Board accepted, her designation as a member of a social group otherwise persecuted. The Board narrowly tailored the definition of social group to the facts of the case: young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. The Board applied the test for social groups set forth in *Acosta*, which defines a “social group” under the 1980 Refugee Act as

a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . [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.<sup>15</sup>

<sup>12</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267.

<sup>13</sup> These categories are race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §1101(a)(42)(A) (1994).

<sup>14</sup> Feminist critics of current asylum law note that while “political opinion” protects male-dominated activities (such as guerrilla activity, political agitation and union activity) and thus persecution of men, no comparable category exists to protect against the kinds of oppression women generally experience. For example, in a 1987 case, the applicant had been raped by a military officer who threatened to expose her as a “subversive” if she resisted. To grant her asylum, the U.S. Court of Appeals for the Ninth Circuit characterized the Salvadoran woman as a person persecuted on the basis of “political opinion” by imputing to her a “political opinion” against the Salvadoran Government in power at the time. *Lazo Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

<sup>15</sup> *In re Acosta*, 19 I & N Dec. 211, 233 (B.I.A. 1985), *modified on other grounds*, *In re Moghrabi*, 19 I & N Dec. 439 (B.I.A. 1987).

Applying the *Acosta* criterion, the Board declared gender and tribal affiliation to be immutable characteristics. The court found intact genitalia to be a characteristic so fundamental to the individual identity of a young woman that she should not be required to change it. This categorization of "intact genitalia" as "fundamental to the individual identity of a young woman" sets an important precedent for immigration judges previously reluctant to acknowledge FGM as a form of persecution.<sup>16</sup> Having established FGM as a form of persecution, and Kasinga as a member of a "social group" worthy of refugee status, the Board had little difficulty in finding the necessary nexus: that Kasinga faces persecution "on account of" her membership in the class of women from her tribe who oppose FGM.

The analysis of the critical definition of social group is the least satisfactory aspect of the majority opinion. What degree of affiliation or homogeneity is necessary to a social group? Can the social group be defined primarily by the harm that constitutes the persecution, or is a separate element of linkage necessary? In this respect the concurring opinion of Lory D. Rosenberg is the most thoughtful and helpful to future advocacy of women's claims.

Citing various authorities for the proposition that the social group category is to be broadly construed as a "catchall" category beyond political opinion, race, religion or ethnicity, Rosenberg emphasizes that social group claims, unlike political opinion claims, are status based and do not necessarily require a showing that the specific individual's opinions or activities were the cause of the persecution. In the context of female genital mutilation, therefore, it is not necessary to demonstrate that the applicant voiced opposition to the practice. Acknowledging that the 1995 gender guidelines refer INS employees to international human rights instruments in assessing claims for asylum, Rosenberg finds support for consideration of gender-related asylum claims under the social group category based on Canadian jurisprudence, the guidance of the UN High Commissioner for Refugees,<sup>17</sup> and the United States and Canadian gender guidelines.<sup>18</sup>

In their concurring opinion, Board members Filppu and Heilman respond to the comprehensive arguments offered by the INS; the concurring opinion of Rosenberg elaborates on the terse majority opinion. Both concurring opinions illuminate the broader implications of this purportedly narrow, fact-specific decision. Filppu and Heilman emphasize that both parties agreed that female genital mutilation could amount to persecution, that there was an identifiable social group, and that the persecution was "on account of" the applicant's inclusion in that group.<sup>19</sup> The parties differed, however, on the need for a remand and, most significantly, on the basis for finding female genital mutilation to be grounds for asylum.

<sup>16</sup> For example, an immigration judge in Baltimore considering the asylum claim of a woman from Sierra Leone found, as did the court in *Kasinga*, that the applicant could not change her gender. The court concluded, however, that the applicant could change her mind with regard to her opposition to the FGM practices. The judge made no effort to determine if her attitudes about FGM (and, thus, her attitudes about the physical integrity of her genitalia) were "so fundamental to the individual's identity or conscience that she ought not to be required to change." Memorandum of Decision and Order [name and case number redacted] (U.S. Immigration Ct., Baltimore, Apr. 28, 1995).

<sup>17</sup> United Nations High Commissioner for Refugees, Memorandum: Female Genital Mutilation (Geneva, UNHCR, Division of International Protection, May 1994).

<sup>18</sup> 8 C.F.R. pts. 103, 204, 205, & 216 (1996); see also Lena H. Sun, *INS Expands Asylum Protection for Women*, WASH. POST, June 3, 1995, at A4; Judith Gaines, *INS Eases Asylum Guidelines for Women*, BOSTON GLOBE, May 27, 1995, at 13; and Michael J. Sniffen, *Immigration Rules Focus on Sexual Violence*, PORTLAND OREGONIAN, May 27, 1995, at A12; Canadian Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(B) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution (1993).

<sup>19</sup> 1996 WL 379826, L. Filppu & M. Heilman, Concurring, at 1. These Board members suggest that the comprehensive framework offered by the Service would be more appropriately proposed through the legislative or regulatory process.

The Board's inclusion of "opposition to FGM" as a factor in defining Kasinga's social group suggests that the Board was not prepared to address the potential for widespread application for asylum in the United States by women of Kasinga's tribe, Togo, or any country in which FGM is widely practiced. The Board itself pointed out that Kasinga's tribe circumcises young women and girls at rates approaching 100 percent. This concern is explicit in the Service's formulation that persecution encompasses only practices that "shock the conscience" (although intent to punish is not deemed necessary). As previously noted, this formulation also anticipates the challenge of cultural activists that granting asylum to all victims of FGM is an invasion of a nation's cultural autonomy. Yet cultural relativists focus on "survival and liberation of African women through their own activism,"<sup>20</sup> and Kasinga has done precisely that—by literally flying away from a culture whose values she rejects. The Board in *Kasinga* would simply support an applicant's decision to condemn and reject FGM.

The Service's formulation also seeks to exclude previously circumcised women because "a woman once circumcised cannot ordinarily be subjected to FGM a second time."<sup>21</sup> This interpretation ignores the larger context in which FGM typically occurs: cultures that severely limit women's expression, choices and actions. The Service's example of a small child as a consenting party is even more disturbing. This presumption of acquiescence for children directly conflicts with the recognized rights of children in the Convention on the Rights of the Child<sup>22</sup> and directly contradicts the position of the UN High Commissioner for Refugees on the inclusion of children who may be subject to female genital mutilation as refugees.<sup>23</sup> Surely with any such permanent and debilitating invasion of bodily integrity, there should be a presumption of nonacquiescence until the individual has reached a level of maturity to make such a significant personal decision.

The Service also argued for remand on the question of whether the applicant could avoid female genital mutilation by moving to another part of Togo. The majority refused to remand, noting that (1) FGM is widely practiced in Togo; (2) acts of violence and abuse against women in Togo are tolerated by the police; (3) the Government of Togo has a poor human rights record; (4) most African women can expect little government protection from FGM; and (5) Togo is a small country of approximately twenty-two thousand square miles, slightly smaller than West Virginia. The majority also noted that the police were looking for the applicant, and her husband was a well-known individual who was a friend of the police. This line of argument and analysis is itself quite troubling in the context of gender-based violence. The conditions necessary to establish persecution *a fortiori* demonstrate at the least a failure on the part of the relevant government to provide effective protection. The majority's opinion suggests that the availability of asylum might turn on the status (or lack of status) of the woman's spouse, the size of the country, or generally unrealistic expectations that women within tightly woven tribal cultures and oppressive societies may simply move from one area of the country to another.

<sup>20</sup> Lewis, *supra* note 1. Canada was the first country to formulate gender guidelines for asylum; the United States was the second to do so. See Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison*, 9 GEO. IMMIGR. L.J. 137 (1995). The gender guidelines are not technically binding on the BIA and, therefore, their use in the majority opinion is itself significant. Moreover, concurring Judge Rosenberg questions the failure of the Service to refer to the gender guidelines in the case. 1996 WL 379826, L. Rosenberg, Concurring, at 5.

<sup>21</sup> 1996 WL 379826, L. Filippu & M. Heilman, Concurring, at 1.

<sup>22</sup> Convention on the Rights of the Child, Art. 12, GA Res. 44/25, Annex, UN GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989), revised by UN Doc. A/RES/44/25/Corr.1 (1990), reprinted in 28 ILM 1457 (1989); see also *id.*, Arts. 19, 24(3), 37.

<sup>23</sup> UN High Commissioner for Refugees, *supra* note 17.

*In re Kasinga* is one of several cases in recent years brought before immigration judges by women seeking asylum in the United States to protect themselves<sup>24</sup> or their children<sup>25</sup> from FGM. These cases are the latest development in the discussion of whether and, if so, when, treatment uniquely affecting women—such as rape,<sup>26</sup> domestic violence,<sup>27</sup> hejab<sup>28</sup> and FGM—can meet the elements required for asylum.

The decision evades many thorny issues presented by such cases. It limits its protective impact to “young women not yet circumcised,” and in so doing declines to take a position as to whether or not the practice of FGM alone suffices to render the women of a tribe or nation members of a persecuted group. An immigration judge in Virginia recently took that step, granting asylum in part on the basis of a woman’s resistance to and subsequent forcibly imposed circumcision.<sup>29</sup> In that case the experience of FGM established past persecution, and so created a showing of a “well-founded fear of persecution,” itself a rebuttable presumption of future persecution. This ruling contravenes the Service’s proposed formulation, which would exclude all women already circumcised. At stake is whether women living in a society that practices FGM can be considered a persecuted class by virtue of living in such a society—meaning that all such women, circumcised or not, would meet the “other social group” criterion of section 101(a)(42)(A).

*In re Kasinga* is therefore a qualified success for women’s rights advocates. The door has been opened by the Service’s position and the Board’s decision to recognize female genital mutilation as grounds for asylum. Yet that door may remain closed as a practical matter to many applicants without the representation, documentation and extraordinarily compelling facts available to this particular applicant. *Kasinga* was seventeen years old when her saga began; most children are mutilated much younger, far too young to allow them to seek asylum independently in the United States or anywhere else.

The inability or unwillingness of the majority to elaborate on its findings of “persecution,” “social group” and the “on account of” nexus may be nothing more than an exercise in judicial economy, given the general consensus of the opposing parties. The eagerness of the majority to find agreement between the parties, however, even when in fact they disagreed on some elements (as in the precise definition of the social group with respect to personal opposition), suggests that critical points of analysis may yet be undecided or contentious among the Board members.

Beyond its surface acceptance of female genital mutilation as grounds for asylum, the position of the Service on many of these critical points would exclude many more applicants than it would accept. First, only female genital mutilation “in its more severe forms” (such as would “shock the conscience”) would qualify. Past victims would almost always be excluded, and there is, at the very least, the suggestion that small children who would be subject to the procedure might be as well. A claimant would have to demonstrate that on return she would be seized and forcibly subjected to female genital mutilation; any pressure short of physical force would be insufficient. A possibility of relocation to another part of the country might defeat the claim, posing the problem that laws that ostensibly protect women from violence but are never enforced might yet

<sup>24</sup> See, e.g., Oral decision of the immigration judge [name and case number redacted] (Office of the Immigration Judge, Oklahoma City, Aug. 30, 1995); Memorandum of Decision and Order [name and case number redacted] (U.S. Immigration Ct., Baltimore, Apr. 28, 1995); *In re M.K.*, No. A-72-374-558 (Office of the Immigration Judge, Arlington, Va., Apr. 20, 1995).

<sup>25</sup> See, e.g., Oral opinion of the Immigration Judge, *In re Oluloro*, No. 172-147-491 (Office of the Immigration Judge, Seattle, Wash., Mar. 23, 1994).

<sup>26</sup> *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

<sup>27</sup> *In re Pierre*, 15 I & N Dec. 461 (B.I.A. 1975).

<sup>28</sup> *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); but see *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

<sup>29</sup> *In re M.K.*, Deportation Proceedings, A-72-374-558 (U.S. Immigration Ct., Arlington, Va., Aug. 9, 1995).

bar women from being given asylum, and that societal and family pressure to submit short of physical force, however severe, would be insufficient grounds for asylum. Also, according to the INS brief, the “on account of” nexus is not demonstrated by a showing that the practice “may play a deeper political role or help perpetrate a system of male domination.”<sup>30</sup> With its emphasis in *Kasinga* on the extreme form of genital mutilation, the police searching for the applicant, and the unavailability of relocation, as well as its definition of the social group with reference to opposition to the practice, the majority opinion (deliberately or otherwise) provides implicit support for a number of the INS’s limiting formulations.

*In re Kasinga* is, however, the first time a court with national jurisdiction has recognized that the circumcision of women can be a form of persecution. The majority opinion, unfortunately, is not an easy “road map” for upcoming adjudications, as Rosenberg’s concurring opinion suggests<sup>31</sup> (indeed, her own opinion is much more helpful to future claimants).<sup>32</sup> In short, it is difficult to posit a more striking example of how exclusion of gender from recognized categories of discrimination and persecution has precluded full realization of women’s rights. Those concerned about protecting women and girls facing FGM will still have many legal and practical hurdles to overcome in representing the women who will undoubtedly follow in *Kasinga*’s footsteps.

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*European Convention on Human Rights—refugees—international zones at airports—deprivation of liberty*

AMUUR v. FRANCE. Case 17/1995/523/609.

European Court of Human Rights, June 25, 1996.

The European Court of Human Rights held that the right to liberty granted in Article 5, paragraph 1 of the European Convention on Human Rights (ECHR) applied to refugees held in international zones at airports and had been breached. The applicants, four Somali nationals, arrived from Syria at Paris-Orly Airport on March 9, 1992. They asserted that they had fled from Somalia because their lives were in danger. The applicants were kept in the “international” or “transit zone” of the airport until March 29, when, the Minister of the Interior having refused them leave to enter, they were sent back to Syria.

The international zone included part of the nearby Hôtel Arcade, which had been adapted for that purpose. According to the applicants, police officers would drop them off at the airport’s “espace lounge” very early in the morning and take them back to the hotel in the evening. The applicants were granted legal aid as of March 24, when a humanitarian organization, which in the meantime had inquired about their situation, put them in contact with a lawyer. On March 25, the applicants asked the French Office for the Protection of Refugees and Stateless Persons to grant them refugee status pursuant to the 1951 Geneva Convention Relating to the Status of Refugees. On March

<sup>30</sup> Brief of the INS at 20.

<sup>31</sup> 1996 WL 379826, L. Rosenberg, Concurring, at 5.

<sup>32</sup> The importance of BIA decisions should not be underestimated. Federal district and circuit courts of appeals have been very deferential to BIA decisions as an administrative law matter. See generally Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOKLYN L. REV. 929, 946 (1994).