



## CRS Report for Congress

# Asylum Law and Female Genital Mutilation: Recent Developments

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### Summary

Female genital mutilation (FGM) is a term encompassing a wide range of procedures that involve the removal or alteration of a woman's genitalia. The federal courts and the Board of Immigration Appeals (BIA) have classified FGM as a form of persecution, a showing of which can act as a basis for a successful asylum claim. However, recent developments in this area of law have created a split between the federal courts and the BIA over the treatment of applicants who have already been inflicted with FGM. The federal courts that have addressed this issue currently treat a past infliction of FGM as a basis for a well-founded fear of persecution. The BIA, on the other hand, has rejected this position, arguing that FGM is a one-time procedure, and that once inflicted, an applicant will not be persecuted with FGM again, and thus cannot act as a basis for an asylum application.

### Introduction

Female genital mutilation (FGM) is a term encompassing a wide range of surgical procedures that involve the removal or alteration of a woman's genitalia.<sup>1</sup> Currently, a well-founded fear of FGM can act as a basis for a successful asylum claim. Recent developments in asylum law, however, have resulted in a split between the Board of Immigration Appeals (BIA) and several federal circuits over whether a prior infliction of FGM may qualify a woman for asylum.

### Prior Case Law

**The Prima Facie Case For Asylum.** Asylum is a form of relief that the Secretary of Homeland Security or the Attorney General may grant in his or her discretion

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<sup>1</sup> See CRS Report RS21923, *Female Genital Mutilation (FGM): Background Information and Issues for Congress*, by Tiaji Salaam-Blyther, Erin D. Williams, and Ruth Ellen Wasem.

if the applicant qualifies to be a refugee, as defined by Section 101(a)(42)<sup>2</sup> of the Immigration and Nationality Act (INA).<sup>3</sup> In order to qualify as a refugee, the applicant must show<sup>4</sup> that she has a well-founded fear<sup>5</sup> of persecution in her home country on account of race, religion, nationality, membership in a social group, or political opinion.<sup>6</sup> The analysis in an asylum claim is usually broken into three elements: (1) proof of persecution or a well-founded fear of persecution, (2) proof of membership in a race, religion, nationality, or social group or belief in a political opinion, and (3) proof that the well-founded fear of persecution is “on account of” the applicant’s membership in the protected class of individuals.

**Woman As A Social Group.** In order for there to be a successful asylum claim, the applicant must not only show she has suffered persecution or has a well-founded fear of persecution, but she must also demonstrate that the well-founded fear of persecution is on account of belonging to a race, religion, nationality, social group, or holding a political opinion.<sup>7</sup> Gender alone does not constitute a social group and is not sufficient to establish asylum status.<sup>8</sup> On the other hand, one formulation of a social group which has been successfully used in an FGM asylum claim is “women opposed to FGM who belong to an ethnic group that practices FGM.”<sup>9</sup> Thus, in order to successfully claim asylum based on FGM, the applicant must show, at a minimum, that she is (1) a female, (2) that belongs to an particular ethnic group, and (3) that ethnic group widely practices FGM.<sup>10</sup>

**FGM As Future Persecution.** An asylum applicant must demonstrate that he is unable to avail himself of the protection of his country because of “persecution or a well-founded fear of persecution.”<sup>11</sup> FGM is recognized by most federal circuits and the BIA

<sup>2</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

<sup>3</sup> INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

<sup>4</sup> 8 C.F.R. § 1208.13(a) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.”). *See also* 8 C.F.R. § 208.13(a).

<sup>5</sup> *See INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (“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.”); *Balogun v. Ashcroft*, 374 F.3d 492, 499 (7th Cir. 2004) (“The asylum applicant must show (1) that she has a genuine, subjective fear of persecution and (2) that her fear is objectively reasonable.”).

<sup>6</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). *See also Cardozo-Fonseca*, 480 U.S. at 428.

<sup>7</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

<sup>8</sup> *See Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

<sup>9</sup> *See In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (holding that persecution was on account of applicant’s membership of a social group comprising of the young women of the Tchamba-Kunsuntu Tribe); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10<sup>th</sup> Cir. 2005) (holding that for purposes of FGM, a social group can be defined by both gender and tribal membership). *See also In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

<sup>10</sup> *See Niang*, 422 F.3d at 1199. *But see Kasinga*, 21 I. & N. Dec. at 365 (appearing to indicate that an FGM asylum applicant must also show a personal opposition to FGM).

<sup>11</sup> INA § 101(a)(42). When the statute speaks of “persecution” and a “well-founded fear of  
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as a form of persecution.<sup>12</sup> The BIA, for example, has characterized FGM as a form of “sexual oppression ... to ensure male dominance and exploitation,” practiced in order to “overcome sexual characteristics of young women ... who have not been, and do not wish to be, subjected to FGM.”<sup>13</sup> Therefore, if an asylum applicant successfully shows a well-founded fear of FGM if she returns to her home country, that alone would satisfy the well-founded fear element of an asylum claim.

Some asylum applicants have also made the argument that they have a well-founded fear of persecution based on the fear that a daughter will suffer FGM upon arrival at the applicant’s home country.<sup>14</sup> Several federal circuits seem to at least implicitly accept this proposition.<sup>15</sup> The BIA has, however, rejected an argument proposed by a childless applicant who based her asylum claim on the fear that her future, unborn daughters may suffer FGM, classifying this fear as too speculative to be well-founded.<sup>16</sup>

**FGM As Past Persecution.** Even though a showing of a well-founded fear of FGM will qualify an applicant for asylum status, the BIA will not regard a past infliction of FGM as sufficient to establish a well-founded fear of persecution.<sup>17</sup> This approach, however, is a marked departure from the approach taken by the federal circuits that have addressed this issue.

When an applicant petitions for asylum status, she must show that she has a “well-founded fear” of persecution. An asylum applicant can create a rebuttable presumption of a “well-founded fear” of persecution if she can show (1) a past incident that rises to the level of persecution (2) that is on account of race, religion, nationality, membership in a social group, or political opinion, and (3) is committed by the government or by forces the government is either unable or unwilling to control.<sup>18</sup> This presumption may be rebutted if it can be shown that “there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country.”<sup>19</sup>

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<sup>11</sup> (...continued)

persecution,” it is referring to prospective persecution if the applicant is sent back to her home country. A showing of past persecution is meant to serve as evidence of prospective persecution.

<sup>12</sup> *Kasinga*, 21 I. & N. Dec. at 365 (BIA 1996); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6<sup>th</sup> Cir. 2004).

<sup>13</sup> *Kasinga*, 21 I. & N. Dec. at 366-367.

<sup>14</sup> *See Abay*, 368 F.3d at 641.

<sup>15</sup> *Id.* *See also* *Nwaokolo v. INS*, 314 F.3d 303, 308 (7<sup>th</sup> Cir. 2002); *Barry v. Gonzales*, 445 F.3d 741, 745 (4<sup>th</sup> Cir. 2006).

<sup>16</sup> *In re A-T-*, 24 I. & N. Dec. 296, 302 (BIA 2007).

<sup>17</sup> When an asylum applicant makes a showing of past persecution, it serves as evidence of prospective persecution in the future if she is sent back to her home country.

<sup>18</sup> *Navas v. INS*, 217 F.3d 646, 655-656 (9<sup>th</sup> Cir. 2000). *See also* 8 C.F.R. § 1208.13(b)(1).

<sup>19</sup> 8 C.F.R. § 1208.13(b)(1)(i)(A).

The leading federal appellate case on the treatment of FGM as past persecution is *Mohammed v. Gonzales*.<sup>20</sup> In this case, the asylum applicant was a woman from Somalia who had already been inflicted with FGM.<sup>21</sup> The applicant claimed that the FGM constituted past persecution which warranted the presumption that she had a well-founded fear of future persecution.<sup>22</sup> The government contended that the past infliction of FGM should have rebutted the presumption because, having already suffered FGM, it was unlikely that the applicant would be inflicted with the procedure in the future.<sup>23</sup> The Ninth Circuit rejected this argument, analogizing FGM to forced sterilization, which had been classified as a “continuing harm that renders a petitioner eligible for asylum, without more.”<sup>24</sup> This holding effectively made a showing of FGM sufficient to create an irrebuttable presumption of a well-founded fear of persecution.<sup>25</sup>

Alternatively, the Ninth Circuit stated that even if FGM created a mere rebuttable presumption of a well-founded fear, the presumption would still be difficult to rebut because of the risk of violence and gender persecution, as evidenced by the applicant’s FGM, if the applicant was removed to her home country.<sup>26</sup> This alternative theory has been endorsed by the Eighth Circuit in *Hassan v. Gonzales*, which held that a showing of past FGM would create a presumption of a well-founded fear since the applicant could still suffer from forms of future persecution other than FGM.<sup>27</sup>

On the other hand, the BIA has expressly rejected both of these theories. The BIA has instead ruled that if the government shows that the asylum applicant has already suffered FGM, the presumption of a well-founded fear of persecution is rebutted.<sup>28</sup> The BIA argues that FGM is a one-time procedure, and once it has been undergone, the applicant will never be persecuted by FGM again.<sup>29</sup> Furthermore, the BIA rejected the theory that FGM constitutes a “continuing harm” which creates an irrebuttable presumption of future persecution.<sup>30</sup> The BIA claimed that the only reason forced sterilization is given “continuing harm” status is because of a statutory provision that

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<sup>20</sup> 400 F.3d 785 (9<sup>th</sup> Cir. 2005).

<sup>21</sup> *Id.* at 789-790.

<sup>22</sup> *Id.* at 791.

<sup>23</sup> *Id.* at 799.

<sup>24</sup> *Id.* See also *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9<sup>th</sup> Cir. 2005) (characterizing forced sterilization as a form of permanent and continuous persecution which creates an irrebuttable presumption of a well-founded fear of persecution).

<sup>25</sup> *But see Hassan v. Gonzales*, 484 F.3d 513, 518 (8<sup>th</sup> Cir. 2007) (holding that while a showing of FGM will be sufficient to create a presumption of a well-founded fear of persecution, the presumption is still rebuttable).

<sup>26</sup> *Mohammed*, 400 F.3d at 800.

<sup>27</sup> 484 F.3d at 518.

<sup>28</sup> *In re A-T-*, 24 I. & N. Dec. at 299.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

expressly states that forced sterilization provides a basis for asylum.<sup>31</sup> Absent such a statutory endorsement from Congress, the BIA concluded that FGM should not be treated the same as forced sterilization.<sup>32</sup> It should be noted that the Ninth Circuit has argued that the “continuing harm” concept arose out of case law and not from the statute; the statutory provision regarding forced sterilization instead creates a nexus between a showing of past forced sterilization and political opinion, thereby automatically satisfying the “on account of” element in an asylum claim and has nothing to do with the “well-founded fear of persecution” element.<sup>33</sup>

On the alternative theory, the BIA rejected the notion that a showing of FGM can create a rebuttable presumption of a well-founded fear of future persecution.<sup>34</sup> This approach, suggested by the Ninth Circuit in *Mohammed* and adopted by the Eighth Circuit in *Hassan*, was dismissed by the BIA as a deviation from regulatory procedures.<sup>35</sup> Specifically, the BIA cited a regulation which states that “If the applicant’s fear of future persecution is unrelated to past persecution, the applicant bears the burden of establishing that the fear is well-founded.”<sup>36</sup> The BIA, in essence, appears to require that a showing of past persecution must create a well-founded fear of identical future persecution.<sup>37</sup> If the past persecution renders an identical form of persecution in the future impossible, then the past persecution will not create a rebuttable presumption of a well-founded fear.<sup>38</sup>

As it currently stands, the majority of federal circuits that have addressed this issue appear to view a past infliction of FGM as constituting past persecution which can create a rebuttable presumption of a well-founded fear of future persecution.<sup>39</sup> However, considering the important gate-keeping function the BIA serves for asylum applications, the majority of applicants who have already suffered FGM will likely have their asylum claims rejected.

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<sup>31</sup> *Id.* at 300. *See also* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

<sup>32</sup> *In re A-T-*, 24 I. & N. Dec. at 300.

<sup>33</sup> *See Mohammed*, 400 F.3d at 800, fn. 22.

<sup>34</sup> *In re A-T-*, 24 I. & N. Dec. at 304.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* *See also* 8 C.F.R. § 1208.13(b)(1); 8 C.F.R. § 208.13(b)(1).

<sup>37</sup> *In re A-T-*, 24 I. & N. Dec. at 304.

<sup>38</sup> *Id.*

<sup>39</sup> *See Mohammed*, 400 F.3d at 800-801; *Hassan*, 484 F.3d at 518; *Barry*, 445 F.3d at 745 (stating in dictum that a showing of a prior infliction of FGM constitutes a prima facie case of persecution for an asylum claim); *Niang*, 422 F.3d at 1197-1198 (agreeing that a prior infliction of FGM is a viable basis for an asylum claim).