

In re A-T-, Respondent

Decided September 27, 2007

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

- (1) Because female genital mutilation (“FGM”) is a type of harm that generally is inflicted only once, the procedure itself will normally constitute a “fundamental change in circumstances” such that an asylum applicant no longer has a well-founded fear of persecution based on the fear that she will again be subjected to FGM.
- (2) Unlike forcible sterilization, a procedure that also is performed only once but has lasting physical and emotional effects, FGM has not been specifically identified as a basis for asylum within the definition of a “refugee” under section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2000), so FGM does not qualify as “continuing persecution.” *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003), distinguished.

FOR RESPONDENT: Ronald D. Richey, Esquire, Rockville, Maryland

FOR THE DEPARTMENT OF HOMELAND SECURITY: Christopher R. Coxe, Jr.,
Assistant Chief Counsel

BEFORE: Board Panel: COLE, FILPPU, and PAULEY, Board Members.

FILPPU, Board Member:

In a decision dated January 19, 2005, an Immigration Judge denied the respondent’s applications for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (“Convention Against Torture”). The respondent has appealed from that decision. The respondent’s request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7) (2007). The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a 28-year-old native and citizen of Mali who was admitted into the United States as a visitor on October 4, 2000, and applied for asylum on May 12, 2004. The respondent testified that she underwent female genital mutilation (“FGM”) as a young girl but has no memory of the procedure. According to the respondent, she is opposed to the practice of

FGM and, if she were to have a daughter in the future, would actively oppose having the procedure performed on her child. The respondent further stated that she had recently learned that her father had arranged for her to marry her first cousin and that she fears the consequences of refusing to comply with her family's wishes. The respondent's uncle also testified on her behalf.

The Immigration Judge determined that the respondent failed to file her application for asylum within 1 year of arriving in the United States, as required by section 208(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(B) (2000), and failed to demonstrate eligibility for an exception based on changed circumstances. *See* 8 C.F.R. § 1208.4(a)(4) (2005). Thus, the Immigration Judge found the respondent statutorily ineligible for asylum and considered only her applications for withholding of removal and protection under the Convention Against Torture. The Immigration Judge found that the respondent's past experience with FGM did not qualify her for the prospective relief of withholding of removal. Further, the Immigration Judge determined that the respondent had failed to demonstrate that it is more likely than not that she would be forced into an arranged marriage against her will, and that she had therefore failed to meet the burden of proof for withholding of removal on that basis. Finally, the Immigration Judge concluded that the respondent had failed to establish that it is more likely than not that she would be tortured if she is returned to Mali.

II. APPLICABLE LAW

An applicant for asylum has the burden of establishing that she is a "refugee" within the meaning of section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (2000). *See* section 208 of the Act. To do this, the alien may demonstrate that she has suffered past persecution on account of one of the five enumerated grounds in section 101(a)(42) of the Act, which include race, religion, nationality, membership in a particular social group, or political opinion. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Once an alien has shown past persecution, she is presumed to have a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1) (2007). The presumption is based on the possibility that a persecutor, having once shown an interest in harming the applicant, might seek to do so again if provided the opportunity. *See Matter of N-M-A-*, 22 I&N Dec. 312, 318 (BIA 1998). In such cases, the burden of proof then shifts to the Department of Homeland Security ("DHS") to rebut the presumption of a well-founded fear. 8 C.F.R. § 1208.13(b)(1)(ii). One way the DHS may meet its burden is to demonstrate by a preponderance of the evidence that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. § 1208.13(b)(1)(i)(A). If the Government successfully

rebutts the presumption, the burden shifts back to the applicant to demonstrate a well-founded fear of future persecution. Aliens who cannot show past persecution may otherwise obtain asylum under the Act if they can demonstrate an objectively reasonable well-founded fear of future persecution on account of a protected ground. 8 C.F.R. § 1208.13(b)(2)(i)(B); *see also Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

As we observed in *Matter of N-M-A-*, *supra*, at 318, asylum is a forward-looking form of relief that provides “prophylactic protection” for individuals who might face persecution in the future. The rationale for considering past persecution is that the “past serves as an evidentiary proxy for the future.” *Id.* (quoting *Marquez v. INS*, 105 F.3d 374, 379 (7th Cir. 1997)). Nevertheless, in certain cases where the applicant has established past persecution but there is little likelihood of future persecution, a favorable exercise of discretion may still be warranted if the alien demonstrates compelling reasons for her unwillingness to return to her country arising out of the severity of the past persecution, or a reasonable possibility that she may suffer other serious harm upon removal to that country. *See* 8 C.F.R. § 1208.13(b)(1)(iii); *see also Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

An alien who is seeking withholding of removal must show that her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. *See* section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A) (2000). In order to make this showing, the alien has the burden of proving that it is more likely than not that she will be persecuted on account of a protected ground. *See INS v. Stevic*, 467 U.S. 407, 413 (1984); 8 C.F.R. § 1208.16(b)(2) (2007). As with asylum, an alien’s showing of past persecution in the proposed country of removal gives rise to a presumption that her life or freedom would be threatened there in the future.¹ *See* 8 C.F.R. § 1208.16(b)(1).

Finally, in order to qualify for protection under the Convention Against Torture, an alien must establish that if she is removed, it is more likely than not that she will be subject to torture, as it is defined by regulation. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a) (2007).

III. ANALYSIS

On appeal, the respondent argues that her past experience with FGM constitutes a continuing harm that renders her eligible for asylum. She further asserts that she has a well-founded fear of persecution if she returns to Mali

¹ Unlike asylum, however, the regulations governing withholding of removal do not provide for a discretionary grant of relief based solely on the severity of past harm.

because she may someday give birth to a daughter who will also be subjected to FGM. Additionally, the respondent claims to fear that her family will force her to enter into an arranged marriage with her first cousin.

A. Female Genital Mutilation: “Continuing Persecution” Theory

In *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), we recognized that FGM can be a form of persecution and found that young women from a certain tribe in Togo who feared such a practice constituted a particular social group. Like the asylum applicant in *Matter of Kasinga*, the respondent is from a country in which FGM continues to be widespread. According to the Department of State 2006 country report on human rights practices in Mali, there are currently no laws prohibiting FGM.² See Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Mali Country Reports on Human Rights Practices—2006* (Mar. 6, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78745.htm>; see also 8 C.F.R. § 1003.1(d)(3)(iv) (allowing the Board to take administrative notice of the contents of official documents). In *Kasinga*, however, the applicant had not yet undergone FGM and was facing an imminent threat of being subjected to the procedure if returned to her country of origin. The respondent in this case has already undergone FGM. Consequently, even assuming arguendo that she is a member of a particular social group who suffered past persecution, “there is no chance that she would be personally [persecuted] again by the procedure.” *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003). Any presumption of future FGM persecution is thus rebutted by the fundamental change in the respondent’s situation arising from the reprehensible, but one-time, infliction of FGM upon her. 8 C.F.R. § 1208.16(b)(1)(i)(A).

Nevertheless, the fact that FGM is generally performed only once, thereby eliminating the risk of identical future persecution, does not end the discussion. In *Mohammed v. Gonzales*, 400 F.3d 785, 800-01 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that FGM constitutes a continuing harm for purposes of asylum, analogizing the procedure to forced sterilization, which we found to be continuing persecution in *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003). We disagree with the analysis in *Mohammed v. Gonzales* and consider *Matter of Y-T-L-* to represent a unique departure from the ordinarily applicable principles regarding asylum and withholding of removal. See also *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (implicitly rejecting the theory that FGM constitutes continuing persecution such that the presumption of a well-founded fear of persecution can never be overcome).

² In the United States, female genital mutilation is a felony punishable by up to 5 years of imprisonment. See 18 U.S.C. § 116 (2000).

Generally, persons who have experienced past persecution, but who have no present well-founded fear, may obtain refugee status only if they demonstrate compelling reasons for being unwilling to return to their country arising out of the severity of the past persecution, or they face a reasonable possibility of other serious harm in the future. *See Matter of N-M-A-*, *supra*, at 318. This principle, derived originally from case law such as *Matter of Chen*, *supra*, is embodied in the regulations that govern asylum adjudications. *See* 8 C.F.R. § 1208.13(b)(1)(iii).

We nevertheless found in *Matter of Y-T-L-*, *supra*, that involuntary sterilization and abortion represented an exception to this principle and constituted continuing persecution, because persons who suffered such harm have been singled out by Congress as having a basis for asylum in the “refugee” definition of section 101(a)(42) of the Act on the strength of the past harm alone. While FGM is similar to forced sterilization in the sense that it is a harm that is normally performed only once but has ongoing physical and emotional effects, Congress has not seen fit to recognize FGM (or any other specific kind of persecution) in similar fashion with special statutory provisions. Hence, we deem it consistent with the statutory and regulatory scheme to view FGM in the same category as most other past injuries that rise to the level of persecution, including those that involve some lasting disability, such as the loss of a limb. We therefore do not subscribe to the Ninth Circuit’s continuing harm analysis.

Stated another way, in *Matter of Y-T-L-*, *supra*, we treated sterilization as continuing persecution because it would have contradicted Congress’s purpose to find that the very act that constituted persecution under the coerced population control provisions was itself a “fundamental change in circumstances” that obviated a future well-founded fear. 8 C.F.R. § 1208.13(b)(1)(i)(A). The statute defined victims of forced sterilization, for example, as qualifying for relief. Thus, it would have been anomalous to rule that the sterilization also formed a basis for denying relief. In *Matter of Y-T-L-*, *supra*, at 606, we specifically spoke of the “dilemma” presented between the “bedrock principle” that refugee law in the main requires a “prospective view” of persecution and the “manifestly clear” intent of Congress to make past victims of China’s coercive family planning policy eligible for asylum, “not simply those who could be [future] victims if returned to China.” We resolved this dilemma by recognizing the “special nature of the persecution at issue” in the coercive family planning context, and by giving “full force to the intent of Congress in extending asylum to those who have sustained” such family planning persecution in the past. *Id.*

Here, in sharp contrast, there is no separate statutory ground of persecution predicated on an alien’s being subjected to FGM. Consequently, there is no basis for following an approach outside the regulatory formula for assessing persecution claims founded on past persecution alone. Simply put, we do not

face a “dilemma” between the fundamental principles of refugee law and the application of specific statutory directives.

The loss of a limb also gives rise to enduring harm to the victim, but such forms of past persecution are routinely assessed under the past persecution standards specified in the asylum and withholding of removal regulations. *See* 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(1). Neither set of regulations adopts a “continuing” harm or continuing persecution theory for injuries that have a lingering or permanent impact on the victim. We do not consider the ruling in *Matter of Y-T-L-*, *supra*, to amount to a general repeal or revision of these regulations, such as the asylum provisions specifying the nature of the inquiry for a grant of asylum based on past persecution in the absence of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1)(iii). In the absence of a specific contrary statutory provision, such as the one at issue in *Y-T-L-*, we consider these regulations to be binding. Accordingly, because we reject the continuing persecution theory, we are unable to find the respondent eligible for withholding of removal based on her past experience with FGM.³ Further, as previously explained, the regulations do not provide for a discretionary grant of withholding of removal based on the severity of past persecution.

B. Asylum 1-Year Bar

The respondent entered the United States in October 2000 and filed her asylum application in May 2004. The Immigration Judge determined that the respondent was statutorily barred from asylum for failure to file her application within 1 year of arriving in the United States, as required by section 208(a)(2)(B) of the Act, and that she failed to demonstrate eligibility for an exception based on changed circumstances. *See* 8 C.F.R. § 1208.4(a)(4). We agree with the Immigration Judge’s conclusion. Although the respondent testified that she did not find out that her parents had arranged for her to marry her first cousin until August 2003, a letter from her father reflects that she likely had some awareness of the arrangement much earlier. Moreover, even accepting the respondent’s testimony that she discovered her parents’ plans in August 2003, she has not explained why she waited an additional 9 months before filing her asylum application. *See* 8 C.F.R. § 1208.4(a)(4)(ii) (requiring

³ The Fourth Circuit, in which this case arises, cited *Mohammed v. Gonzales*, *supra*, with approval in *Barry v. Gonzales*, 445 F.3d 741, 745 (4th Cir. 2006). However, the opinion cited *Mohammed* (along with authorities from two other circuits) only for the proposition that FGM is persecution and did not address the merits of the Ninth Circuit’s continuing persecution theory. As such, *Barry* represents mere dicta in this regard and is not binding on us here. *See also Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir. 2007) (recognizing as “settled principle” the view that the imminent threat of FGM may form the basis of a claim for asylum or withholding of removal).

applications to be filed within a “reasonable period” after discovering changed circumstances). We therefore conclude that the respondent is ineligible for asylum and may be considered only for withholding of removal and protection under the Convention Against Torture.

Because we have rejected the continuing persecution theory put forth in *Mohammed v. Gonzales*, *supra*, we are unable to find the respondent eligible for withholding of removal based on her past experience with FGM. Moreover, despite the severity of harm she endured as a victim of FGM, she is ineligible for a humanitarian grant of asylum under 8 C.F.R. § 1208.13(b)(1)(iii). Additionally, the respondent’s current status as an unmarried woman with no children renders her claim that her future child or children may be subjected to FGM in Mali too speculative to warrant consideration. *See generally Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). Moreover, we held in *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007), that an alien may not establish eligibility for asylum or withholding of removal based solely on the fear that his or her daughter might be forced to undergo FGM in the alien’s home country. *See also Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (rejecting an alien’s withholding claim “based solely on the psychological suffering” she might endure if her daughter were required to submit to FGM in Senegal).

C. Arranged Marriage

Finally, we agree with the Immigration Judge that the respondent failed to establish eligibility for withholding of removal on the basis of her fear of an arranged marriage. Initially, we note that an arranged marriage between adults is not generally considered per se persecution. *See, e.g., Mansour v. Ashcroft*, 390 F.3d 667, 680 (9th Cir. 2004) (observing that arranged marriage, “while unfortunate and deplorable, may not constitute persecution if imposed on an adult”). It appears from the record that the respondent and her intended fiancé are of similar ages and backgrounds, given the respondent’s testimony that she and her cousin played together as children, and that the family used to joke that they would one day marry. Thus, if the respondent were to return to Mali and proceed with the marriage, it is not likely that she would be in a disadvantaged position in relation to her husband on account of her age or economic status.

It is understandable that the respondent, an educated young woman, would prefer to choose her own spouse rather than acquiesce to pressure from her family to marry someone she does not love and with whom she expects to be unhappy. The respondent has also expressed valid concerns about possible birth defects resulting from a union with her first cousin. While we do not discount the respondent’s concerns, we do not see how the reluctant

acceptance of family tradition over personal preference can form the basis for a withholding of removal claim.

Moreover, the respondent has presented insufficient evidence regarding the consequences she might face if she refuses to marry her intended fiancé. She stated in her affidavit that her father “will stop at nothing to force me to marry who he dictates,” but she gives little indication of what he might do if she disobeys him. The respondent testified that her father might take out his anger on her mother and dissolve their marriage, but a letter from the respondent’s mother expresses no such concerns. Likewise, a letter from the respondent’s father states that she must proceed with the marriage “to uphold the reputation of our family,” but it includes no indication of possible consequences for failing to comply with the arrangement. Further, the respondent testified that if she refused to marry her cousin and was then shunned by her family, she could not relocate elsewhere in Mali because single women living alone are viewed as prostitutes. However, the respondent’s uncle, who testified on her behalf, conceded that single women are indeed able to live alone and support themselves in Mali. Thus, we agree with the Immigration Judge that the respondent could reasonably relocate within Mali to avoid the marriage. *See* 8 C.F.R. § 1208.16(b)(3).

Additionally, we concur with the Immigration Judge that the respondent failed to demonstrate a nexus between any harm she may fear and a protected ground. The respondent suggests that young female members of the Bambara tribe who oppose arranged marriage constitute a particular social group. *Cf. Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3513 (U.S. Mar. 16, 2007) (No. 06-1264). We question the viability of the respondent’s proposed group, as we are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-75 (BIA 2007) (holding that “affluent Guatemalans” did not constitute a particular social group, partly because the perception of wealth is highly subjective); *Matter of C-A-*, 23 I&N Dec. 951, 959-61 (BIA 2006) (finding that noncriminal informants working against the Cali drug cartel in Colombia were not sufficiently visible to be a particular social group), *aff’d*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 127 S. Ct. 977 (2007). Moreover, even accepting the respondent’s status as a member of such a group, we conclude that she has failed to demonstrate a clear probability that she would be persecuted on that basis. Rather, the respondent has expressed only a generalized fear of disobeying her authoritarian father.

Finally, the respondent seems to suggest on appeal that her past experience with FGM creates a presumption that she is at risk of future persecution; that is, even if she cannot be subjected to FGM a second time, she may be

vulnerable to other forms of persecution on account of her membership in a particular social group. *Hassan v. Gonzales, supra*, appears to support the respondent's theory. In *Hassan*, the Eighth Circuit recognized FGM as past persecution and Somali women as a particular social group.⁴ *Id.* at 518 (quoting *Mohammed v. Gonzales, supra*, at 797, in observing that “the immutable trait of being female is a motivating factor” for FGM). It held that although FGM is a form of persecution that can happen only once, the DHS nevertheless retains the burden of rebutting the presumption of a well-founded fear with regard to other common types of persecution a Somali woman might endure, such as rape. *Id.* at 518-19.

However, we find *Hassan* to be at odds with the regulatory structure for asylum, which provides: “If the applicant’s fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.” 8 C.F.R. § 1208.13(b)(1); *see also Matter of N-M-A-, supra*, at 321-23 (finding that an asylum applicant who suffered past persecution under a regime no longer in power bears the burden of demonstrating a well-founded fear of future persecution from a new persecutor); 8 C.F.R. § 1208.16(b)(1)(B)(iii) (placing the same burden on applicants for withholding of removal). Unlike FGM, family pressures to accede to arranged marriages are not necessarily confined to females. Within the contemplation of 8 C.F.R. § 1208.16(b)(1)(B)(iii), we find that the FGM suffered by the respondent is unrelated to her father’s desire that she uphold her family’s reputation by marrying her cousin. In this instance, the respondent has not met her burden of showing a clear probability either that she would be forced into an arranged marriage against her will or that she would be persecuted on account of her rejection of the marriage.

D. Convention Against Torture

The Immigration Judge found that the respondent failed to present evidence that it is more likely than not that she would be tortured if she is returned to Mali. We agree and find that she does not qualify for protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(c), 1208.18(a).

⁴ Because gender is an immutable trait that is generally recognizable, Somali women would appear to meet the social visibility requirement discussed above. We find it unnecessary in this instance to resolve whether such a broadly defined group could constitute a *particular* social group for purposes of asylum and withholding of removal.

IV. CONCLUSION

The Immigration Judge correctly determined that the respondent is barred from seeking asylum because her application was not timely filed or subject to an exception. We also concur with the Immigration Judge's conclusion that the respondent has failed to establish eligibility for withholding of removal or protection under the Convention Against Torture. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security. *See* section 240B(b) of the Act, 8 U.S.C. § 1229c(b) (2000); 8 C.F.R. §§ 1240.26(c), (f) (2007). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act, 8 U.S.C. §§ 1229b, 1255, 1258, and 1259 (2000). *See* section 240B(d) of the Act.