



Case Western Reserve Journal of International Law

Volume 32 | Issue 1

2000

In through the Side Door: Analyzing *in re Anikwata* under U.S. Asylum Law and the Torture Convention

James A. Lazarus

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

James A. Lazarus, *In through the Side Door: Analyzing in re Anikwata under U.S. Asylum Law and the Torture Convention*, 32 Case W. Res. J. Int'l L. 101 (2000)

Available at: <https://scholarlycommons.law.case.edu/jil/vol32/iss1/4>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

**IN THROUGH THE SIDE DOOR: ANALYZING *IN RE ANIKWATA*
UNDER U.S. ASYLUM LAW AND THE TORTURE CONVENTION**

James A. Lazarus *

I. INTRODUCTION 101

II. THE CASE OF ANIKWATA 103

III. WOMEN’S RIGHTS VERSUS CULTURAL RITES..... 105

 A. An Overview of Female Genital Mutilation 105

 B. U.S. Commitments to Women’s Rights Outweigh Cultural Rites 108

IV. FAILURE UNDER DOMESTIC IMMIGRATION LAW..... 113

 A. Parental Rights: “Exceptional and Extremely Unusual Hardship” 114

 B. Asylum Law: Meeting the Refugee Act Test..... 117

 1. “Social Group” 118

 2. “Well-founded Fear of Persecution” 120

V. ENTERING THROUGH THE SIDE DOOR: THE U.N. CONVENTION
 AGAINST TORTURE 122

VI. CONCLUSION 127

I. INTRODUCTION

U.S. asylum law should have protected Virginia Anikwata from making a painful decision in May 1998. She had to leave her twelve-year old daughter, Sharon, alone in the United States, or return with Sharon to Nigeria to undergo female genital mutilation (FGM). If forced to return to Nigeria, Anikwata would become the property of her in-laws. She and Sharon would be forced into polygamous marriages. None of Anikwata’s previous requests succeeded in convincing the Immigration and

* A.B. Bowdoin College, 1997; J.D. Candidate, 2000, Case Western Reserve University School of Law; Articles Editor, *Case Western Reserve Journal of International Law*. I would like to thank my Note Advisor, Professor Hiram Chodosh, for providing a year of valuable guidance, untiring review and comprehensive feedback. I also appreciate the assistance of Professor David Leopold and Virginia Anikwata’s attorneys, Martha Saenz and Morton Sklar, Director, World Organization Against Torture. In addition, I am grateful to the Frederick K. Cox International Law Center for awarding me its generous Distinguished Student Note Award.

Naturalization Service (INS) to call off her deportation. At the final hour, she petitioned under the United Nations Convention Against Torture (the Torture Convention).¹ The fate of Anikwata and Sharon depends on the Board of Immigration Appeals' (the BIA or the Board)² upcoming decision in *In re Virginia Anikwata*.³ The Board's judgment will reflect U.S. immigration policy in two areas. First, the outcome will either reaffirm or correct the critical failure of U.S. immigration law to protect a single mother and her only daughter from the severe physical and psychological hardship resulting from a forced separation. Second, the Board's holding will determine whether the Torture Convention provides applicants an alternative way to avoid deportation previously unavailable under asylum law.

This Note is divided into five sections. Following this Introduction, Section II reviews the procedural and substantive nature of Anikwata's case. Section III argues that the competing interest of cultural autonomy is outweighed by two factors. First, the United States must provide basic human rights to women and children under domestic and international law. Second, the sociological and medical dangers that FGM entails warrant U.S. protection. Section IV theorizes how the BIA might have handled Anikwata's case had FGM and polygamy been elements of an asylum proceeding. This section criticizes how the BIA likely would have handled the matter by analyzing the current state of asylum case law and the recent changes to statutory law. Section V considers whether the Torture Convention should protect Anikwata from deportation. This Note argues that it is likely the Torture Convention argument will also fail before the BIA. That Anikwata may not avoid deportation and be forced back to Nigeria should prompt legislators to repeal the overly restrictive effects of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).⁴ Although IIRAIRA sought to reduce "real and perceived" abuses of the asylum system, the law greatly restricts necessary safeguards of U.S. asylum law.⁵ Most notably, the law permits family breakups more easily despite evidence of extreme hardship. Legislators must also make

¹ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) [hereinafter Torture Convention].

² The Board of Immigration Appeals is the top administrative review body in the immigration system.

³ No copy of proceedings available yet.

⁴ Pub. L. No. 104-208, 110 Stat. 3009-546 to 3009-724 (codified as amended in scattered sections of 8 U.S.C.) (discussed in Section IV.A, *infra*).

⁵ IIRAIRA severely restricted U.S. policies toward legal and illegal immigrants. *See, e.g.,* Michele R. Pistone, *New Asylum Laws: Undermining an American Ideal*, 3 BENDER'S IMMIGR. BULL. 496, 497 (1998) (providing examples which demonstrate the limitations of the IIRAIRA).

changes to asylum law to protect women and children like the Anikwatas who oppose forced marriage or forced FGM.

II. THE CASE OF ANIKWATA

Virginia Anikwata came to the United States in 1986 with her late husband on his student visa.⁶ Her husband died in 1987, eight weeks after their daughter Sharon's birth.⁷ Sharon is a twelve-year old U.S. citizen born in Washington, D.C.⁸ Anikwata, 36, earned a licensed practical nurse's certificate and worked in retirement and nursing homes.⁹ Anikwata's status in the United States changed from legal to illegal as a result of her husband's death.¹⁰ From 1989 to 1990, Anikwata worked in childcare for a family who sponsored her for a green card.¹¹ In 1991, however, an INS representative happened to knock on Anikwata's door in search of someone else.¹² When Anikwata could not produce a greencard, the INS realized Anikwata's status as an illegal alien and began its pursuit to deport her.¹³ Anikwata received extensions in 1992 and 1993 before she was asked to surrender herself for deportation.¹⁴ In 1994, Anikwata filed an affidavit with the BIA that said her daughter would face hardship due to the laws and customs of Anikwata's tribe in Nigeria.

Anikwata asserts that if deported to Nigeria, she and her daughter would become the property of her late husband's family.¹⁵ They would be

⁶ See Dennis O'Brien, *Nigerian Says Deportation May Endanger Her Daughter*, BALTIMORE SUN, May 29, 1998, at 7B.

⁷ See Sylvia Moreno, *For Her Daughter's Protection: Nigerian Fights Deportation, Fearing Mistreatment by Tribe*, WASH. POST, May 27, 1998, at B1; O'Brien, *supra* note 6, at 7B.

⁸ See Sarah Pekkanen, *Woman Fights Deportation to Nigeria*, BALTIMORE SUN, May 30, 1998, at 1A; see also *All Things Considered: Asylum and Genital Mutilation* (NPR radio broadcast, May 27, 1998) available in LEXIS, News Library, SCRIPT File (noting that Sharon does not want to move to her mother's home town in Nigeria, where she will have no telephone, computer, and possibly not enough food).

⁹ See O'Brien, *supra* note 6, at 7B.

¹⁰ See Moreno, *supra* note 7, at B1.

¹¹ See *id.*

¹² See *id.*

¹³ See Dorothy S. Boulware, *Mother Fights Deportation to Save Daughter from Painful Ritual*, BALTIMORE AFRO-AM., June 12, 1998, at A1.

¹⁴ See *id.*

¹⁵ See *id.* (noting that Anikwata could be forced to wed a brother-in-law and bear more children because her husband's family refuses to release her and accept the refund of the dowry).

forced to abide by her in-law's tribal traditions of polygamous marriage,¹⁶ and Sharon would be forced to undergo FGM.¹⁷ Anikwata states that she has no relatives in the United States with whom she could entrust her daughter if deported.¹⁸

Anikwata qualified for a form of release called a "Suspension of Deportation."¹⁹ She only had to prove that she had been in the United States for at least seven years, had good moral character and that deportation would prove to be an "extreme hardship" on Sharon.²⁰ Under IIRAIRA, however, the issuance of an order to appear before an immigration judge for removal proceedings ("Notice to Appear," formerly called an "Order to show Cause") interrupted the requisite seven year period of residence, precluding Anikwata's qualification for suspension.²¹

Thus, all of Anikwata's previous attempts to legalize her residency in the United States failed.²² In January 1998,²³ Anikwata filed a petition to reopen her case on the grounds of political asylum.²⁴ She wanted to argue that the law protected her from deportation to Nigeria where she underwent the "persecution" of FGM.²⁵ Anikwata's asylum claim could only be considered with the permission of the Baltimore INS district office or the BIA, which rejected her claim. The INS claimed that Anikwata had many

¹⁶ See World Organization Against Torture USA, Submission in Support of Convention Against Torture Petition and Interview of Virginia Anikwata, INS Case Number A70 505 637, at 5-6 (Nov. 30, 1998) (on file with author) [hereinafter Submission].

¹⁷ See Pekkanen, *supra* note 8.

¹⁸ See *id.*

¹⁹ See Immigration and Nationality Act § 244(a) [hereinafter INA], 8 U.S.C. § 1254(a) (repealed 1996); *infra* Section IV(A).

²⁰ See Boulware, *supra* note 13, at A1.

²¹ See Telephone Interview with Martha Saenz, Anikwata's original attorney (Mar. 5, 1999) (noting that although the Attorney General vacated *In re* N-J-B-, Interim Decision # 3309, (BIA 1997), which presumably would have permitted Anikwata's suspension, Congress later codified the harmful decision as part of immigration law). See generally Lee A. O'Connor, *Suspension of Deportation after IIRAIRA and NACARA*, 3 BENDER'S IMMIGR. BULL. 1156 (1998) (exploring the possible effects of changes to the INA on currently pending cases); *infra* Section IV (discussing new "Cancellation of Removal and Adjustment of Certain Nonpermanent Residents").

²² See *Hearing Scheduled in Deportation*, TIMES-PICAYUNE (New Orleans), Oct. 2, 1998, at A25.

²³ Anikwata did not raise the FGM issue until January 1998 because FGM did not become grounds for asylum until *In re* Kasinga, Interim Decision #3278 (BIA 1996). See Telephone Interview with Martha Saenz, *supra* note 21. For more on Kasinga, see *infra* section IV(B).

²⁴ See Moreno, *supra* note 7, at B1.

²⁵ See *id.*

opportunities to raise the FGM issue and did not merit any further opportunities to evade deportation.²⁶

On the brink of deportation, Anikwata filed a last minute petition invoking Article III of the Torture Convention, which prohibits the deportation of anyone who has experienced torture or cruel and inhuman treatment or is likely to experience such treatment in the future.²⁷ The INS ordered a stay in deportation on May 28, 1998, the day after Anikwata filed the Torture Convention petition.²⁸ In September 1998, the BIA agreed to hear Anikwata's petition for withholding of deportation in October 1998 based on the Torture Convention.²⁹ Congress incorporated the Torture Convention into U.S. law in October 1998.³⁰ The law bars immediate deportation for any non-citizen who files a claim under the Torture Convention.³¹ The BIA will likely deport Anikwata because the INS fears opening the floodgates to new asylum claims.

III. WOMEN'S RIGHTS VERSUS CULTURAL RITES

A. *An Overview of Female Genital Mutilation*

FGM includes any procedure involving partial or total removal of the external female genitalia or other injury to the female genital organs for any purpose.³² Over two million girls are at risk of FGM annually.³³ The

²⁶ See Moreno, *supra* note 7, at B1 (quoting an INS official as stating that "[a]ll the information has been heard by an immigration judge and the Board of Immigration Appeals, and they have found her claims have no merit"). But see Telephone Interview with Martha Saenz, *supra* note 21 (arguing that Anikwata never eluded the INS; on the contrary, the INS "tripped over her" when they knocked on her door in search of someone else).

²⁷ See Sylvia Moreno, *INS Frees Nigerian Woman During Appeal*, WASH. POST, May 29, 1998, at D3.

²⁸ See Morton Sklar, *New Convention Against Torture Remedies*, 3 BENDER'S IMMIGR. BULL. 651, 652 (1998) (noting that the remarkable turnaround in the INS's decision-making demonstrates the growing importance of the Torture Convention).

²⁹ See Sylvia Moreno, *Woman to Get Hearing to Protect Daughter*, WASH. POST, Sept. 28, 1998, at B6.

³⁰ See Barbara Crossette, *Mother Cites New U.S. Law on Torture to Fight Return to Nigeria*, N.Y. TIMES, Dec. 3, 1998, at A8 (discussing the Torture Convention's possible impact on the Anikwata case).

³¹ See Sarah Wyatt, *Deportation Target Fears Child's Mutilation*, CHATTANOOGA FREE PRESS, Dec. 6, 1998, at A4.

³² See WORLD HEALTH ORGANIZATION ET AL., FEMALE GENITAL MUTILATION: A JOINT WHO/UNICEF/UNFPA STATEMENT 3 (1997).

It is debated whether FGM is properly termed mutilation or circumcision. Dr. Sarah Maier, a family practice resident at University Family Physicians/Smiley's Clinic in Minneapolis, comments, "but in doing that [calling female circumcision "FGM"], we just continue the victimization, because these women don't see themselves as having been mutilated." Kay

practice is widespread among the illiterate and also common among the educated.³⁴ A girl is typically subjected to FGM between the ages of one week and fourteen years, and before the onset of menstruation.³⁵ The procedure is traditionally performed by female lay people.³⁶ Some doctors also perform FGM; however, few medical associations condone the practice.³⁷

FGM has four forms.³⁸ Sunna ("tradition" in Arabic) involves the excision of the prepuce, with or without excision of part or all of the clitoris. Clitoridectomy, the most common procedure, accounts for 80% of all operations.³⁹ Clitoridectomy involves the excision of the clitoris with partial or total excision of the labia minora.⁴⁰ Additional cuts into the vagina are added in some areas to make childbirth easier. Approximately 85% of all women who undergo FGM experience one of these two types.⁴¹ Infibulation or Pharaonic circumcision, the third form, is practiced mainly in the horn of Africa.⁴² Infibulation involves the stitching and narrowing of

Miller, *Circumcision Ritual Creates Cultural Conflict for Somali Women*, STAR TRIB., May 24, 1998, at A1. In contrast, Surita Sandosham, Executive Director of the women's rights group Equality NOW, argues that "[t]he term 'female circumcision' is a misnomer. This practice . . . involves the cutting of the clitoris and, in the more drastic forms, all external genitalia. The male equivalent of even the less severe forms of FGM would be castration, not circumcision." Surita Sandosham, Editorial, *Defining Circumcision*, N.Y. TIMES, Dec. 28, 1995, at A20.

³³ See WORLD HEALTH ORGANIZATION ET AL., *supra* note 32, at 5.

³⁴ See Celia W. Dugger, *Genital Ritual is Unyielding in Africa*, N.Y. TIMES, Oct. 5, 1996, at A6.

³⁵ See FAMILY LAW COUNCIL (AUSTRALIA), *FEMALE GENITAL MUTILATION: A REPORT TO THE ATTORNEY GENERAL* 8 (1994).

³⁶ See NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION* 29 (1995).

³⁷ See *id.*

³⁸ Although the FGM procedure and its consequences are disturbing, it is important to distinguish between the various forms of FGM and the different techniques involved as well as their attendant consequences. See, e.g., Bernadette Passade Cisse, *International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based On Fear of Female Genital Mutilation*, 35 COLUM. J. TRANSNAT'L L. 429, 450 (1997) (arguing that "well-meaning articles emphasize the most shocking FGM practices and consequently portray African parents as barbaric child abusers and African societies as oppressors of women, without nuancing their analysis of FGM, perhaps for fear of providing any arguments that might legitimize the practice").

³⁹ See FRAN HOSKEN, *THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES* 3 (4th ed. 1993); WORLD HEALTH ORGANIZATION ET AL., *supra* note 32, at 5.

⁴⁰ See HOSKEN, *supra* note 39, at 3.

⁴¹ See TOUBIA, *supra* note 36, at 10.

⁴² See Dugger, *supra* note 34, at A6.

the vaginal opening by fastening together the bleeding sides of the labia majora with thorns, catgut or sticky paste.⁴³ A small opening is created by inserting a splinter of wood to allow for elimination of urine and later menstrual blood.⁴⁴ “The legs of the child are then tied together, immobilizing her for several weeks or until the wound is healed.”⁴⁵ Women who are infibulated must be cut open to allow penetration and require additional cuts when giving birth.⁴⁶ The final form of FGM, “unclassified,” includes such techniques as pricking, piercing or incising of the clitoris and/or labia, stretching of the clitoris and/or labia, or cauterization by burning of the clitoris and surrounding tissue among other procedures.⁴⁷

Although caused by factors besides FGM, it is notable that the highest maternal mortality rates in the world are found in FGM-practicing areas.⁴⁸ All FGM operations are performed without anesthetic, typically on “struggling children held down by force . . . under highly septic conditions, using a variety of tools.”⁴⁹ Besides death from shock, bleeding or severe infection, transmission of the HIV virus is also reported.⁵⁰ Long-term medical complications include genital malformation, delayed onset of menstruation, chronic pelvic complications, recurrent urinary retention and bladder infection, sexual frigidity and lack of libido.⁵¹ Psychological complications include a sense of loss of femininity, depression, psychosis, and a high rate of divorce.⁵² The pregnant victim of FGM faces various obstetric complications, and her unborn baby may suffer injury or brain damage as a result of a difficult birth.⁵³ Other problems involve psycho-sexual, gynecological and urinary complications.⁵⁴ For women who have no

⁴³ See HOSKEN, *supra* note 39, at 3.

⁴⁴ *See id.*

⁴⁵ *Id.*; see also WORLD HEALTH ORGANIZATION ET AL., *supra* note 32, at 3 (describing infibulation).

⁴⁶ See WORLD HEALTH ORGANIZATION ET AL., *supra* note 32, at 7.

⁴⁷ *See id.* at 3.

⁴⁸ See HOSKEN, *supra* note 39, at 2.

⁴⁹ *Id.* at 33.

⁵⁰ See Dr. Muniini K. Mulera, *Uganda: Let Government Ban Circumcision*, AFR. NEWS, Aug. 3, 1998, available in LEXIS, News Library, AFRNWS File; see also Miller, *supra* note 32, at A1 (noting that unsterilized razors, pieces of glass, knives and sharp stones may be used on one girl after another, risking the transmission of infections, including AIDS).

⁵¹ See Mulera, *supra* note 50.

⁵² *See id.*; see also Miller, *supra* note 32, at A1.

⁵³ See Mulera, *supra* note 50.

⁵⁴ See AMNESTY INTERNATIONAL-GHANA & ASSOCIATION OF CHURCH DEVELOPMENT PROJECTS (ACDEP) IN NORTHERN GHANA, WORKING TOGETHER FOR CHANGE: STOP FEMALE GENITAL MUTILATION 14 (1996) (noting marital conflicts due to sexual insensitivity,

one with whom to share their concerns, "their condition can progress to psychopathological levels."⁵⁵

B. U.S. Commitments to Women's Rights Outweigh Cultural Rites

That FGM has existed for over two thousand years raises the concern that the United States may be pushing its own moral agenda on other cultures.⁵⁶ If that is the case, the INS might argue that Anikwata does not merit a withholding of deportation because FGM is a legitimate, accepted cultural practice and not torture.⁵⁷ While universalists argue that fundamental human rights norms transcend culture,⁵⁸ cultural relativists⁵⁹ maintain that defining FGM as "persecution" challenges the cultural autonomy of FGM-practicing nations in Africa and the Middle East.⁶⁰ The United States rightly subscribed to the former theory, as evidenced by the

anxiety/psychosis; urinary problems include dribbling, inconsistency, poor flow, obstruction, dysuria (painful or difficult passage of urine)).

⁵⁵ TOUBIA, *supra* note 36, at 19. For a brief discussion of the sexual and psychological effects of FGM, see *id.* at 17-19.

⁵⁶ Scholars believe FGM began in Egypt or the Horn of Africa more than two thousand years ago, before the advent of Christianity or Islam. See Celia W. Dugger, *Rite of Anguish: A Special Report*, N.Y. TIMES, Oct. 5, 1996, § 1, at 1. Others have suggested that the ritual dates back more than ten thousand years. See Miller, *supra* note 32, at A1. Slave girls in ancient Rome were infibulated to prevent conception because childbearing would hinder their work. See HOSKEN, *supra* note 39, at 74. In addition, "[w]hen excavating Egyptian graves, archaeologists found mummies that were excised." See *id.*

⁵⁷ See generally James T. Dixon, *Bridging Society, Culture, and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. 263 (1997) (containing a useful discourse on the debate over FGM and the legal ramifications therefrom); see also Barrett A. Breitung, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 EMORY INT'L L. REV. 657, 659 (1996) (examining how a group of states believe they can "outlaw a traditional practice that is both historically based and claimed as vital to group integrity").

⁵⁸ Shashi Tharoor indicates that just because something is a cultural tradition does not mean it is positive, stating that, "[s]lavery was part of world culture . . . until it was abolished." U.N.:DPI/NGO Conference Examines Universality of Human Rights in Context of Diverse Cultures, M2 PRESSWIRE, Sept. 15, 1998, available in LEXIS, NEWS Library, M2PW File.

⁵⁹ "Cultural relativism can be described, in its simplest form, as the theory that there is infinite cultural diversity and that all cultural practices are equally valid." Beth Ann Gillia, *Female Genital Mutilation: A Form of Persecution*, 27 N.M. L. REV. 579, 579 n.1 (1997) (citing Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. J. 367, 370 (1989)).

⁶⁰ See Linda A. Malone & Gillian Wood, *In Re Kasinga*, 91 AM. J. INT'L L. 140, 142 (1997).

adoption of its own anti-FGM law⁶¹ and its decision in the Kasinga matter.⁶²

The United States wisely promotes the protection of women and children and rejects the parent's right to inflict FGM on their child.⁶³ Naysayers argue that "[c]ircumcision in both males and females in Africa is a mark of cultural identity" designating one's membership in one's tribe and participation in its life and assumptions.⁶⁴ Moreover, "it is women themselves who, having survived the procedures and all their attendant risk, loss and pain, insist upon subjecting their small daughters to the same operations."⁶⁵ However, some women practice the ritual as an escape from

⁶¹ See 18 U.S.C. § 116 (Supp. III 1997).

⁶² See *infra* Section IV (describing Board of Immigration Appeals' acceptance of asylum claim based on fear of FGM). For a discussion of legal reactions to FGM by the West, see generally Carol M. Messito, *Regulating Rites: Legal Responses to Female Genital Mutilation in the West*, 16 IN PUB. INTEREST 33 (1997/1998).

⁶³ The United States has signed many international treaties reflecting its commitment to women's rights, children's rights and the eradication of FGM. See, e.g., Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter CEDAW]; Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., 85th plen. mtg., Supp. No. 49, U.N. Doc A/48/49 (1993); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., Annex, U.N. Doc. A/Res/44/25 (1989) [hereinafter Child Convention]; *Report of the Fourth World Conference On Women: Beijing 4-15 September 1995*, United Nations Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995); International Covenant on Economic, Social, and Cultural Rights, G.A. Res 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, Annex, at 490, U.N. Doc. A/6316 (1967); Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. GAOR, 3d. Sess., U.N. Doc. A/810 at 71 (1948); Vienna Declaration and Programme of Action, U.N. GAOR, 48th Sess., at 20, U.N. Doc. A/CONF. 157/24 (1993); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém Do Pará"), June 9, 1994, 33 I.L.M. 1534.

⁶⁴ Rev. Bonnie Shullenberger, Editorial, *Africans View Circumcision as Rite*, N.Y. TIMES, June 22, 1995, at A26; see also Megan King, *Western Intervention to Eradicate Female Genital Mutilation: Balancing Effective Tactics While Mediating Cultural Sensitivity* (1997) (unpublished Senior Essay in Women's Studies, Brandeis University) (on file with author) (examining *inter alia* the problem of respecting FGM as a cultural rite); L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997) (providing a comprehensive analysis on issues related to FGM, its culture, and the West's relation to Africa). For a useful bibliography treating FGM and human rights, see Rebecca J. Cook & Valerie L. Oosterveld, *A Select Bibliography of Women's Human Rights*, 44 AM. U. L. REV. 1429, 1458-60 (1995).

⁶⁵ Melvin Konner, *Mutilated in the Name of Tradition*, N.Y. TIMES, Apr. 15, 1990, § 7 (Book Review Desk), at 5; see also Pamela Constable, *A New Life and New Hope*, WASH. POST, June 11, 1998, at M5, available in LEXIS, News Library, CURNWS File, (noting

male domination. In Sierra Leone, for example, “the rituals of genital cutting persist because they are a rare female preserve in a society otherwise heavily dominated by men.”⁶⁶

Proponents of FGM might argue that it is impossible to convert millions of people from performing a tradition practiced for thousands of years. In the weeks after the Egyptian Health Minister banned FGM on girls, for example, Egyptians continued the practice despite the threat of a three-year jail sentence.⁶⁷ Nevertheless, recent reports suggest that the West is influencing some African groups to abolish FGM.⁶⁸ The Sabinu Elders of Uganda, for example, converted themselves from proponents to opponents of FGM by replacing FGM with a “symbolic ritual declaring the girl a woman without maiming her for life.”⁶⁹ Furthermore, a 1991 study indicated that FGM is decreasing among certain sections of African countries.⁷⁰

that Kasinga [discussed in Section IV *infra*] was protective of her uncle, who wanted her cut, stating, “he is not a bad person; he was following what his ancestors did”).

⁶⁶ Howard W. French, *The Ritual: Disfiguring, Hurtful, Wildly Festive*, N.Y. TIMES, Jan. 31, 1997, at A4.

⁶⁷ See Neil MacFarquhar, *Mutilation of Egyptian Girls: Despite Ban, It Goes On*, N.Y. TIMES, Aug. 8, 1996, at A3; Barbara Crossette, *Court Backs Egypt's Ban on Mutilation*, N.Y. TIMES, Dec. 29, 1997, at A3; Scheherezade Faramarzi, *'It Won't Be Obeyed': Egypt Officials Face an Uphill Battle to Enforce Ban on Female Circumcision*, CHI. TRIB., Mar. 7, 1999, § 13 (WomaNews), at ND2 (discussing difficulty of imposing court ban on FGM throughout Egypt).

⁶⁸ See, e.g., Erika Sussman, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 CORNELL INT'L L.J. 193, 236-40 (1998) (noting that modern efforts by the West to prohibit FGM date back to 1906 in Kenya, 1924 in the Sudan, and 1959 in Egypt).

⁶⁹ Barbara Crossette, *Sabinu Elders of Uganda Lead Women From Circumcision*, CHI. TRIB., Aug. 9, 1998, at 6; see also Vivienne Walt, *Knowing Rite From Wrong: Senegal's Villages Are Making a Healthy Leap Away From Old Traditions and Female Circumcision*, CHI. TRIB., Aug. 9, 1998, § 13 (WomaNews), at SD1 (noting that in the last year, 44 Senegalese communities have declared an end to female circumcision and have begun pressing others to join them); Dr. César Chelala, *New Rite is Alternative to Female Circumcision*, S.F. CHRON., Sept. 16, 1998, at A23 (announcing that a tribe in Kenya found an alternative rite, known as “ntanira na mugambo” or “circumcision through words,” which includes a weeklong program of counseling and training for young women).

⁷⁰ See César Chelala, *An Alternative Way to Stop Female Genital Mutilation*, 352 LANCET 126 (1998). A 1991 survey in Kenya showed that 78% of adolescents had undergone FGM, compared with 100% of women older than fifty. In the Sudan, there was a 10% drop in its practice among women aged fifteen to forty-nine between 1981 and 1990. See *id.*; see also Gillia, *supra* note 59, at 589 n.68 (noting that Cameroon, Djibouti, Egypt, Ghana and the Sudan have outlawed or restricted FGM and citing Mary Ann James, *Recent Development, Federal Prohibition of Female Genital Mutilation: The Female Genital Mutilation Act of 1993*, H.R. 3247, 9 BERKELEY WOMEN'S L.J. 206 (1994)).

The adverse medical effects caused by FGM⁷¹ should convince any legislator unfamiliar with the practice of its deleterious physical and psychological effects.⁷² In fact, the dangers FGM involves overshadow arguments that the United States is interfering with another country's culture, especially where FGM is performed against its victim's will. The health risks attendant to FGM favor an extra-sensitive immigration policy when dealing with persons threatened by its practice. At the same time, infibulation is much more dangerous to a woman's well-being than excision or clitoridectomy, and presumably represents a stronger basis for asylum.⁷³ "When health risk is cited as the major justification for eradication, the arguments ring false in communities where clitoridectomy or excision is the norm."⁷⁴

In addition to the medical justifications supporting Anikwata's right to protect Sharon from FGM, Anikwata should emphasize both of their rights to avoid forced polygamous marriages. The United States is a signatory to several treaties supporting a woman's right to resist forced marriage and sexual servitude. Under Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, for example, "[p]arties shall take all appropriate measures to eliminate discrimination against *women in all matters relating to marriage and family relations* and in particular shall ensure . . . [t]he same right to freely choose a spouse and to enter into marriage only with their free and full consent."⁷⁵

⁷¹ See *supra* Section III(A).

⁷² See *In re Kasinga*, Interim Decision #3278, at 14 (holding that FGM is meant to manipulate a woman's sexuality in order to assure dominance and exploitation). The BIA noted that FGM has been condemned by such groups as the United Nations, the International Federation of Gynecology and Obstetrics, the Council on Scientific Affairs, the World Health Organization, the International Medical Association, and the American Medical Association. See *id.*

⁷³ Anikwata's tribe, the Ibo, located in southeast Nigeria, subject their female children to excision and clitoridectomy. See HOSKEN, *supra* note 39, at 192. But see Letter from Morton Sklar, Anikwata's attorney and Director of the World Organization Against Torture, to James Lazarus (Feb. 17, 1999) (on file with author) [hereinafter Letter 1] (noting that because "different clans do different things," it is not known for certain what Anikwata could expect).

⁷⁴ TOUBIA, *supra* note 36, at 16.

⁷⁵ CEDAW, *supra* note 63, at 196 (emphasis supplied). Over fifty countries signed the Convention, including the United States. See Billie Heller, *International Convention On Women's Rights: Bringing About Ratification In The United States*, 9 WHITTIER L. REV. 431, 432 (1987) "'Signing' indicates basic agreement with the provisions of the document, and an intention to secure ratification or accession to it by one's country." *Id.* But see Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 50 (1997) (noting that the Senate has yet to ratify this most comprehensive Convention dealing with women's rights).

In addition, Article 2 of the 1993 Declaration on the Elimination of Violence Against Women states that violence against women shall be understood to encompass sexual and psychological violence occurring in the family, including dowry-related violence.⁷⁶ Finally, the Convention on the Rights of the Child requires its signatories to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”⁷⁷

Both Anikwata and Sharon are in danger of forced marriages if deported to Nigeria.⁷⁸ Anikwata’s in-laws likely made a significant dowry payment to Anikwata’s parents upon her marriage. The high bride-price is often based on whether the bride has been mutilated.⁷⁹ Anikwata has stated in an affidavit that upon returning to Nigeria, her in-laws will take Sharon away from her — “that’s the way the culture is.”⁸⁰ While the Nigerian government and constitution do not explicitly prohibit FGM nor condone its practice,⁸¹ the practice of polygamy is both *de jure* and *de facto* widely accepted.⁸²

⁷⁶ Declaration on the Elimination of Violence Against Women, *supra* note 63, art. 2. Hillary Charlesworth has noted that:

The Declaration on the Elimination of Violence against Women is an advance on CEDAW’s recommendations on violence because it is applicable to all members of the United Nations. While General Assembly resolutions are not, strictly speaking, binding, they are . . . at the very least, . . . an important statement of the international community’s views and contribute to the formation of customary international law.

Hillary Charlesworth, *The Declaration on the Elimination of All Forms of Violence Against Women*, AM. SOC’Y INT’L L. NEWSL., June 1994, at 1, 2.

The United Nations and the Organization of American States have declared private and government violence against women a violation of international law. *See* Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL’Y SYMP. 87, 95 (1999).

⁷⁷ Child Convention, *supra* note 63, art. 24(3).

⁷⁸ “For a woman not to marry is still unthinkable in Africa and the Middle East Polygamy is legal and practiced everywhere in the Middle East and Africa.” HOSKEN, *supra* note 39, at 321, 323.

⁷⁹ *See id.* at 325.

⁸⁰ *All Things Considered: Asylum and Genital Mutilation*, *supra* note 8.

⁸¹ *See* Zubair M. Kazaure, Editorial, *Forced Circumcision is Alien to Nigeria*, N.Y. TIMES, Apr. 9, 1994, at A20.

⁸² *See supra* note 39, at 321, 323; *see also* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH REPORT 1999 57 (1999) (noting that the rights of women in Nigeria are “routinely violated”).

It is noteworthy that tribal or customary law,⁸³ perhaps the most pervasive law existing in Nigeria, supports the practice of polygamy and FGM.⁸⁴ The *Oluloro* immigration judge⁸⁵ remarked that “although the Nigerian government does not promote FGM, Nigerian State Department reports indicated that FGM is . . . common and is deeply ingrained in the cultural tradition.”⁸⁶ If forced to return to Nigeria, Anikwata can not be expected to overcome such indoctrinated traditions and institutions.⁸⁷ On the contrary, Anikwata requires the support of the United States, an avowed supporter of women’s rights, human rights and children’s rights.

IV. FAILURE UNDER DOMESTIC IMMIGRATION LAW

Anikwata attempted to use different immigration procedures to dodge deportation before relying finally on the Torture Convention.⁸⁸ The BIA refused to consider the issues of FGM and forced polygamous marriage

⁸³ African customary law is a blend of African customs, imported colonial common and civil law notions, and religious concepts from Christianity, Islam and traditional African religions

. . . Customary law was not written and was interpreted solely by males during the colonial era. Thus, the needs and opinions of females were completely ignored in the interpretation of custom.

Fitnat Naa-Adjeley Adjetej, *Reclaiming the African Woman’s Individuality: The Struggle Between Women’s Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1365 (1995).

⁸⁴ See Gregory A. Kelson, *Granting Political Asylum to Potential Victims of Female Circumcision*, 3 MICH. J. GENDER & L. 257, 286-87 (1995) (citing Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511 (1993), and noting that although the Nigerian constitution could be interpreted to prohibit female circumcision, the Nigerian government does not guarantee protection against it).

⁸⁵ See *infra* Section IV(A) (discussing the *Oluloro* case in more detail).

⁸⁶ Kris Ann Moussette, *Female Genital Mutilation and Refugee Status in the United States -A Step in the Right Direction*, 19 B.C. INT’L & COMP. L. REV. 353, 390 (citing *In re Oluloro*, No. A72 147 491, at 16 (Mar. 23, 1994) (oral decision)).

⁸⁷ To support this contention, the petitioner’s memorandum argued:

The Nigerian Government supports, and will not take action against, the enforcement of traditional laws by the family of Virginia’s dead husband to inflict FGM on Sharon, and to place both Sharon and Virginia in a position that amounts to sexual servitude based on their gender

. . . .

. . . [I]n the clan and village where Virginia and Sharon would be obliged to live [FGM] exceeds 90%.

Submission, *supra* note 16, at 3, 4.

⁸⁸ See Letter 1, *supra* note 73 (noting the same).

until Anikwata's petition under the Torture Convention. This section predicts, analyzes and criticizes the outcome of a hypothetical decision by the BIA to consider the FGM and polygamy issues under U.S. immigration law (specifically asylum laws). First, a procedural technicality imposed by IIRAIRA prevented Anikwata from raising a claim based on "exceptional and extremely unusual hardship."⁸⁹ Ironically, Anikwata could easily have met the substance of this test. Anikwata's case demonstrates the inability of present law to address important humanitarian issues for immigrants not meeting the overly restrictive legislative requirements of IIRAIRA.⁹⁰ Second, this section posits that Anikwata's claim would have failed had the BIA heard the FGM and polygamy issues under asylum law. The landmark 1996 *Kasinga* decision⁹¹ granting asylum to a refugee fleeing an FGM-practicing country did not reach much beyond the facts of that particular case. The BIA's likely decision not to grant Anikwata asylum had they afforded her the opportunity to argue the claim demonstrates the inability of immigration law to accommodate especially sensitive and urgent cases such as this.

A. Parental Rights: "Exceptional and Extremely Unusual Hardship"

Several procedures are available to illegal aliens to avoid deportation. In cases involving separation between family members, petitioners often employ a measure called "suspension of deportation" because of the "extreme hardship" standard available under that statute.⁹² Under IIRAIRA, however, Congress amended the statute for illegal immigrants. The new "Cancellation of Removal and Adjustment of Status for Nonpermanent Residents" (Cancellation)⁹³ calls for "*exceptional and extremely unusual hardship*" to reduce the pool of qualified applicants.⁹⁴ The full statute requires that the applicant be present in the United States for at least ten years, be a person of good moral character, remain clear of certain offenses, and establish the extremely unusual hardship to his child who must be a U.S. citizen or legal permanent resident.⁹⁵ The applicant's hardship is no

⁸⁹ See *infra* note 97 and accompanying text.

⁹⁰ See generally Pistone, *supra* note 5, at 496-97 (discussing the harshness of IIRAIRA).

⁹¹ See discussion of *In re Kasinga*, *infra* Section IV(A)(1) (restricting FGM-asylum grants to persons in nearly identical circumstances as petitioner).

⁹² See INA § 244(a), 8 U.S.C. § 1254(a)(repealed 1996); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 688 (6th ed., 1998); see also Submission, *supra* note 16, at 8 (noting other federal immigration statutes and agency rules protecting the unity of the family).

⁹³ See INA § 240B, 8 U.S.C. § 1229b (1994); 8 C.F.R. §§ 240.11(a), 240.20 (1999); KURZBAN, *supra* note 92, at 698.

⁹⁴ KURZBAN, *supra* note 92, at 702 (emphasis supplied).

⁹⁵ See *id.* at 699.

longer considered under the new test.⁹⁶ In addition, Anikwata could not have invoked this new procedure because “the commencement of removal proceedings terminates continuous physical presence.”⁹⁷

The INA ironically states that being a “practicing polygamist” precludes someone from possessing “good moral character.”⁹⁸ The INS views the act of polygamy so critically as to preclude cancellation of deportation. It seems odd that the INS will not apply this same value judgment to Anikwata’s case, in which she seeks protection from the very practice the INS denounces in this statute. In any event, Anikwata would easily have fulfilled this portion of the test. Anikwata became an upstanding member of American society immediately upon entrance into the United States. She worked nights in order to spend time with her daughter during the day and is a model parent intimately involved in her daughter’s daily life.⁹⁹ The immigration judges’ permitted use of discretion on this portion of the test¹⁰⁰ would have resulted in a favorable decision for Anikwata.

Despite this new and limiting Cancellation standard faced by petitioners, cases turning on the pre-1996 criteria are still instructive in assessing whether Anikwata’s forced separation from Sharon could qualify as hardship on Sharon.¹⁰¹ *In re Oluloro*,¹⁰² for one, demonstrates how immigration judges have protected the right of children not to be separated from their parents because of the “extreme hardship” separation produces. In this matter, an Oregon judge held that a Nigerian illegal alien could remain in the United States rather than face deportation.¹⁰³ Deportation would have meant leaving her two American-born daughters in the United States with her abusive husband rather than taking them back to Nigeria where they would be forced to undergo FGM.¹⁰⁴ Although the court’s ruling holds less precedential value since the INS did not appeal the

⁹⁶ See *id.* at 701.

⁹⁷ O’Connor, *supra* note 21, at 1157 (citing INA § 240A(d); see *supra* Section II (noting that INS initiated removal proceeding against Anikwata).

⁹⁸ See KURZBAN, *supra* note 92, at 679 (referring to INA § 212(a)(10)(A)). For a description of the discretionary and statutory grounds for ineligibility, see *id.*

⁹⁹ See Submission, *supra* note 16, at 9 (stating the same).

¹⁰⁰ See KURZBAN, *supra* note 92, at 679 (citing Matter of Turcotte, 12 I. & N. Dec. 206 (BIA 1967), a precedent discretion case).

¹⁰¹ See *id.* at 702.

¹⁰² See Patricia Dysart Rudloff, *In re Oluloro: Risk of Female Genital Mutilation as “Extreme Hardship” in Immigration Proceedings*, 26 ST. MARY’S L. J. 877, 877 (1995) (citing *In re Oluloro*, No. A72 147 491 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision on file with *St. Mary’s Law Journal*)).

¹⁰³ See *id.* at 878.

¹⁰⁴ See *Nigerians Spared Deportation*, N.Y. TIMES, Mar. 24, 1994, at A19.

decision,¹⁰⁵ the holding and reasoning of the matter should persuade immigration judges to consider humanitarian factors in cases with comparable fact patterns.

Some courts have held that choosing to leave a citizen child behind in the United States does not constitute the requisite hardship because the INA does not compel the alien to make such a choice.¹⁰⁶ However, the hardship test does apply to the citizen child if taken to the parent's country.¹⁰⁷ In *In re Ige*, the Board rejected a Nigerian couple's argument that their children would face extreme hardship by remaining in the United States.¹⁰⁸ The BIA stated, however, that "[a]ssuming a United States citizen child would not suffer extreme hardship if he accompanies his parent abroad, any hardship the child might face if left in the United States is the result of parental choice, not of the parent's deportation."¹⁰⁹ In the *Anikwata* matter, *Anikwata* does not assume that bringing her daughter to Nigeria would not qualify as extreme hardship. In fact, it would qualify as torture.¹¹⁰ The Iges' concern over their two boys, ages seven and one, did not reach the same dimensions as *Anikwata's* concern over her twelve-year old daughter.

The court in *Bastidas v. INS*¹¹¹ found that where a father expresses a deep affection for his child based on his actions, the court will not accept a finding of no "extreme hardship" unless other circumstances mandate otherwise.¹¹² In that case, the petitioner's legal status terminated as a result of a divorce from his American wife. The court recognized that the petitioner loved his son based upon the time the two spent together. The immigration judge granted *Bastidas* the right to avoid "extreme emotional hardship" by preventing his deportation.¹¹³ In *Anikwata's* case, Sharon has lived with her mother since her father's death, and would endure psychological devastation upon losing her other parent at such a young

¹⁰⁵ See Rudloff, *supra* note 102, at 878 (citing 8 C.F.R. § 3.1(g) (1994), which states that "selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues"); see also Timothy Egan, *An Ancient Ritual and a Mother's Asylum Plea*, N.Y. TIMES, Mar. 4, 1994, at A25, available in LEXIS, News Library, NYT File.

¹⁰⁶ See KURZBAN, *supra* note 92, at 703 (citing *In re Ige*, 20 I. & N. Dec. 880 (BIA 1994).

¹⁰⁷ See *In re Ige*, 20 I. & N. Dec. 880, 885 (BIA 1994).

¹⁰⁸ See *id.* (holding that parents would not undergo extreme hardship by leaving their children in the United States where children could accompany parents to Nigeria without harm).

¹⁰⁹ *Id.* at 880 (emphasis added).

¹¹⁰ See discussion *infra* Section V.

¹¹¹ *Bastidas v. INS* 609 F.2d 101 (3d Cir. 1979) (recognizing parent-child bond as basis for extreme hardship).

¹¹² See *id.* at 105.

¹¹³ See *id.* at 106.

age.¹¹⁴ In short, the defunct standards applied in these cases that protected a parent's right to avoid separation from her child deserve preservation, for these standards safeguard valuable family bonds.¹¹⁵ At any rate, the circumstances of Anikwata's case are so extenuating that Sharon would have met the more burdensome "exceptional and extremely unusual hardship" standard.

B. *Asylum Law: Meeting the Refugee Act Test*

If the applicant fails to achieve a Cancellation, she may try for a "Withholding of Removal"¹¹⁶ as set out in INA section 241(b)(3)¹¹⁷ or a grant of asylum.¹¹⁸ In order to qualify for asylum,¹¹⁹ the applicant must meet the definition of a "refugee" under the 1980 Refugee Act,¹²⁰ which is part of the INA. The INA defines "refugee" as someone who cannot return

¹¹⁴ See Submission, *supra* note 16, at 2.

¹¹⁵ The U.S. Supreme Court recognized the importance of strong family bonds in American ethos. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

¹¹⁶ To qualify for Withholding of Removal (formerly called "withholding of deportation" under INA 243(h)), the court must find a "clear probability of persecution" on one of the five bases under the Refugee Act (discussed *infra*). See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984) (laying out the standard); see also *Safaie v. INS*, 25 F.3d 636, 641 (8th Cir. 1994) (noting that the standard for withholding deportation is more difficult to meet than the "well-founded fear" standard applicable to asylum").

¹¹⁷ 8 U.S.C. § 1231(b)(3) (Supp. III 1997).

¹¹⁸ See Rudloff, *supra* note 102, at 899 (citing 8 U.S.C. § 1101(A)(42) (1988)).

¹¹⁹ Note that asylum is broken down, among other ways, into "affirmative asylum" and "defensive asylum." "Affirmative asylum" means the individual seeks asylum immediately upon entering the United States, whereas "defensive asylum" is a defense to removal from the United States. See Gillia, *supra* note 59, at 590 n.71.

¹²⁰ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(1994); see, e.g., *In re Kasinga*, Interim Decision #3278, at 25 (BIA 1996) (Lory D. Rosenberg, concurring) (noting that 1980 Refugee Act sought to establish compliance with this country's domestic and international humanitarian obligations under the following two U.N. conventions: the 1967 U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967 [1968] 19 U.S.T 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 and the 1951 UN Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150); see also Federation for American Immigration Reform, *Refugees and Asylum* (visited Oct. 23, 1998) <<http://www.fairus.org/04138705.htm>>.

The distinction between a refugee and an asylee is that the former applies for entry to the United States from abroad, and the latter is already in the United States, legally or illegally when the application is made

. . . .

In practice, a majority of the asylum applications each year are 'defensive' applications filed by deportable clients attempting to use asylum as a means to avoid deportation.

Id.

to their home 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.¹²¹

1. "Social Group"

The *Kasinga* Board held that the practice of FGM may form the basis for a claim of persecution under the Refugee Act;¹²² and that members of the Tchamba-Kunsuntu Tribe 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 INA.¹²³ In that matter, Kasinga fled from Togo to the United States to avoid FGM and spent sixteen months in a U.S. prison before the BIA granted her petition for asylum based on the fear of FGM.¹²⁴

Although this landmark decision signaled a major step forward for women's rights and human rights, the decision also limited future FGM-related petitions like Anikwata's. The BIA, for example, narrowly tailored the definition of social group to the facts of that case.¹²⁵ Applying the narrow *Kasinga* definition of social group to the Anikwata matter would bar Anikwata from succeeding in an asylum claim. The accepted INS formulation of social group excluded previously circumcised women because "a woman once circumcised cannot ordinarily be subjected to FGM a second time."¹²⁶ In addition, the BIA failed to protect any woman who lives in an FGM-practicing society as a member of "some other social

¹²¹ See *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (demonstrating the same), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

Race, religion, nationality, membership in a particular social group or political opinion as an exclusive list says something about the world in 1951. It also says something about those who were negotiating the refugee compacts, whose ideas have come under increasing pressure and scrutiny in terms of development in society, and about the world since then.

Arthur C. Helton, Keynote Address delivered for Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 471 (1998).

¹²² See *In re Kasinga*, Interim Decision #3278, at 125 (BIA 1996).

¹²³ See generally Malone & Wood, *supra* note 60 (discussing interpretation of social group in *Kasinga*).

¹²⁴ See Evelyn C. White, *Escape From the Knife*, S.F. CHRON., March 15, 1998, at 3, available in LEXIS, News Library, SFCHRON File (book review) (describing the deplorable conditions Kasinga and refugees face in U.S. prisons).

¹²⁵ See Malone & Wood, *supra* note 60, at 143.

¹²⁶ *Id.* at 145 (citing 1996 WL 379826, L. Flippu & M. Heilman, Concurring, at 1).

group.”¹²⁷ The BIA intentionally engineered an overly fact-specific standard to avoid the possibility of inviting immigrants like Anikwata from flooding the INS with new bases for asylum. The Board might argue, for example, that granting asylum to women who previously underwent FGM would invite millions of women to further stretch the generous standard based on other forms of past mistreatment.¹²⁸ Furthermore, by expanding the scope of a “well-founded fear of persecution” to non-traditional areas, objective decision-making on a case by case basis could become an expensive, unmanageable process.¹²⁹ While the INS fears can be appreciated,¹³⁰ the more pressing issue concerns how asylum law can protect applicants whose exceptional circumstances call for compassion.¹³¹

In defining “social group,” the oft-cited *Acosta* court held that a Salvadoran alien who fled his home country because of the threat to taxi drivers did not qualify for asylum.¹³² The court found that “taxi drivers” failed to satisfy the “social group” requirements because being a taxi driver is not an immutable characteristic.¹³³ On the contrary, *Acosta* could have switched trades or moved to a different city,¹³⁴ thereby avoiding

¹²⁷ See *id.* at 146-47 (noting that “[w]ith its [the Board’s] emphasis . . . on the extreme form of genital mutilation . . . as well as its definition of the social group with reference to opposition to the practice, the majority opinion . . . provides implicit support for a number of the INS’s limiting formulations”).

¹²⁸ See, e.g., Sharon Nichols, *American Mutilation: The Effects of Gender-Biased Asylum Laws on the World’s Women*, 6 KAN. J.L. & PUB. POL’Y 42, 50 (1997) (citing Jennifer Bingham Hill, *Battered, Raped, and Veiled: The Sanctuary Seekers*, L.A. TIMES, Nov. 20, 1994, at 26).

¹²⁹ See Lena H. Sun, *INS Expands Asylum Protection*, WASH. POST, June 3, 1995, at A4 (quoting Dan Stein, president of the Federation for American Immigration Reform [FAIR] as stating, “[w]e cannot bring people here simply because they are suffering under general cultural forms of oppression”). But see *infra* text accompanying note 188.

¹³⁰ See Telephone Conversation with Martha Saenz, *supra* note 21 (noting that the INS will delay as long as they can because they worry about what the decision would lead to).

¹³¹ See, e.g., Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re Kasinga and Prospect for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 387-88 (1997) (arguing that rather than seek to keep immigration levels down, asylum law should ensure the protection of refugees under international treaties and the Immigration and Nationality Act).

¹³² See *In re Acosta*, 19 I. & N. Dec. at 211, 236-37.

¹³³ See *id.* at 234.

¹³⁴ Cf. *Mensah v. Minister For Immigration and Ethnic Affairs* (1997), No. BC9705791, 1997 AUST FEDCT LEXIS 893, at *17 (noting that FGM had been illegal in Ghana and that a person would be able to seek protection locally or at least by relocating to another part of the country); see also Bernadette Passade Cissé, Panel: Female Genital Surgery, in Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation* 29 COLUM. HUM. RTS. L. REV. 467, 485 (suggesting that “[a]djudicators may argue that the

endangerment to his life. Anikwata could successfully respond to such arguments, however.¹³⁵ Anikwata cannot change her predicament as a widowed Nigerian woman of the Ibo tribe—characteristics that qualify her to enter a forced polygamous marriage and become the property of her in-laws. In addition, Anikwata's in-laws hold an interest in Anikwata and Sharon as chattels;¹³⁶ thus, Anikwata's in-laws would have good reason to locate her once they realize she returned to Nigeria. Moreover, Anikwata "has no connections or means of support"¹³⁷ anywhere in Nigeria except the village where her in-laws reside. In short, the outcome of an asylum petition would depend principally on the BIA's more expansive interpretation of "social group" to include categories like "monogamous women in polygamy-practicing countries" or "women objecting to their daughters' subjection to FGM."¹³⁸

2. "Well-founded Fear of Persecution"

To establish a well-founded fear of persecution and obtain asylum the petitioner must demonstrate a "subjectively genuine" and "objectively reasonable" fear of persecution on account of political opinion or membership in a particular social group.¹³⁹ The INS would probably debate the veracity of Anikwata's subjective fear because she waited a few years

group practices FGM and is in, for example, southern Nigeria; why can't the applicant go to northern Nigeria to obtain protection there?").

¹³⁵ The U.N. Handbook employed by IJs in decision-making states that a country-wide threat need not be evidenced in every case in order to avoid deportation. See Robert B. Jobe, *Establishing the Threat of Persecution on a Country-Wide Basis in [1994-1995]* 2 IMMIGR. & NATIONALITY L. HANDBOOK 610, 617 (noting that that United States has described the Handbook as "a significant source of guidance" in construing the Refugee Convention and Protocol, even though it is not binding on adjudicators).

¹³⁶ See Submission, *supra* note 16, at 5 ("[U]nder the custom and practice of her clan and village, the husband, and the husband's family on his death, are deemed to have ownership rights over wives and female children").

¹³⁷ *Id.*

¹³⁸ See, e.g., *Lwin v. INS*, 144 F.3d 505, 510-11 (7th Cir. 1998) (noting that, "[a]lthough social group membership has increasingly been invoked as the basis of asylum claims, the meaning of 'social group' remains elusive," resulting in courts applying the term "reluctantly and inconsistently"). But see Karen Musalo, *Ruminations on In Re Kasinga: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 361-62 (1998) (acknowledging that since the Kasinga decision, at least four INS cases have permitted women who already underwent FGM to remain in the United States because *inter alia* they "had female daughters who they were trying to protect from the procedure").

¹³⁹ *Pitcherskaisa v. INS*, 118 F.3d 641, 643-46 (9th Cir. 1997) (asserting that political opinions promoting support of lesbian and gay civil rights in Russia, and membership in social group of Russian lesbians constituted "well-founded fear").

before raising the FGM and marriage issues.¹⁴⁰ Anikwata could respond that American law did not recognize FGM as a basis for asylum until the 1996 *Kasinga* decision, so she never knew to raise the FGM issue. Moreover, it is not difficult to believe a widower who says she does not want to become her in-laws' property, subject her daughter to FGM, and be forced to marry her late-husband's brother.

The *In re Mogharrabi* decision laid out the objective component in a four-part test similar to *Acosta* in refining what constitutes a "well-founded" fear: (1) The alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, (2) the persecutor is aware that the alien possesses this characteristic, (3) the persecutor has the capability of punishing the alien, and (4) the persecutor has the inclination to punish the alien.¹⁴¹

Anikwata's widowhood is the characteristic her persecutors seek to overcome. Anikwata's persecutors, her in-laws, will want to punish Anikwata whether or not she returns with Sharon.¹⁴² If Anikwata returns with Sharon, she will be blamed and punished for her late husband's death.¹⁴³ As "a sign of respect and allegiance to her dead husband," she will be forced to become the sexual partner of males in her in-laws' family.¹⁴⁴ If Anikwata returns without Sharon, she will be punished for denying her in-laws their traditional property rights over Sharon and for not preventing her husband's death.¹⁴⁵ Thus, Anikwata could meet the requirements of this four-part test. Her greatest difficulty would entail convincing the BIA that forced polygamous marriage constitutes "persecution."¹⁴⁶

"Well-founded fear of persecution" under the INA statute should include a fear of living in a society that perpetuates the subordination of

¹⁴⁰ See *All Things Considered: Asylum and Genital Mutilation*, *supra* note 8 (stating the same); Emily Barker et al., *The Public Sector*, AM. LAW, Jan.-Feb. 1997, at 64, 79 (quoting Kasinga's lawyer, Karen Musalo, as stating, "The hardest thing to establish is that your client is telling the truth."); see also Barry Graham, *Blade Runner*, PHOENIX NEW TIMES, Apr. 16, 1998, available in LEXIS, News Library, Phoenix New Times File (noting the coincidence that just when a Nigerian illegal alien had been on the fringe of deportation, she conveniently received a letter telling her that her child would be in danger of FGM if the deportation occurred).

¹⁴¹ *In re Mogharrabi*, I. & N. Dec. 439, 446 (BIA 1987).

¹⁴² See Submission, *supra* note 16, at 2.

¹⁴³ See *id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*

¹⁴⁶ See Cissé, *supra* note 134, at 486-87 (positing that more flexibility is needed in determining bases for "fear of persecution" in FGM asylum cases). "[I]ndividuals who have a common characteristic that they should not . . . be asked to change . . . fall under this construction of social groups." *Id.* (emphasis added).

women.¹⁴⁷ The BIA has yet to extend the principles set forth in *Kasinga* to claims involving women who have already undergone FGM.¹⁴⁸ Women who once lived in FGM-practicing countries had far fewer human rights than afforded to them in the West.¹⁴⁹ “A mutilated woman . . . may have a well-founded fear of persecution if such persecution includes . . . perpetuat[ing] the ideology of women being subordinate to men . . . by forcing [them] to return to their homelands.”¹⁵⁰ For Anikwata, attending school and establishing a career in the United States accustomed her not only to an improved standard of living, but also to improved treatment as a woman and a human being. In contrast, Anikwata’s deportation to Nigeria would reduce her status dramatically.¹⁵¹

V. ENTERING THROUGH THE SIDE DOOR: THE U.N. CONVENTION AGAINST TORTURE

The Torture Convention,¹⁵² adopted by the United States in 1994 and implemented as part of the INA in October 1998,¹⁵³ could not have come at a better time for immigration lawyers. Immigration lawyers are still unraveling the wave of restrictive legislation passed under IIRAIRA,¹⁵⁴ which explains in part why Anikwata’s asylum petition failed.¹⁵⁵ Attorneys now increasingly look to the Torture Convention as an alternative “side door” into the United States for otherwise ineligible applicants.¹⁵⁶

¹⁴⁷ See Amy Stern, *Female Genital Mutilation: United States Asylum Laws are in Need of Reform*, 6 AM. U. J. GENDER & L. 89, 90 (1997) (stating the same).

¹⁴⁸ But see Musalo, *supra* note 138, at 361-62 (noting INS cases permitting women who already underwent FGM to avoid deportation because of the danger placed on their daughters).

¹⁴⁹ See generally, HOSKEN, *supra* note 39, at 317-25 (discussing the status of women in FGM-practicing countries).

¹⁵⁰ Stern, *supra* note 147, at 90.

¹⁵¹ See *id.*

¹⁵² For full title, see *supra* note 1.

¹⁵³ See Crossette, *supra* note 30, at A8 (discussing the Torture Convention’s possible impact on the Anikwata case).

¹⁵⁴ See *supra* Section IV(A).

¹⁵⁵ For explanation of why the IIRAIRA did not apply to Anikwata, see *supra* Section IV(A).

¹⁵⁶ The first action in which the INS granted protection under the Torture Convention involved an ethnic Kurd who lost his asylum case and waived his right to appeal. See *Protection Granted Iraqi Under U.N. Convention Against Torture*, 3 BENDER’S IMMIGR. BULL. 549 (1998) (discussing the decision involving an Iraqi army deserter who was severely beaten and tortured before escaping to Iran in 1994); see also Letter from Morton Sklar, Director, World Organization Against Torture USA to James Lazarus (Feb. 12, 1999) (on file with author) [hereinafter Letter 2] (stating that “there are really important cases and issues presented, including the protection of victims of rape, domestic violence, persecution

In Anikwata's case, for example, the INA would probably not permit asylum because Anikwata did not match one of the five categories under the Refugee Act test.¹⁵⁷ Alternatively, the Torture Convention does not require that any of the five elements of the Refugee Act (political opinion, race, religion, nationality, or social group) be present.¹⁵⁸ Thus, even if the BIA rejected Anikwata's argument that she fits the "gender" social group category created by *Kasinga*, Anikwata could still persuade the BIA under the Torture Convention.¹⁵⁹

In addition, unlike under asylum law, no previous removal orders or criminal record can proscribe an applicant from the reaches of the Torture Convention.¹⁶⁰ The statute reads: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture."¹⁶¹ The implementation of the statute by the INS through rulemaking indicates that the worst of criminals, including alien terrorists and persons who engaged in genocide, may avail themselves of the Torture Convention.¹⁶² By comparison, Anikwata's illegal ten-year stay in the United States should not prevent access to the Convention. Moreover, the INS may not invoke the

based on sexual orientation, and other grounds that fall outside the traditional asylum case"). *But see* Jenna Greene, *Making A New Case For Asylum*, LEGAL TIMES, Jan. 11, 1999, at 2 (noting that unlike applicants invoking the Torture Convention, refugees petitioning under asylum law can obtain permanent residence and citizenship); Sklar, *supra* note 28, at 655-56 (noting that stay of removal, the only recourse under the Torture Convention, can leave the applicant in a "strange netherworld" if some form of proper legal status cannot be obtained).

¹⁵⁷ See *supra* Section IV(B).

¹⁵⁸ Cf. Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533, 540-41 (1998).

¹⁵⁹ See, e.g., Debra Baker, *New Ground for Asylum?*, A.B.A. J., Dec. 1998, at 32 (noting that Morton Sklar, Anikwata's lawyer, does not think that her case falls within one of the five asylum categories); see also Ginger Thompson, *No Asylum for a Woman Threatened With Genital Cutting*, N.Y. TIMES, Apr. 25, 1999, at A35, 41 (discussing case in which woman from Ghana could not gain asylum because FGM in Ghana "would be imposed as a matter of individual punishment, rather than as a matter of general practice imposed on a particular social group").

¹⁶⁰ See Greene, *supra* note 156, at 2.

¹⁶¹ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (1998). Thus, while granting asylum is discretionary, the Torture Convention protection is mandatory. See *Interim Rule Issued for Claims under Convention Against Torture*, 4 BENDER'S IMMIGR. BULL. 256, 257 (1999).

¹⁶² See Eligibility for Protection under the Convention Against Torture, 64 Fed. Reg. 8496 (1999)(to be codified at 8 C.F.R. § 507.1); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478-79 (1999).

more restrictive Cancellation procedure as a way to accelerate her removal.¹⁶³

The Torture Convention, as enacted by Congress in the Foreign Affairs Reform and Restructuring Act of 1998,¹⁶⁴ requires agencies to “implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture or Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.”¹⁶⁵ Three basic requirements must be fulfilled to qualify under the Torture Convention. First, the petition must involve severe pain and suffering.¹⁶⁶ Second, the torture must involve a public official.¹⁶⁷ Third, the torture must be inflicted intentionally.¹⁶⁸

Whether Anikwata left Sharon behind in the United States and is forced to marry one of her in-laws or brings Sharon to Nigeria to undergo FGM, Anikwata satisfies the “severe pain and suffering” requirement. Recall Section IV’s argument that Anikwata could have met the new, more restrictive “exceptional and extremely unusual hardship” requirement under the Cancellation standard for illegal immigrants. Here, too, the unsettling suggestion that Anikwata either (1) subject her daughter to FGM and both herself and her daughter to forced marriages or (2) abandon her daughter, whom Anikwata alone has raised over the past eleven years, qualifies Anikwata as meeting the Torture Convention’s gentler “severe pain and suffering” language. Moreover, the torture may be inflicted as punishment for an act Anikwata is suspected of committing.¹⁶⁹ Anikwata’s in-laws will rape her as a sign of respect to her dead husband’s family.¹⁷⁰ This consequential mistreatment amounts to punishment.

Although the current law fails to mention “rape” and specifically precluded from the definition “lesser forms of cruel, inhuman or degrading punishment that do not amount to torture,”¹⁷¹ it is arguable that Congress meant to include rape as torture. The current definition of torture is subject

¹⁶³ See *supra* Section IV(A); see also Rosati, *supra* note 158, at 540 (discussing the same).

¹⁶⁴ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (1998).

¹⁶⁵ *Id.*

¹⁶⁶ See Implementation of the Convention Against Torture, 64 Fed. Reg. 8490 (1999)(to be codified at 8 C.F.R. § 208.18); see also Kristen B. Rosati, *The United Nation Convention Against Torture: A Detailed Examination of the Convention as an Alternative for Asylum Seekers*, 3 BENDER’S IMMIGR. BULL., 183, 185 (1998).

¹⁶⁷ See *id.*

¹⁶⁸ See Implementation of the Convention Against Torture, 64 Fed. Reg. at 8491.

¹⁶⁹ See *id.* at 8490.

¹⁷⁰ See Greene, *supra* note 156, at 2; see also Submission, *supra* note 16, at 6 (noting the credible danger of rape if Anikwata is deported).

¹⁷¹ Implementation of the Convention Against Torture, 64 Fed. Reg. at 8490.

to the reservations and understandings of the resolution ratifying the Convention.¹⁷² In its resolution, Congress defined “torture” as “the meaning given the term in section 2340(1) of title 18, United State Code, and includes the use of rape¹⁷³ and other forms of sexual violence.”¹⁷⁴

The application of the latter two requirements of the Convention Against Torture are less forceful, but still potentially favorable to Anikwata. The Torture Convention, as codified by Congress and the INS, requires that the torture be “by . . . or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁷⁵ The Nigerian government has not prohibited the tribal custom of forcible marriage and marital rape is not a crime in Nigeria.¹⁷⁶ The Nigerian government imposes no *de facto* obligation on its officials to prevent FGM or any obligation, legal or otherwise, to proscribe forced polygamous marriages. Thus, it is arguable that the Nigerian government “officially consents” to Anikwata’s punishment.¹⁷⁷ In addition, the Torture Convention (as codified by the INS) requires that the public official have a “legal responsibility to intervene.”¹⁷⁸ The INS interprets the ‘legal duty’ to be no ‘less than what is required by international law.’¹⁷⁹ International agreements that protect women’s and children’s rights¹⁸⁰ invoke the INS standard and qualify Nigeria’s inaction as *intentional* acquiescence to torture.¹⁸¹

¹⁷² See *id.*

¹⁷³ A recent decision of the European Court of Human Rights interpreted the Torture Convention in finding that the rape of a Turkish woman constituted torture. See Deborah E. Anker & Kimberly Dempsey, *Comparative Refugee Law: Gender Asylum Claims In Different Jurisdictions*, BENDER’S IMMIGR. BULL., 3, 14-15 (1998) (citing *Aydin v Turkey*, No. 57/1996/676/866, available at <<http://www.dhcour.coe.fr/>>).

¹⁷⁴ Torture Victims Relief Act of 1998, Pub. L. No. 105-320, § 3, 112 Stat. 3016 (1998).

¹⁷⁵ Implementation of the Convention Against Torture, 64 Fed. Reg. at 8490; see also Torture Convention, *supra* note 3, pt. 1, art. 1(1).

¹⁷⁶ See *infra* note 181 (noting that marital rape is not a crime in Nigeria). But see Stephens, *supra* note 76, at 96 (noting that rape qualifies as torture under the Torture Convention when the person committing the rape is acting under governmental authority).

¹⁷⁷ The Nigerian government need not have knowledge of a *specific* act of torture on a specific individual. See Kristen B. Rosati, *Article 3 of the U.N. Convention Against Torture: A Powerful Tool to Prevent Removal Just Became More Powerful*, 4 BENDER’S IMMIGR. BULL., 137, 141 (1999).

¹⁷⁸ Implementation of the Convention Against Torture, 64 Fed. Reg. at 8491.

¹⁷⁹ Rosati, *supra* note 158, at 538.

¹⁸⁰ See *supra* note 63 (listing the same).

¹⁸¹ See Sklar, *supra* note 28, at 653 (noting increased support for the position that government inaction to harmful private conduct should be considered subject to international human rights treaty protections). While Nigerian law does not recognize marital rape as a crime, rape is a recognized crime in international law. See HUMAN RIGHTS WATCH, *supra* note 82, at 57; Stephens, *supra* note 76, at 95-96; see also Morton Sklar, *Implications of the*

The Torture Convention requires that “it is more likely than not that [the applicant] *would be* tortured.”¹⁸² While the regulation’s language only deals with the possibility of future torture, the INS assesses all relevant evidence “including . . . past torture.”¹⁸³ Although Anikwata was an infant when she underwent FGM, there is no requirement that the torture remain the same kind last experienced by the petitioner. A different form of torture – including forceable polygamy, rape, and psychological separation from one’s only living immediate family member – would apply to Anikwata today. The INS must also consider the applicant’s ability to relocate to a different part of the country.¹⁸⁴ This factor cuts in Anikwata’s favor because (1) Anikwata’s in-laws have a monetary incentive to find Anikwata and Sharon and (2) Anikwata must live with her in-laws because she has no other means of support.¹⁸⁵

Despite the various legal arguments justifying why Anikwata should prevail on a Torture Convention claim, her petition will likely fail. Whether Anikwata’s arguments rely on the Torture Convention or asylum law, the INS must still weigh the risk that her case could make entrance into the United States much easier for illegal immigrants previously unprotected.¹⁸⁶ The problem of “opening the floodgates” exists whether the argument is brought under the Torture Convention, asylum law, or any other framework. The Torture Convention will probably fail for the same reasons that the asylum claim would have failed – fear of a flood of new immigrants.¹⁸⁷

New Implementing Statute and Regulations on Convention Against Torture Protections, 76 INTERPRETER RELEASES 265, 274 (1999) (noting that Nigeria’s acquiescence in the Anikwata case was demonstrated by (1) Nigeria’s failure to deter FGM in comparison to other African countries and (2) the high percentage of women in Anikwata’s in-laws’ tribe who have been subject to FGM”).

¹⁸² Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 64 Fed. Reg. 8488, 8489 (1999) (to be codified at 8 C.F.R. § 208.16)(emphasis supplied).

¹⁸³ *Id.* “If a person has been tortured in the past and is being returned to the same country . . . that past torture is certainly strong evidence that the individual will be tortured again if the human rights conditions in the country have not changed appreciably.” Rosati, *supra* note 158, at 543; *see also* Sklar, *supra* note 28, at 655.

¹⁸⁴ Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 64 Fed. Reg. at 8489.

¹⁸⁵ *See text supra* accompanying notes 136-67.

¹⁸⁶ *See All Things Considered: Asylum and Genital Mutilation*, *supra* note 8 (quoting Immigration Law expert Stephen Lagomsky as stating that Anikwata’s case could invite claims based on all kinds of potential harms to children). *But see infra* text accompanying note 188 (explaining that the INS fears are unwarranted because few women can escape their home countries).

¹⁸⁷ The number of asylum cases in 1993 was seventy-eight times greater than in 1973. *See* Federation for American Immigration Reform, *Illegal Immigration: It’s Not About Just the*

Judges and legislators, however, should not allow fear of an immigration flood to dissuade them from granting Anikwata's petition. Most women in FGM-practicing countries cannot escape their home countries.¹⁸⁸ When they do escape to the United States, immigration procedures should not force them back to a society that treats them as second-class citizens.

VI. CONCLUSION

Anikwata fears for her daughter's subjugation to FGM. Separation of this mother-daughter family will cause substantial emotional harm to both family members. Anikwata and Sharon fear undergoing forced marriages and becoming Anikwata's in-laws' property. Taken as a whole, the law's consideration of these factors failed to protect Anikwata under the INA. Virginia Anikwata, indeed, finds herself in a "Sophie's Choice"¹⁸⁹ predicament. Leaving her daughter alone in the United States or taking her to Nigeria to undergo FGM are not viable options for any mother. The only ideal resolution involves permitting them both to live together permanently in the United States.

In review, four conclusions have been drawn. First, by withholding Anikwata's deportation, the United States does not impose its own agenda on Nigeria. Rather, the United States recognizes the dangers of FGM and reaffirms its commitments to advancing women and children's rights. Second, U.S. asylum law would not have protected Anikwata because the *Kasinga* Board intentionally crafted its decision to avoid application to cases like Anikwata's. Third, although the extreme nature of Anikwata's case might have satisfied the new Cancellation standard for a suspension of deportation, the overly-strict IIRAIRA prevented Anikwata from pursuing a suspension remedy. Finally, while Anikwata could meet the standards

Border (visited Sept. 20, 1999) <<http://www.fairus.org/html/04135705.htm>>. "With more than a million illegal and legal immigrants settling in the United States each year, immigration has an impact on education, health care, government budgets, employment, the environment, crime and countless other areas of American life." Federation for American Immigration Reform, *What is the Federation for American Immigration Reform?* (visited Oct. 23, 1998) <<http://www.fairus.org/fair.htm>>. There are an estimated seventy thousand illegal Nigerians in the United States while 3.6 million eligible people currently wait to be admitted as immigrants to the United States, some of them having been on that list for eighteen years. See Federation for American Immigration Reform, *Illegal Aliens* (visited Oct. 23, 1998) <<http://www.fairus.org/04118604.htm>>.

¹⁸⁸ See Pistone, *supra* note 5, at 509.

¹⁸⁹ See WILLIAM STYRON, *SOPHIE'S CHOICE* (1979) (telling the story of a mother at Auschwitz who is ordered to select one of her children to be sent to the ovens while the other is spared).

outlined under the Torture Convention, the Board will likely deny withholding of deportation out of fear of setting a dangerous precedent.¹⁹⁰

Legislators and the Board of Immigration Appeals should view this case as an opportunity to rectify a significant weakness of U.S. immigration law. Overly restrictive procedures reinforced by IIRAIRA do not effectively address the humanitarian needs raised by cases like Anikwata's. This case represents an opportunity to expand protections afforded by gender-based asylum law. Decision-makers must recall that the United States has openly outlawed FGM at home and condemned the practice abroad. Such factors should encourage judges, the Board of Immigration Appeals and the INS to allow applicants like Virginia Anikwata to avoid the hardship of making a decision no parent should ever be forced to make.

¹⁹⁰ See Greene, *supra* note 156, at 14 (quoting Sklar as stating that "the strong indication we're getting is the INS is still taking the position of believing that Sharon should just stay in the U.S").