



---

1-1-1995

## In Re Oluloro: Risk of Female Genital Mutilation as Extreme Hardship in Immigration Proceedings Symposium - Human Rights in the Americas - Recent Development.

Patricia Dysart Rudloff

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Patricia Dysart Rudloff, *In Re Oluloro: Risk of Female Genital Mutilation as Extreme Hardship in Immigration Proceedings Symposium - Human Rights in the Americas - Recent Development.*, 26 ST. MARY'S L.J. (1995).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol26/iss3/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

## RECENT DEVELOPMENT

### **IN RE OLULORO: RISK OF FEMALE GENITAL MUTILATION AS "EXTREME HARDSHIP" IN IMMIGRATION PROCEEDINGS**

**PATRICIA DYSART RUDLOFF**

I. Introduction .....	877
II. Statement of Facts and Posture of the Case .....	878
III. Female Genital Mutilation .....	880
IV. Pertinent U.S. Immigration Law .....	885
A. Suspension of Deportation .....	886
B. Asylum and Withholding of Deportation .....	889
V. The International Perspective .....	893
A. Women's Rights Are Human Rights .....	893
B. The United States and Human Rights .....	896
VI. The <i>Oluloro</i> Decision and Rationale .....	897
VII. Why Not Asylum or Withholding of Deportation? .....	899
VIII. Conclusion .....	903

#### I. INTRODUCTION

On March 23, 1994, in *In re Oluloro*,<sup>1</sup> Immigration Judge Kendall Warren handed down a decision which indicates that, in immigration proceedings, the United States Immigration and Naturalization Service (INS) should consider human rights abuses directed at women.<sup>2</sup> The overriding concern in the case confronting Judge Warren was the possibility that two

---

1. No. A72 147 491 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*).

2. See Nena Baker, *A Judge Decides: Lydia Oluloro Stays*, OREGONIAN, Mar. 24, 1994, at A1 (noting that judge's ruling dealt with treatment of women in male-dominated, patriarchal cultures); Bob Caldwell, *Human-Rights Defense Makes Reporting Complicated*, OREGONIAN, Apr. 3, 1994, at B1 (reporting that U.S. Representative Pat Schroeder of Colorado hailed ruling as victory for recognition of women's human rights); Stuart Wasserman & Maria Puente, *Mutilation Fear Wins Halt to Deportation*, USA TODAY, Mar. 24,

young U.S. girls would suffer female genital mutilation (FGM) if the INS deported their mother to Nigeria.<sup>3</sup> In reaching the decision to suspend the mother's deportation, Judge Warren condemned FGM as "cruel and serv[ing] no known medical purpose."<sup>4</sup> Thus, Judge Warren ruled that the practice presented an extreme hardship for the girls.<sup>5</sup> Unfortunately, the court's ruling has no precedential value because the INS chose not to appeal the decision to the Board of Immigration Appeals (BIA).<sup>6</sup> The decision, however, offers some hope and guidance to other alien parents who seek to protect their daughters from FGM and similar atrocities.<sup>7</sup>

## II. STATEMENT OF FACTS AND POSTURE OF THE CASE

Emanuel Oluloro, a Nigerian citizen and a member of the Yoruba tribe, first entered the United States in 1980 as a nonimmigrant student.<sup>8</sup> After marrying a U.S. citizen, the INS granted Emanuel's petition to become a permanent resident alien.<sup>9</sup> Without first divorcing his American wife, Emanuel returned to Nigeria and married Lydia Oluloro in August 1986.<sup>10</sup> Lydia entered the United States in September 1986 on a nonim-

---

1994, at A3 (stating that legal experts view decision as late recognition of human rights violations in globally occurring gender-based persecution).

3. *Oluloro*, No. A72 147 491, at 16-18.

4. *Id.* at 16.

5. *Id.* at 17.

6. See Aliens and Nationality, 8 C.F.R. § 3.1(g) (1994) (discussing precedential value of BIA decisions). This subsection provides that selected BIA decisions will serve as precedents for INS officers. *Id.*; see Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 637 n.53 (1993) (explaining that published opinions of BIA are binding on immigration judges unless federal court decides differently); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 950 (1992) (noting that BIA recognized homosexuals as social group for asylum purposes in nonprecedential opinion); Stuart Grider, Recent Development, *Sexual Orientation as Grounds for Asylum in the United States—In Re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993), 35 HARV. INT'L L.J. 213, 215 (1994) (asserting that clear immigration standards are indiscernible because few BIA opinions are actually selected for publication). See generally Nena Baker, *A Judge Decides: Lydia Oluloro Stays*, OREGONIAN, Mar. 24, 1994, at A1 (predicting that *Oluloro* opinion will have limited impact on asylum cases); Colleen O'Connor, *Mutilation Custom*, CHI. TRIB., June 27, 1994, at 7 (indicating that another Nigerian mother could not rely on *Oluloro* for precedent).

7. See Jill Lawrence, *Gender Persecution New Reason for Asylum*, L.A. TIMES, Mar. 27, 1994, at A14 (finding ray of hope in *Oluloro*); Colleen O'Connor, *Mutilation Custom*, CHI. TRIB., June 27, 1994, at 7 (discussing predicament of another Nigerian mother who found comfort and hope in *Oluloro*).

8. *In re Oluloro*, No. A72 147 491, at 11 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*).

9. *Id.*

10. *Id.* at 6. Lydia was not aware of Emanuel's American marriage. *Id.* The couple's Nigerian marriage was solemnized three times, including a ceremony that required Eman-

migrant visitor visa after Emanuel convinced her that the INS would deny her entry if she informed the authorities of her marriage to a lawful permanent resident.<sup>11</sup> The Oluloros ended their turbulent and abusive marriage in 1993 after Emanuel's arrest for raping Lydia.<sup>12</sup> Although the divorce decree granted Lydia legal custody of their two U.S.-born daughters, the court allowed Emanuel to have unsupervised weekend visits with the girls.<sup>13</sup> Significantly, Emanuel never petitioned for Lydia's permanent resident visa,<sup>14</sup> and Emanuel notified the INS of Lydia's illegal status.<sup>15</sup> The INS then initiated deportation proceedings against Lydia, which culminated in Judge Warren's opinion.<sup>16</sup>

During the INS hearing, Lydia conceded to her deportability, but refused to designate a deportation site.<sup>17</sup> Consequently, the court selected Nigeria, Lydia's homeland, as the country for deportation.<sup>18</sup> Lydia Oluloro then petitioned for suspension of deportation, claiming that her daughters, who would accompany her to Nigeria, faced the extreme hardship of FGM.<sup>19</sup> Alternatively, she sought withholding of deportation or asylum to avoid the traumatization of her daughters.<sup>20</sup> In the end, Judge

---

uel to swear that he had no other wife. *Id.* In February 1987, the Oluloros remarried in the United States after Emanuel's first marriage ended in divorce. *Id.* at 7.

11. *Id.* at 6. This was apparently the first of several deceptions in relation to Lydia's presence in the United States. Emanuel provided Lydia with a fraudulent letter of invitation so that she might obtain a visa. *Id.* at 6, 8. Her passport indicated that she was married, had three children, and intended to visit a person with whom she was not familiar. *Id.* at 6-7. Later, Lydia signed a Social Security card application that stated she was born in Chicago. *Id.* at 9. By showing the Social Security card, Lydia obtained welfare benefits, food stamps, and public housing. *Id.* at 10. For employment purposes, Lydia indicated that she was a U.S. citizen on an I-9 form. *Id.* at 9. Lydia's testimony, which Judge Warren found credible, indicated that Emanuel coached her in all of these actions. *Id.* at 18-20. According to Lydia, in the Yoruba culture, women do what their husbands order. *Id.* at 7.

12. *Oluloro*, No. A72 147 491, at 5, 7. After he spent eight days in jail, a grand jury concluded that the evidence against Emanuel was insufficient, and the state therefore dropped the charges against him. *Id.* at 11-12. At the time of the INS hearing, however, a restraining order prevented Emanuel from approaching Lydia. *Id.* at 9.

13. *Id.* at 9, 17. Lydia's girls were six and five years of age at the time of the hearing. *Id.* at 7. The eldest daughter claimed that Emanuel had hit her on several occasions. *Id.*

14. *Id.* at 19. Emanuel claimed that Lydia would not provide him with the divorce papers from a prior marriage. *Id.* at 12. Lydia alleged that Emanuel told her that they could not afford an attorney or the filing costs involved in the process. *Id.* at 9. Judge Warren concluded that Emanuel was using Lydia's illegal status to maintain control over her through threats of deportation. *Id.* at 19.

15. *Id.* at 13.

16. *Oluloro*, No. A72 147 491, at 2.

17. *Id.*

18. *Id.*

19. *Id.* at 2, 10. Lydia believed that, if she worked in Nigeria to support her daughters, her older sister would perform FGM on the girls. *Id.* at 10.

20. *Oluloro*, No. A72 147 491, at 10.

Warren suspended Lydia Oluloro's deportation because the risk of ritual FGM in Nigeria posed an extreme hardship for her young U.S.-born daughters.<sup>21</sup>

### III. FEMALE GENITAL MUTILATION

Approximately forty Middle Eastern and African countries engage in the practice of ritual female genital mutilation, a custom that originated more than 2500 years ago.<sup>22</sup> Estimates suggest that eighty to one-hundred million women and young girls know the trauma of having their external genitalia removed.<sup>23</sup> Experts predict that this mutilation affects half the women and girls in Nigeria.<sup>24</sup> While the tradition of removing external female genitalia varies from culture to culture,<sup>25</sup> generally, a tribe will practice only one of three types of FGM.<sup>26</sup> The first and mildest

21. *Id.* at 20.

22. Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 525-26 (1993); see 140 CONG. REC. S14,242-43 (daily ed. Oct. 5, 1994) (statement of Sen. Reid introducing bill entitled "Federal Prohibition of Female Genital Mutilation Act of 1994") (explaining that Act is necessary because immigrants from countries allowing FGM are bringing practice to United States); *In re Oluloro*, No. A72 147 491, at 17 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*) (relying on State Department reports that indicate genital mutilation is deeply ingrained custom that dates back at least 1000 years); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1509 (1992) (indicating that Muslim Africa is largest cultural group to practice FGM).

23. See S. Res. 263, 103d Cong., 2d Sess., 140 CONG. REC. S13,100 (daily ed. Sept. 21, 1994) (statement of Sen. Reid submitting resolution entitled "To Express the Sense of the Senate Condemning the Cruel and Tortuous Practice of Female Genital Mutilation") (including estimate within background information on FGM); Ellen Goodman, *Another Step Toward Redefining Abuse of Women*, BOSTON GLOBE, Mar. 27, 1994, at 75 (claiming that two million women are maimed by FGM each year); Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 26, 30 (stating that World Health Organization believes over 80 million women have been mutilated by this practice); Stuart Wasserman & Maria Puente, *Female Genital Mutilation Under Scrutiny at Hearing*, USA TODAY, Feb. 11, 1994, at A3 (estimating that as many as 110 million women have undergone FGM).

24. See, e.g., *Oluloro*, No. A72 147 491, at 4 (relying on State Department information); Nena Baker, *A Judge Decides: Lydia Oluloro Stays*, OREGONIAN, Mar. 24, 1994, at A1 (reporting factors that influenced Judge Warren's decision); Bob Caldwell, *Human-Rights Defense Makes Reporting Complicated*, OREGONIAN, Apr. 3, 1994, at B1 (discussing *Oluloro* decision).

25. See, e.g., Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1947 (1993) (stating that 250 different Nigerian tribes practice varying methods of FGM).

26. See *Oluloro*, No. A72 147 491, at 3 (distinguishing types of FGM); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (noting that FGM includes removal of part or all of clitoris as

form of FGM is somewhat similar to male circumcision in that the procedure removes the tip of a woman's clitoris, just as circumcision removes the foreskin from a man's penis.<sup>27</sup> Muslim cultures refer to this FGM procedure as *sunna*, which, in English, translates to "tradition."<sup>28</sup> The second form, excision, is the removal of a woman's clitoris and labia minora.<sup>29</sup> Infibulation is the third and most drastic form of genital mutilation: after removal of all a woman's external female genitalia, thorns are used to stitch together the raw edges of the labia majora.<sup>30</sup> A small piece of wood is inserted into the resultant incision to prevent the wound from closing,<sup>31</sup> and the woman's legs are temporarily bound together to allow scar tissue to form.<sup>32</sup>

The age at which ritual FGM occurs is as varied as the procedure. Teens, women on wedding nights, and women about to give birth to their first child may be the victims of this painful procedure.<sup>33</sup> The normal

well as removal of all external genitalia); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946-47 (1993) (describing clitoridectomy, excision, and infibulation).

27. E.g., *Oluloro*, No. A72 147 491, at 3; Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993).

28. E.g., *Oluloro*, No. A72 147 491, at 3; Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993).

29. Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993).

30. *Id.* at 1947; see Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 31 (relating one woman's graphic description of her experience); *Not Here . . . Not Ever*, USA TODAY, Mar. 23, 1994, at A10 (noting that wound is sewn with thorns). *But see* Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 187 (1993) (stating that incision is most commonly stitched with cat gut). *See generally Oluloro*, No. A72 147 491, at 3 (describing infibulation procedures); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (listing infibulation procedure as one type of FGM).

31. E.g., Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1947 (1993); see Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 30 (quoting one victim, who stated that stick prevented total closure of incision and allowed her to expel bodily fluids); *Not Here . . . Not Ever*, USA TODAY, Mar. 23, 1994, at A10 (noting that opening was pencil size).

32. E.g., Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1947 (1993); Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 30.

33. *See* Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (noting that, depending on culture, newborns, brides, and new mothers may experience trauma of FGM); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106

practice, however, is to perform the ritual on babies or young girls.<sup>34</sup> While men are responsible for the procedure in some cultures,<sup>35</sup> more typically, the tribal women and midwives make the cuts necessary to bring a "high bride price."<sup>36</sup> Of course, these "surgeons" have no medical training,<sup>37</sup> and true surgical instruments, sterile conditions, and anesthesia are unknown to the practitioners.<sup>38</sup> Crude knives, pieces of glass, or razor blades are often used to make the incision,<sup>39</sup>

---

HARV. L. REV. 1944, 1950 (1993) (relating that some Nigerian communities believe first-born baby will die if its head touches mother's clitoris); Sally Jacobs, *Persecution Based on Sex Is Viewed as a Cause for Asylum*, BOSTON GLOBE, Apr. 8, 1994, at 1 (describing one Nigerian woman's ordeal at age 18); Jill Lawrence, *Gender Persecution New Reason for Asylum*, L.A. TIMES, Mar. 27, 1994, at A14 (discussing Malian woman's abuse by her family because she refused to undergo FGM near time of her marriage).

34. See Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (explaining that procedure is most commonly performed on girls from ages three to eight); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1944 (1993) (asserting that thousands of young African girls die each year from tetanus infections related to FGM); *Nigerian, Daughters Can Stay in U.S.*, CHI. TRIB., Mar. 24, 1994, at 17 (noting that ritual is designed to maintain virginity of young girls and women).

35. See *Oluloro*, No. A72 147 491, at 8 (relating Lydia Oluloro's memory of elderly man using pocket knife to excise clitoris of six-year-old girl); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1944 (1993) (describing film depicting medicine man excising small girl's clitoris).

36. See, e.g., *Oluloro*, No. A72 147 491, at 17 (concluding that tribal women usually enforce practice); 140 CONG. REC. S14,242, S14,245 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun) (explaining that procedure is most commonly performed by tribal women and midwives because they want daughters to marry); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (asserting that procedures are performed almost entirely by women); Eugenie A. Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 333 (1994) (explaining that most rituals are conducted by midwives because many families cannot afford services of physician).

37. 140 CONG. REC. S14,242-03 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun); Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 30; see Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (noting that FGM is rarely performed by medical personnel).

38. 140 CONG. REC. S14,242-03 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun); see Eugenie A. Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 333 (1994) (explaining that term "female genital surgeries" has no medical legitimacy); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1947 (1993) (writing that, in parts of Nigeria, local barber may perform FGM).

39. E.g., Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993); Eugenie A. Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 333 (1994); see, e.g., 140 CONG. REC. S14,242-03 (daily ed. Oct. 5, 1994) (statements of Sen. Moseley-Braun and Sen. Reid) (commenting that incision is often

while kerosine, motor oil, or native soaps are used to cleanse the wound.<sup>40</sup>

The consequences of genital mutilation can be severe: shock, intense pain, infections, hemorrhaging, and death are often the immediate results.<sup>41</sup> Urinary and menstrual problems can also occur when the body is unable to rid itself of fluids in the normal manner.<sup>42</sup> To have sexual intercourse or give birth, an infibulated woman may be opened and then refibulated afterwards.<sup>43</sup> Moreover, infibulated women often give birth to stillborn or brain-damaged babies because scar tissue, which can block the baby's oxygen supply during birth, develops around the vagina.<sup>44</sup> Infant mortality rates are highest in countries allowing genital mutilation—a result of the stillbirths as well as the mutilation itself.<sup>45</sup>

---

made with broken glass or razor blade). *But see* Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 187 (1993) (stating that, in Somalia, state-run hospitals perform excision).

40. Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1947 (1993).

41. Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 187 (1993); *see, e.g.*, S. Res. 263, 103d Cong., 2d Sess., 140 CONG. REC. S13,100 (daily ed. Sept. 21, 1994) (statement of Sen. Reid) (reporting that some young girls suffer convulsions and bite through their tongues); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (reporting Sudanese estimates that approximately one-third of all girls who endure FGM die from lack of antibiotics); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1948 (1993) (explaining that some victims die when major blood vessels are severed).

42. *E.g.*, 140 CONG. REC. S14,242–43 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 187 (1993); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1948 (1993).

43. *E.g.*, Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 187 (1993); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1948 (1993).

44. *See, e.g.*, Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993) (explaining that built up scar tissue often impairs walking); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1948 (1993) (asserting that hemorrhaging, torn tissue, and prolapsed uterus are other dangers of FGM).

45. Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 526 (1993).



Westerners view FGM as persecution, torture, abuse, and, as its name suggests, mutilation.<sup>46</sup> The practitioners of this procedure, however, have no such intent; they believe that their respective cultures are merely continuing a traditional rite of passage that provides females with a sense of identity and tribal recognition.<sup>47</sup> Some practitioners further believe their religion requires the surgery,<sup>48</sup> and many others see the procedure as virginity insurance for a future husband or as a method of controlling a wo-

---

46. See generally S. Res. 263, 103d Cong., 2d Sess., 140 CONG. REC. S13,100 (daily ed. Sept. 21, 1994) (statement of Sen. Reid) (calling FGM tortuous); Eugenie A. Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 332-33 (1994) (discussing cultural biases that create difficulty in naming practice of removing female genitalia).

47. E.g., *Oluloro*, No. A72 147 491, at 3; see e.g., 140 CONG. REC. S14,242-43, S14,245 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun) (reporting that female genital removal is encouraged so families can be certain that husbands provide "meal tickets" for daughters); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1510 (1992) (stating that women who avoid genital removal may not be allowed to marry); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1949 (1993) (explaining that genital excision confers rights to social benefits on women and ensures against ostracism). In some Nigerian tribes, excised women "click" at unexcised women to insult them. Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1950 (1993); see also Nena Baker, *Female Circumcision in Defense of Her Daughters*, OREGONIAN, Feb. 7, 1994, at C1 (asserting that, when new children join culture prescribing genital removal and children are protected from procedure, mother and children are ostracized from society); *Nigerian Fights Ouster, Says Girls Face Mutilation*, CHI. TRIB. Feb. 8, 1994, at 8 (quoting family view that Lydia's children would be "American whores" unless they have their genitals removed).

48. Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 527 (1993); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1951 (1993). Proponents argue that, because both the Koran and the Bible require virginity and modesty, any practice fostering these virtues is justified. Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1951 (1993). But see 140 CONG. REC. S14,242-43, S14,245 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun) (explaining that, although FGM is thought of as Moslem practice, it actually predates that religion); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 527 (1993) (stating that Koran requires circumcision for men, but not for women); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1951 (1993) (reporting that Christianity and Islam are major religions in Nigeria, but that neither have formal doctrines prescribing FGM). Opponents of genital removal contend that a practice espousing mutilation is the antithesis of religious ideals. Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1952 (1993).

man's sex drive to prevent marital infidelity.<sup>49</sup> Enhanced fertility, aesthetics, and cleanliness are other justifications offered by practitioners for the continuation of FGM.<sup>50</sup>

To date, international disdain and condemnation of FGM has not forced these communities to abandon their deeply rooted tradition. In light of the continuation of this practice, the international community must offer a safe refuge to the women and girls who attempt to escape the trauma of FGM. In the United States, refuge is theoretically possible under the Immigration and Naturalization Act when the circumstances of those who fear atrocities like FGM merit such relief.

#### IV. PERTINENT U.S. IMMIGRATION LAW

The Immigration and Naturalization Act (INA)<sup>51</sup> is the statutory body of law that regulates an alien's right to enter and stay in the United States.<sup>52</sup> These regulations require deportation for reasons such as overstaying a visa or illegally entering the country;<sup>53</sup> however, the INA also recognizes that circumstances in other countries may force people to seek

---

49. E.g., Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 527 (1993); Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 30; see, e.g., Eugenie A. Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 341, 345-47 (1994) (explaining that chastity is marketable, and that mutilation protects this "investment"); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1952 (1993) (relating cultural belief that, without genital removal, women have insatiable sexual drives and search out additional partners when husbands cannot meet their demands). But see Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 527 (1993) (asserting that psychological nature of libido precludes mutilation from effectively controlling sex drive); Eugenie A. Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329, 345 (1994) (concluding that refubulation covers evidence of premarital sex).

50. See, e.g., 140 CONG. REC. S14,242-03 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun) (asserting that government statements condemning mutilation will be unsuccessful without education programs); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1953 (1993) (arguing that compliance with external norms will not end FGM). In countries where this practice continues, opponents should argue for enforcement of human rights provisions within adopted constitutions and endorsed international documents. Note, *What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1953-54 (1993).

51. Immigration and Naturalization Act of 1952, 8 U.S.C. §§ 1101-1555 (1988 & Supp. V 1993).

52. 8 U.S.C. § 1151 (Supp. V 1993).

53. *Id.* § 1251(a)(1)(B),(a)(C)(i).

refuge in the United States.<sup>54</sup> Therefore, three significant types of relief—suspension of deportation, asylum, and withholding of deportation—may be available to deportees such as Lydia Oluloro if they can satisfy stringent criteria.<sup>55</sup>

#### A. *Suspension of Deportation*

Aliens facing deportation may qualify for a discretionary grant of suspended deportation.<sup>56</sup> To qualify for suspended deportation, aliens must (1) establish seven years of continuous physical presence in the United States, (2) prove their good moral character, and (3) demonstrate extreme hardship for themselves or for citizen family members present in the United States.<sup>57</sup> The INA sets forth statutory factors, such as personal habits, criminal activity, and perjury, that immigration judges must weigh when determining an alien's moral character.<sup>58</sup> Habitual drinking, gambling, smuggling, prostitution, and lying under oath to obtain immigration benefits are examples of behavior that will prevent a grant of suspended deportation or any other type of relief that depends on good moral character.<sup>59</sup> While the INA provides explicit guidance for proving good moral character, immigration judges cannot rely on statutory definitions when determining what evidence establishes an extreme hardship.

Extreme hardship findings are case specific, and the adversity likely to be endured by an alien or a citizen family member must be extraordinary when compared to the burden suffered by other aliens facing deporta-

54. *Id.* §§ 1157(b), 1158(a)–(c), 1253(h)(1) (1988 & Supp. V 1993).

55. Lydia Oluloro included a request for voluntary departure in her petition. When no alternative to deportation exists, certain aliens may petition for a discretionary grant of voluntary departure. 8 U.S.C. § 1254(e)(1) (Supp. V 1993). This grant precludes final deportation orders that bar legal re-entry for five years. *Id.* § 1182(a)(6)(B); see AUSTIN T. FRAGOMEN, JR. ET AL., *IMMIGRATION LAW AND BUSINESS* § 6.8(b)(1), at 2 (1994) (stating that timely departure allows alien choice of destination and averts stigma of forced deportation). To qualify for voluntary departure, an alien must prove that she is willing to leave at her own expense and that she exhibited good moral character for the preceding five years. 8 U.S.C. § 1254(e)(1) (Supp. V 1993).

56. 8 U.S.C. § 1254(a) (1988 & Supp. V 1993); *INS v. Jong Ha Wang*, 450 U.S. 139, 139–40 (1981); *In re Oluloro*, No. A72 147 491, at 14–15 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*).

57. 8 U.S.C. § 1254(a)(1) (1987); see *INS v. Rios-Pineda*, 471 U.S. 444, 445–46 (1985) (restating statutory requirements, but concentrating discussion on seven-year presence element). In *Rios-Pineda*, the United States Supreme Court noted that leaving the United States because of threatened deportation, and then illegally reentering two months later, interrupted the alien's continuous presence in this country. *Rios-Pineda*, 471 U.S. at 449 n.2.

58. 8 U.S.C. § 1101(f) (1987 & Supp. V 1994).

59. *Id.* §§ 1101(f)(1), (4), (6), 1182(a)(2)(D), (6)(E) (Supp. V 1994).

tion.<sup>60</sup> Generally, courts look at factors such as age, health, and the community ties of those affected by the deportation.<sup>61</sup> Immigration judges also consider the adverse effects that a U.S. citizen might suffer because of a peculiar situation in the destination country.<sup>62</sup> Although these factors may sufficiently establish extreme hardship, immigration judges will reject petitions based solely on other types of claims.

For instance, a claim of economic difficulty, by itself, is not sufficient to establish extreme hardship.<sup>63</sup> Likewise, an alien parent cannot automatically assume that the birth of a U.S.-citizen child will constitute an extreme hardship.<sup>64</sup> Moreover, choosing to leave a citizen child behind in the United States is not evidence of hardship because the INA does not compel the alien to make such a choice.<sup>65</sup> When circumstances surrounding the deportation will cause an involuntary separation of the alien's

---

60. See, e.g., *Jong Ha Wang*, 450 U.S. at 145 (explaining that Attorney General's limits on interpretation of extreme hardship denote exceptional quality of suspended deportation); *Hernandez-Patino v. INS*, 831 F.2d 750, 753 (7th Cir. 1987) (stressing that, unless aliens prove that their hardship is unique, BIA will have no basis of comparison for similar applications); *Ramirez-Durazo v. INS*, 794 F.2d 491, 499 (9th Cir. 1986) (finding that circumstances were not unique and extrapolating, as required, to prove extreme hardship).

61. See, e.g., *Babai v. INS*, 985 F.2d 252, 255 (6th Cir. 1993) (listing other factors for deportation, such as no relatives in home country and denial of religious freedom); *Hernandez-Patino*, 831 F.2d at 754 (including family ties in United States and immigration history as considerations in extreme hardship findings); *Sanchez v. INS*, 755 F.2d 1158, 1160 n.2 (5th Cir. 1985) (noting that length of stay in United States and opportunity to obtain visa are factors in proving extreme hardship).

62. E.g., *Hernandez-Patino*, 831 F.2d at 754 (determining that political and economic conditions of deportation destination are important considerations).

63. See, e.g., *Jong Ha Wang*, 450 U.S. at 142 (agreeing with BIA finding that economic disadvantage alone will not demonstrate extreme hardship); *Liu v. United States*, 13 F.3d 1175, 1177 (8th Cir. 1994) (stating that liquidation of business before deportation is not extreme hardship); *Ramirez-Durazo*, 794 F.2d at 498 (finding that lower standard of living and limited job opportunities in Mexico did not demonstrate extreme hardship).

64. See, e.g., *Hernandez-Patino*, 831 F.2d at 754 (noting that birth of child in United States does not give permanent resident status to illegal alien); *Ramirez-Durazo*, 794 F.2d at 499 (explaining that citizen child's readjustment and inconvenience when accompanying deported alien parents is not extreme hardship); *Marquez-Medina v. INS*, 765 F.2d 673, 676 (7th Cir. 1985) (asserting that de facto deportation for deportable alien's child is not extreme hardship).

65. See, e.g., *Liu*, 13 F.3d at 1177 (asserting that deportation order does not mandate separation of parent and child); *In re IGE*, No. A-27178229, 1994 WL 520996, at \*5 (BIA Sept. 16, 1994) (order denying suspension of deportation) (requiring parents, who claimed they would leave citizen children behind if deported, to prove such intention). A deported alien's decision to leave citizen children in the United States is a personal choice and does not present an extreme hardship. *IGE*, 1994 WL 520996, at \*6.

family, however, the court must consider the extent of hardship for the alien and the citizens involved.<sup>66</sup>

If an alien meets the statutory criteria for suspended deportation, the immigration judge must find that the alien merits a grant of discretionary relief from deportation.<sup>67</sup> Applicants have the burden of proving that their cases merit such relief.<sup>68</sup> Immigration judges primarily consider the applicant's immigration conduct and any violations of previous INS orders regarding deportation.<sup>69</sup> When an alien meets the criteria for suspension of deportation and convinces the court to grant discretionary relief, the alien's status automatically changes to that of permanent resident.<sup>70</sup> Unlike Lydia Oluloro, many aliens do not succeed at simultaneously establishing seven years of continuous presence in the United States and an extreme hardship caused by deportation. Those who cannot qualify for suspended deportation may satisfy the criteria for asylum or withholding of deportation.

66. See, e.g., *Babai*, 985 F.2d at 254–55 (finding that BIA erred when it did not consider hardship on citizen child who was old enough to decide to stay in United States); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1422–26 (9th Cir. 1987) (discussing hardship to citizen children who would remain in United States if parents are deported); *Bastidas v. INS*, 609 F.2d 101, 104–05 (3d Cir. 1979) (concluding that BIA failed to consider emotional hardship on deported alien father and citizen child, who would remain with citizen mother).

67. See, e.g., *Rios-Pineda*, 471 U.S. at 445–46 (stating that court, in its discretion, may deny suspension of deportation even when alien meets statutory criteria); *Ramirez-Durazo*, 794 F.2d at 497; (explaining that alien must satisfy statutory criteria and prove entitlement to discretionary relief).

68. See *IGE*, 1994 WL 520996, at \*2 (declaring that alien must prove statutory requisites and eligibility for judge's favorable discretion).

69. See, e.g., *Rios-Pineda*, 471 U.S. at 448 (denying suspended deportation because seven-year presence requirement was met by refusing to comply with previous voluntary departure orders). In *Rios-Pineda*, an alien illegally entered the United States in 1972 and left voluntarily after he was apprehended in 1974. *Id.* at 446. Two months later, he paid \$450 to have himself and his wife smuggled into the United States. *Id.* After the couple was apprehended in 1978, they asked for and received the right to voluntarily depart from the United States. *Id.* By extending departure deadlines several times, they were able to stay in the country long enough for the birth of a U.S.-citizen child. *Id.* Ultimately, the INS began deportation proceedings and denied suspended deportation. *Id.* at 447. After a lengthy appeals process, the Supreme Court found that denial of suspended deportation was not an abuse of the BIA's discretion. *Id.* at 450–51. The illegal entries, noncompliance with departure orders, and satisfaction of the seven-year presence requirement through the lengthy appeals process justified the BIA's decision. *Id.* at 448; see also *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1262 (7th Cir. 1985) (discussing alien's conduct in disregarding BIA orders).

70. 8 U.S.C. § 1254(a) (1994).

### B. *Asylum and Withholding of Deportation*

Asylum, another form of discretionary relief, is available to certain aliens who face deportation to a hostile country.<sup>71</sup> Eligibility for asylum depends on whether the alien is a refugee and whether the alien merits such discretionary relief.<sup>72</sup> According to the INA, a refugee is one who (1) is outside the country of birth or the last country of habitual residence, (2) has “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,” and (3) will not or is unable to return to or accept the protection of that country.<sup>73</sup> To satisfy the persecution element, aliens must demonstrate their subjective fear of persecution based on race, religion, nationality, social group, or political opinion.<sup>74</sup> Additionally, an objective observation of the situation in the country at issue must establish that a reasonable possibility exists for such persecution.<sup>75</sup> Refugee status does not automatically guarantee a grant of asylum, and because this relief is

71. 8 U.S.C. § 1158(a) (1988); *see, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 & n.5 (1987) (discussing U.S. asylum law and noting that asylum is discretionary grant by Attorney General); *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984) (explaining that alien must satisfy refugee criteria and merit discretionary grant of asylum); *Fisher v. INS*, 37 F.3d 1371, 1375 (9th Cir. 1994) (setting forth provisions of INA that give Attorney General discretion to grant asylum).

72. 8 U.S.C. § 1158(a) (1988); *see, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 444 (finding that refugees who establish well-founded fear of persecution are not entitled to anything more than eligibility for discretionary grant of asylum); *Safaie v. INS*, 25 F.3d 636, 640–41 (8th Cir. 1994) (affirming BIA decision to deny asylum because Iranian woman did not establish refugee status and eligibility for discretion of asylum); *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991) (noting that because El Salvadoran failed to demonstrate well-founded fear, BIA did not have to determine if discretionary relief was warranted); *In re Acosta*, No. A-24159781, 1985 WL 56042, at \*7 (BIA Mar. 1, 1985) (order dismissing appeal of judgment that denied asylum and withholding of deportation) (asserting that, by terms of INA, eligibility for exercise of discretion is available only if alien satisfies refugee criteria).

73. 8 U.S.C. § 1101(a)(42) (1988).

74. *See Cardoza-Fonseca*, 480 U.S. at 430–31 (stating that “fear” in refugee definition requires consideration of alien’s subjective beliefs); *Gomez*, 947 F.2d at 663 (explaining that aliens prove subjective fear by showing events personally affecting them); *Acosta*, 1985 WL 56042, at \*9 (interpreting fear as awareness or anticipation of harm).

75. 8 C.F.R. § 208.13(b)(2) (1994); *see Stevic*, 467 U.S. at 424–25 (asserting that well-founded fear depends on whether objective circumstances establish reasonable possibility of persecution); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1002 (9th Cir. 1988) (*per curiam*) (declaring that objective component requires specific, credible, and direct evidence); *Acosta*, 1985 WL 56042, at \*12 (interpreting well-founded fear to include objective, external facts that establish realistic view of persecution). The courts consider the following factors in evaluating asylum claims: (1) the presence of a trait or belief that a persecutor targets for castigation; (2) the persecutor can become aware or is already aware of the existence of such a trait or belief; (3) the persecutor has the potential for punishing the alien; and (4) the persecutor is inclined to punish. *Acosta*, 1985 WL 56042, at \*13.

discretionary, the alien must convince the court to exercise that discretion.<sup>76</sup> If the INS denies asylum to a refugee, the court must next decide if the alien qualifies for withholding of deportation.<sup>77</sup>

An application for asylum is also considered as a petition for withholding of deportation.<sup>78</sup> Unlike a discretionary grant of asylum, the United States must withhold deportation to a country when any "alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>79</sup> Entitlement to withholding of deportation depends on an alien's ability to prove that a clear probability of persecution exists<sup>80</sup>—in other words, that persecution is more likely than not to occur.<sup>81</sup> This standard of proof, however, is more stringent than the well-founded fear necessary for establishing refugee status,<sup>82</sup> and therefore, failure to meet the burden for asylum will preclude the alien from withholding of deportation.<sup>83</sup>

76. See, e.g., *In re Pula*, No. A-26873482, 1987 WL 108948, at \*7 (BIA Sept. 22, 1987) (order sustaining appeal of judgment denying asylum) (stating that applicant for asylum must provide relevant evidence to support grant of discretion). At this point, the court considers an alien's entire immigration history, including fraudulent claims to immigration benefits, age, and health. *Id.* at \*6-7. Additionally, the court will examine close family relationships established in the United States. *Id.* at \*7. Finally, the court evaluates the danger of persecution if the alien cannot meet the criteria for other types of deportation relief. *Id.* When adverse factors that would prevent discretionary relief are absent, the alien merits a grant of asylum. *Id.*

77. 8 C.F.R. § 208.16(a) (1994).

78. *Id.* § 208.3(b).

79. 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993); see, e.g., *Cardoza-Fonseca*, 480 U.S. at 429 (explaining that Attorney General lost discretion to deny withholding of deportation with passage of Refugee Act of 1980); *Ananeh-Firempong v. INS*, 766 F.2d 621, 624 (1st Cir. 1985) (teaching that "shall not" wording in 8 U.S.C. § 1253(h) imposes mandatory duty not to deport certain aliens).

80. See *Stevic*, 467 U.S. at 430 (concluding that proving right to withholding of deportation requires alien to meet standard of clear probability of persecution).

81. See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1578 (9th Cir. 1986) (noting that clear probability standard requires alien to show persecution "is more likely than not" to occur).

82. See, e.g., *Cardoza-Fonseca*, 480 U.S. at 443 (asserting that right to withholding of deportation requires more stringent standard of proof); *Fisher*, 37 F.3d at 1376 (noting that, by failing to meet lesser burden of proof for asylum, alien cannot establish right to withholding of deportation). Compare 8 C.F.R. § 208.13(b)(2) (1994) (basing well-founded fear on reasonable possibility of actual persecution) with 8 C.F.R. § 208.16(b), (b)(1) (1994) (using language such as "would be threatened" and "more likely than not" to establish burden of proof for withholding of deportation).

83. See, e.g., *Safaie*, 25 F.3d at 641 (finding that failure to satisfy more lenient asylum standard precludes withholding-of-deportation determination); *Gomez*, 947 F.2d at 665 (explaining that failure to meet less stringent standard of proof asylum ends right to withholding of deportation).

Grants of asylum and withholding of deportation rely on persecution based on one of the five previously described classifications. Targets of the persecution must share an immutable trait that is unalterable or that is so vital to an individual's identity that the characteristic should not change.<sup>84</sup> However, courts struggle with the broad applicability of membership in a particular social group.<sup>85</sup> Given that group members must share common immutable traits similar to color, kinship, shared experiences, or gender, the variety of groups is unlimited.<sup>86</sup> To simplify social group determinations, the courts apply a three-prong test to such claims. The alien must (1) identify a particular social group, (2) prove membership in that group, and (3) establish personal persecution or well-founded fear of persecution because of that membership.<sup>87</sup> Because of the catch-all nature of membership in a particular social group, this classification may be the sole ground upon which an alien, especially a parent fearing a torment like FGM, can base a persecution claim.<sup>88</sup>

---

84. See, e.g., *Acosta*, 1985 WL 56042, at \*16 (finding that because race, religion, nationality, and political opinion describe immutable traits, same principle applies to membership in social group); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 937 (1992) (explaining that immutability of religion and political beliefs derives from fact that person could not as matter of conscience easily change these characteristics).

85. *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993); see *Acosta*, 1985 WL 56042, at \*17–18 (relying on various resources to define social group); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 939–40 (1992) (asserting that courts either offer social group definitions unsupported by analysis or avoid defining concept at all).

86. *Acosta*, 1985 WL 56042, at \*18; see *Safaie*, 25 F.3d at 640 (finding innate gender of Iranian women and intolerable restrictions they suffer to be overbroad group traits). See generally *Fatin*, 12 F.3d at 1238 (explaining that literal interpretation of “social group” is very open-ended and that virtually any collection of people could form particular social group); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 189 (1993) (stating that women who endure gender-based discrimination typically share common lifestyles, cultures, and experiences and, therefore, compose particular social groups); Kristine M. Fox, Comment, *Gender Persecution: Canadian Guidelines Offer a Model for Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 141–42 (1994) (noting inconsistent holdings that have attempted to define particular social groups).

87. See, e.g., *Safaie*, 25 F.3d at 640 (finding that group of women refusing to comply with Iranian customs could be particular social group); *Fatin*, 12 F.3d at 1240 (failing to establish that alien, willing to risk persecution for opposing Iranian law, was precluded from membership in particular social group); *Sanchez-Trujillo*, 801 F.2d at 1574–77 (finding that “group of young, urban, working class males of military age” was not particular social group).

88. See, e.g., *Ananeh-Firempong*, 766 F.2d at 626 (finding that woman from Ghana established membership in her family as basis for persecution); Stuart Grider, Recent De-



While both asylum and withholding of deportation allow the alien to stay in the United States until the alien can no longer demonstrate a basis for the persecution claim, these forms of relief provide very different results.<sup>89</sup> At the end of the first year of asylum, an alien who remains qualified for refugee status may apply for permanent residence.<sup>90</sup> This benefit, however, is not available to one who merits withholding of deportation.<sup>91</sup> Moreover, the INS will grant asylum to the spouse and children of an asylee,<sup>92</sup> but no similar privilege is offered to an alien whose deportation has been withheld.<sup>93</sup>

Although the INA prescribes an alien's rights, privileges, and responsibilities while in the United States, this statute also embodies the U.S. commitment to protect international human rights.<sup>94</sup> In making this commitment, the United States has implicitly accepted the international community's inclusion of women's rights as part of international human rights.<sup>95</sup> Therefore, alien mothers who fear their daughters will suffer

velopment, *Sexual Orientation as Grounds for Asylum in the United States*—In *Re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993), 35 HARV. INT'L L.J. 213, 222 (1994) (explaining that court granted petitioner asylum because his sexual orientation gave him membership in particular social group).

89. See 8 U.S.C. § 1158(b) (1987) (providing asylum procedure); 8 C.F.R. § 208.24(a)(1), (b)(1) (1994) (setting forth reasons for revoking asylum and withholding of deportation). Asylum and withholding of deportation can also be revoked if the alien's application contains fraudulent statements about eligibility or if the alien commits some act that would be ground for denial of asylum. 8 C.F.R. § 208.24(a)(2),(3), (b)(2),(3) (1994).

90. 8 C.F.R. § 209.2(a)(ii) (1994).

91. *In re Oluloro*, No. A72 147 491, at 2 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*). See generally R. PATRICK MURPHY ET AL., 1993-94 IMMIGRATION & NATIONALITY LAW HANDBOOK 466 (1993) (stating that withholding of deportation does not result in permanent residence).

92. 8 U.S.C. § 1158(c) (1987); 8 C.F.R. § 208.21(a) (1994).

93. No statutory or regulatory provisions address the status of the family of an alien granted withholding of deportation.

94. See *Cardoza-Fonseca*, 480 U.S. at 436-38 (discussing U.S. adoption of U.N. documents that mandate responsibility of member nations to protect refugees); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 177-78 (1993) (asserting that INA, as amended by Refugee Act of 1980, complies with U.N.'s intent to protect international human rights).

95. See Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 542 (1993) (declaring that member nations who do not comply with U.N. documents requiring protection of human rights regardless of gender do not meet their obligations to international community); Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum*, 2 AM. U. J. GENDER & L. 107, 117-19 (1994) (describing several U.N. efforts to include women's human rights issues on its agendas).

gender-based atrocities such as FGM should be able to protect their families with the refuge provided by U.S. immigration law.

## V. THE INTERNATIONAL PERSPECTIVE

### A. *Women's Rights Are Human Rights*

Protecting human rights became a focused concern in the mid-1940s, when the international community formulated the Charter of the United Nations<sup>96</sup> and the Universal Declaration of Human Rights.<sup>97</sup> Both of these documents emphasize that nations must respect the human rights of every person, without regard to gender, race, or religion.<sup>98</sup> By granting refugees international recognition and legal status, instruments such as the United Nations Convention Relating to the Status of Refugees<sup>99</sup> and the United Nations Protocol Relating to the Status of Refugees<sup>100</sup> re-emphasize this concern for human rights. These instruments prevent deportation to a country where a person's freedom or life is in danger because of religion, nationality, race, membership in a particular social group, or political opinion.<sup>101</sup> Public condemnation for whom a person is,

96. U.N. CHARTER art. 1.

97. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); see Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 542 (1993) (explaining that purpose of U.N. Charter and Universal Declaration of Human Rights is to promote rights of all people, regardless of gender); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 225 (1988) (noting that U.N. Charter and Universal Declaration form foundation of other human rights documents).

98. U.N. CHARTER art. 1(3); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 2, U.N. Doc. A/810 (1948); see, e.g., David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 224 (1988) (explaining that Universal Declaration urges all nations to provide legal remedies for every person who suffers from human rights violations).

99. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter *Refugee Convention*].

100. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter *Refugee Protocol*].

101. Refugee Convention, *supra* note 99, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176; Refugee Protocol, *supra* note 100, art. I, 19 U.S.T. at 6225, 606 U.N.T.S. at 268; see, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (concluding that Refugee Convention mandated signatory states to refrain from sending aliens back to countries that threatened their freedom or lives); *INS v. Stevic*, 467 U.S. 407, 416 (1984) (asserting that Refugee Protocol bound member states to Refugee Convention provisions); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 634 (1993) (indicating that Refugee Protocol incorporates Refugee Convention Articles 2 through 34); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92

or what a person believes, is often easy to define as a human rights violation.<sup>102</sup> The Refugee Convention and Protocol, however, omit gender as a class protected from discrimination.<sup>103</sup> Unfortunately, this omission allows private persecutions, such as domestic violence and FGM, to persist.<sup>104</sup>

In 1980, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention)<sup>105</sup> to provide legal equality and protection for women. The Women's Convention specifically recognized that women suffer public and private discrimination distinct from men.<sup>106</sup> Under the Women's

COLUM. L. REV. 923, 924 (1992) (noting that Refugee Protocol incorporates many of Refugee Convention's provisions).

102. See Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 539 (1993) (explaining that international law typically regulates public actions of nations); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 628, 628 n.11 (1993) (stating that public activities are often labeled as political (quoting Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGE 3 (1987))); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 181 (1993) (noting that torture, detention, and disappearances are commonly considered human rights violations).

103. Refugee Convention, *supra* note 99, art. 1(A)(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152; see, e.g., Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 512 (1993) (urging amendment of Convention's definition of refugee to encompass gender-based persecution); Kristine M. Fox, Comment, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 118 (1994) (explaining that absence of gender as enumerated category forces women to fit their claims within one of five grounds).

104. See, e.g., Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 628 (1993) (explaining that rape by government official and refusal to wear required veil are often viewed as private matters); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 182 (1993) (asserting that violence directed at women is so prevalent in some societies as to be commonplace and ignored); Kristine M. Fox, Comment, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 129-30 (1994) (finding that many governments fail to protect wives from domestic abuse because women are believed to be property of husbands).

105. Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 22, 1980, U.N. Doc. A/Res. 34/180, 19 I.L.M. 33, 34 (1980) [hereinafter *Women's Convention*].

106. Women's Convention, *supra* note 105, art. 16, 19 I.L.M. at 41; see Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 544 (1993) (indicating that Article 16 of Women's Convention requires member states to end private and public discrimination). Article 16 mandates elimination of unequal treatment in the marriage and family. Women's Convention, art. 16, 19 I.L.M. at 41. Yet, many countries made reservations to Article 16, which means that women will

Convention, member countries must amend or abolish any practice, custom, or regulation that discriminates against women.<sup>107</sup> More recently, the World Conference on Human Rights drafted the Vienna Declaration and Programme of Action,<sup>108</sup> which urged the United Nations to incorporate women's human rights concerns in all of the organization's activities. Both the Vienna Declaration and the Women's Convention illustrate how participating governments have placed major emphasis on their human rights obligation to abolish violence against women.<sup>109</sup> The effectiveness of these documents, nevertheless, depends on the ability of governments and the United Nations to provide the mechanisms that will give the provisions effect.<sup>110</sup>

The latest attempt to protect women's international human rights was ratified on April 19, 1994, when the Second Plenary Session of the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Inter-American Convention).<sup>111</sup> The Preamble to this document proclaims that "violence against women constitutes a violation of their

---

suffer in their private lives in those countries. *Id.*; see Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum*, 2 AM. U. J. GENDER & L. 107, 118 (1994) (noting that Article 5 of Women's Convention speaks to human rights violations justified by tradition); see also David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 226 (1988) (explaining that Women's Convention mandates that women have access to foreign judicial systems).

107. Women's Convention, art. 2, 19 I.L.M. at 36; David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 226 (1988).

108. Vienna Declaration and Programme of Action, Oct. 13, 1993, U.N. Doc. A/CONF. 157/24 Pt. II, art. 43, 32 I.L.M. 1661, 1678 [hereinafter Vienna Declaration and Programme]; see, e.g., Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 156-57 (1994) (discussing Programme's provisions regarding gender violence found in war and in peace). The Programme of Action explicitly labels systematic rapes, forced pregnancies, and sexual slavery as human rights violations. *Id.* at 156. Additionally, this document addresses gender violence in the family and public violence directed at women by nongovernment persons. *Id.* at 157.

109. Vienna Declaration and Programme, *supra* note 107, art. 38, 32 I.L.M. at 1678; see, e.g., Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 159 (1994) (explaining that Programme specifically calls for training of U.N. personnel to address abuses directed at women). See generally Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 543 (1993) (stating that 23 of 100 Women's Convention countries made more than 100 reservations to document provisions).

110. Inter-American Commission of Women, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, OEA/Ser. L. 11.3.6, CIM Doc. 20/94 (Apr. 19, 1994) (on file with the *St. Mary's Law Journal*) [hereinafter Inter-American Convention].

111. *Id.* pmb., at 1.

human rights and fundamental freedoms."<sup>112</sup> Violence, for the purposes of the Inter-American Convention, is any act based on gender that results in psychological, sexual, or physical harm, whether it occurs in private or in public.<sup>113</sup> Among the rights enumerated in the Inter-American Convention are a woman's right to be free of torture<sup>114</sup> and her "right to have the inherent dignity of her person respected."<sup>115</sup> Member nations have an obligation to create the requisite legislation to eradicate and punish violence against women and to implement Inter-American Convention measures.<sup>116</sup> The United States, however, was less than supportive in the drafting of the Inter-American Convention because Congress is considering ratification of the Women's Convention, which espouses similar purposes.<sup>117</sup>

### B. *The United States and Human Rights*

Although the United States proclaims itself a leader in promoting human rights,<sup>118</sup> history provides another perspective. *Twelve years* after the United Nations Protocol mandated that countries provide refuge for the victims of human rights violations, the United States complied by enacting the Refugee Act of 1980.<sup>119</sup> Moreover, Congress has yet to recog-

112. *Id.*

113. *Id.* art. 1, at 2.

114. Inter-American Convention, *supra* note 110, art. 4(d), at 3.

115. Inter-American Convention, *supra* note 110, art. 4(e), at 3.

116. Inter-American Convention, *supra* note 110, art. 7(c), (h), at 4.

117. Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 557 (1993).

118. *See, e.g.*, Kristine M. Fox, Comment, *Gender Persecution: Canadian Guidelines Offer a Model for Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 144 (1994) (stressing that State Department issued its first report on violations of women's human rights in February 1994); Carol Giacomo, *U.S. Says It is Determined to Push Human Rights*, REUTER NEWswire, June 14, 1993, available in Reuters Info. SCVS (reporting Secretary of State Warren Christopher's speech to World Conference on Human Rights). Secretary Christopher insisted that the United States would never join forces with those nations seeking to undermine the movement for human rights. Carol Giacomo, *U.S. Says It is Determined to Push Human Rights*, REUTER NEWswire, June 14, 1993, available in Reuters Info. SCVS. The article notes that the speech came shortly after President Clinton decided to continue favorable trade status for China, a country the United States lists among the main abusers of human rights. *Id.*

119. Refugee Act of 1980, Pub. L. 96-212, tit. II, § 201a, 94 Stat. 102 (amending 8 U.S.C. §§ 1101, 1151-53, 1181-82, and 1253-54; enacting §§ 1157-59, and 1521-25 (Supp. IV 1980)) [hereinafter Refugee Act]; *see, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 437 (stating that primary purpose of Refugee Act was to bring United States into line with U.N. Refugee Protocol). According to the *Cardoza-Fonseca* Court, the United States actually adopted the Protocol in 1968. *Cardoza-Fonseca*, 480 U.S. at 437. In acceding to the Protocol, the United States bound itself to comply with the U.N. Convention Relating to the Status of Refugees. *Id.* at 429. Convention states agreed not to deport aliens to countries

nize the international view espoused by the Women's Convention and the Inter-American Convention that eliminating gender-based violence is a human rights obligation.<sup>120</sup> The lack of legislation prohibiting gender-based violence, therefore, nearly precludes the INS and the judicial system from granting refuge to women who flee from atrocities like FGM.

## VI. THE *OLULORO* DECISION AND RATIONALE

Realizing that U.S. immigration law affords limited protection for alien women suffering from gender-based violence, Judge Warren had to determine what, if any, relief was available for Lydia Oluloro. Noting that the evidence applied to all forms of relief requested in her petition, Judge Warren concluded that suspension of deportation would be the most beneficial relief available to Lydia and her U.S.-born daughters.<sup>121</sup> Suspension of deportation is granted, at the judge's discretion, when an alien of good moral character has been present in the United States for seven continuous years and deportation would be an extreme hardship for the alien or U.S.-citizen family members.<sup>122</sup> Lydia had little difficulty satisfying the continuous-presence requirement and the statutory criteria set forth for proving good moral character.<sup>123</sup> The key element in this case was establishing extreme hardship for Lydia or her daughters. Judge

---

where their lives or liberty would be threatened. *Id.*; see *Stevic*, 467 U.S. at 416-18 (explaining that Refugee Act provisions conform with Refugee Protocol language regarding refugees and expulsion of those who would be threatened in country of deportation); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 177 (1993) (commenting that Refugee Protocol broadens applicability of Refugee Convention to include all who suffer inhumane treatment). The United States complied with the 1967 Protocol through the Refugee Act of 1980. See *Stevic*, 467 U.S. at 416. In accepting the definition of refugee from the Protocol, the United States added nationality and social group to its prior definition. Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 178 (1993).

120. See 139 CONG. REC. E2,967-68 (daily ed. Nov. 20, 1993) (extension of remarks by Rep. Miller) (indicating that President Clinton has urged ratification of Women's Convention). This appears to be the last reference in the Congressional Record regarding the U.S. stand on the Women's Convention. See Recent Action Regarding Treaties to Which the United States is a Party, Nov. 1993, 32 I.L.M. 1688, 1691 n.3 (noting that Women's Convention has no force in United States); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 510 (1993) (noting that, upon publication of article, United States had not adopted any international document accepting women's rights as human rights).

121. *In re Oluloro*, No. A72 147 491, at 20 (Wash. EOIR Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*).

122. 8 U.S.C. § 1254(a)(1) (1988 & Supp. V 1993).

123. *Oluloro*, No. A72 147 491, at 15.

Warren's rationale, therefore, includes an extensive discussion of the evidence that satisfies the extreme hardship element.

In particular, Judge Warren found that, if she were deported, Lydia Oluloro would not suffer extreme hardship because her stay in the United States was of a relatively short duration and she had formed few community ties.<sup>124</sup> Additionally, Lydia's age and health were not factors conducive to a finding of extreme hardship.<sup>125</sup> Had the judge's determinations ceased at this point, Lydia would have been deported.<sup>126</sup> However, Lydia's daughters are U.S. citizens, and Judge Warren also considered the hardship her deportation would have on them.<sup>127</sup>

Several pivotal factors prompted Judge Warren's conclusion that Lydia's deportation would be an extreme hardship for her daughters. The judge found, for instance, that the children would have some difficulty adjusting to the quality of medical treatment, sanitation facilities, and educational institutions in Nigeria.<sup>128</sup> Also, because Lydia has legal custody of the children, they would likely be burdened by separation from their father, who would remain in the United States.<sup>129</sup> According to Judge Warren, however, the risk that FGM posed to the girls presented the most significant factor leading to a finding of extreme hardship.<sup>130</sup> Declaring the practice archaic, cruel, and dangerous, Judge Warren believed Lydia's relatives were very likely to subject the two young girls to the tribal custom of FGM.<sup>131</sup>

Once Judge Warren determined that Lydia Oluloro satisfied the statutory requirements for suspended deportation, he next had to decide if she merited such discretionary relief.<sup>132</sup> Lydia's immigration history and her relationship with Emanuel Oluloro weighed heavily in the judge's decision to grant suspended deportation.<sup>133</sup> Judge Warren concluded that Emanuel's testimony regarding Lydia's involvement in providing the INS with a fraudulent visa application and her misrepresentation about citizenship status for Social Security and employment purposes was not candid or credible.<sup>134</sup> Judge Warren justified Lydia's actions by finding that

124. *Id.* at 16.

125. *Id.*

126. *See id.* (noting that, without further inquiry, Lydia Oluloro probably could not establish extreme hardship).

127. *Oluloro*, No. A72 147 491, at 16-17.

128. *Id.* at 16.

129. *Id.*

130. *Id.* at 16-17.

131. *Oluloro*, No. A72 147 491, at 17.

132. *Id.* at 17-18.

133. *Id.* at 18-20.

134. *Id.* at 18-19.

Emanuel was the real catalyst for her deceptions.<sup>135</sup> By granting her petition for suspension of deportation, Lydia's immigration status immediately changed, and she became a lawful permanent resident of the United States.<sup>136</sup>

#### VII. WHY NOT ASYLUM OR WITHHOLDING OF DEPORTATION?

Fortunately for Lydia Oluloro, Judge Warren did not reach the issue of whether she could be granted asylum or withholding of deportation.<sup>137</sup> Lydia would have borne a difficult burden of proof had she not been granted suspension of deportation. Asylum would have been available if the INS had found that Lydia was a refugee who merited such discretionary relief.<sup>138</sup> However, if she could not establish a well-founded fear of persecution, asylum would not have been possible.<sup>139</sup> Lydia Oluloro did not believe the Nigerian government would help her to protect her daughters from Yoruba tribal customs.<sup>140</sup> Nevertheless, FGM is not clearly a form of persecution based on a woman's race, religion, nationality, membership in a social group, or political opinion.<sup>141</sup> FGM is directed at a woman because of her gender, but U.S. immigration laws,

135. *Oluloro*, No. A72 147 491, at 19.

136. *Id.* at 20.

137. *In re Oluloro*, No. A72 147 491, at 20 (Wash. Immigr. Ct. Mar. 23, 1994) (unpublished transcript of oral decision, on file with the *St. Mary's Law Journal*).

138. Immigration and Naturalization Act, 8 U.S.C. §§ 1101(a)(42), 1158(a) (1987); see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-29 (1988) (explaining asylum provision of INA and noting that eligibility depends on Attorney General's finding that alien is refugee).

139. 8 U.S.C. § 1101(a)(42) (1988); 8 C.F.R. § 208.13(b) (1994).

140. See *Oluloro*, No. A72 147 491, at 4 (noting that, while Nigeria outlawed FGM, more than 50% of Nigerian women have endured this procedure); Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1953 (1993) (asserting that international community must use human rights documents already supported by Nigeria to force end to deeply rooted custom).

141. See *Oluloro*, No. A72 147 491, at 20 (stating that grant of suspended deportation rendered applications for asylum and withholding of deportation moot). Both of these types of deportation relief require persecution or threats on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42) (1988); 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993); see also Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 183 (1993) (asserting that persecution based on gender exists because governments fail to protect women from FGM). While gender is not one of the categories, women who suffer such persecution form a particular social group because of similar backgrounds. Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 189 (1993); see *Female Circumcision an Issue in Deportation*, WASH. POST, Feb. 8, 1994, at C3 (stating that *Oluloro* may be first case to use FGM as reason for blocking deportation).



unlike the Women's Convention and the Inter-American Convention, do not consider gender as a ground for persecution.<sup>142</sup>

However, the BIA has held that membership in a social group depends on a shared immutable trait such as gender.<sup>143</sup> Recent circuit court decisions suggest that, in a case with the right facts, gender can establish membership in a particular social group.<sup>144</sup> For example, in *Fatin v. INS*,<sup>145</sup> the petitioner suggested that, if she were deported, she would endure persecution because she was an Iranian woman who found Iran's laws so oppressive that she would not conform.<sup>146</sup> The Third Circuit found that the petitioner established membership in a particular social group.<sup>147</sup> Yet, the court denied the petitioner's claim for asylum because she did not provide evidence of an unwillingness to conform to Iranian law indicating that she would endure punishment rather than comply.<sup>148</sup> The Eighth Circuit, in *Safaie v. INS*,<sup>149</sup> agreed with the *Fatin* court that a group of women so opposed to an abhorrent practice could be a particular social group if the members would rather endure the severe consequences of noncompliance than obey.<sup>150</sup> However, the petitioner in *Safaie*, as in *Fatin*, conformed to Iranian traditions and law and, therefore, could not prove that her hate for these practices was an immutable trait.<sup>151</sup>

Like the women in *Fatin* and *Safaie*, Lydia Oluloro would have been required to satisfy the three-part test for persecution because of her

142. 8 U.S.C. § 1101(a)(42) (1987); *see, e.g.*, *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (discussing BIA interpretation of social group and noting that sex was included as one type of immutable trait); Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 188 (1993) (noting that gender is not expressly stated as ground for persecution).

143. *In re Acosta*, No. A-24159781, 1985 WL 56042, at \*18 (BIA Mar. 1, 1985) (order dismissing appeal of judgment that denied asylum and withholding of deportation).

144. *See, e.g.*, *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (concluding that petitioner was not member of women's group which was so opposed to Iranian customs that members would rather be persecuted than conform); *Fatin*, 12 F.3d at 1241 (finding that petitioner established social group of women whose opposition to Iranian rules was so strong that they preferred castigation to conformance, but holding that petitioner failed to establish her membership in such group).

145. 12 F.3d 1233 (3d Cir. 1993).

146. *Fatin*, 12 F.3d at 1241.

147. *Id.*

148. *Id.*

149. 25 F.3d 636 (8th Cir. 1994).

150. *Safaie*, 25 F.3d at 640.

151. *Id.*

membership in a social group.<sup>152</sup> Lydia may have been able to identify a group of women who fear FGM and to demonstrate that she is a group member.<sup>153</sup> Moreover, Lydia partially satisfied the persecution requirement because she personally endured the ordeal of FGM.<sup>154</sup> Lydia could not establish, however, that she may again be the target of such persecution.<sup>155</sup>

If Lydia had attempted to establish an asylum case, she would have faced difficulty because her particular social group is the Nigerian mothers of the Yoruba tribe who suffered genital mutilation and who now fear the effects of this torture on their daughters. In this case, those persecuted are the daughters, but because the well-founded fear element is personal,<sup>156</sup> Lydia could not rely on her daughters' persecution to satisfy her burden of proof. In the same vein, Judge Warren recently refused to reopen another Nigerian woman's case so that she could seek asylum on similar grounds.<sup>157</sup> Judge Warren stated that the justification for granting asylum is fear for self, not for another.<sup>158</sup> Thus, Lydia had no grounds for a well-founded fear of persecution, and accordingly, the INS could not

152. *Fatin*, 12 F.3d at 1240. To satisfy this test, the alien must (1) identify a group with immutable traits, (2) demonstrate membership in the group, and (3) show that the membership brings with it a well-founded fear of persecution. *Id.*

153. See *Oluloro*, No. A72 147 491, at 5, 7-8 (describing testimony of Lydia and friend regarding FGM); Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 31 (reporting on three women, including Lydia, who fear FGM).

154. E.g., 8 C.F.R. § 208.13(a)(1) (1994) (providing that past persecution on account of one of five grounds will establish well-founded fear of persecution); *Oluloro*, No. A72 147 491, at 5, 7-8 (relating testimony about suffering FGM).

155. 8 C.F.R. § 208.13(a)(1)(i) (1994); see, e.g., *Fisher v. INS*, 37 F.3d 1371, 1377 (9th Cir. 1993) (explaining that, when alien bases application for asylum on fears of persecution if returned to particular place, court must assess likelihood of future persecution); *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991) (stating that alien must provide some evidence that support fear of persecution); *Acosta*, 1985 WL 56042, at \*12 (asserting that grant of refuge is available when aliens demonstrate likelihood they will be persecuted if returned to home country).

156. See *Safaie*, 25 F.3d at 641 (finding that petitioner's expulsion from university and firing from job were not actions that evidenced particularized fear of persecution); *Gomez*, 947 F.2d at 663 (explaining that aliens must demonstrate events that personally affected them and inference of being singled out for persecution); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 243-45 (1988) (establishing that label "social group" is mechanism for recognition of persecution).

157. Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 31.

158. *Id.*; Stuart Wasserman & Maria Puente, *Female Genital Mutilation Under Scrutiny at Hearing*, USA TODAY, Feb. 11, 1994, at A3.

have granted her petition for asylum.<sup>159</sup> Furthermore, Lydia's inability to prove a well-founded fear precluded her from withheld deportation because the requisite standard, clear probability of persecution, is a heavier burden of proof.<sup>160</sup>

At present, suspended deportation is the only relief available to a deportable alien mother whose daughter is likely to suffer gender-based oppression like FGM. The Oluloro children are extremely fortunate that, as U.S. citizens who faced the extraordinary hardship of FGM, their alien mother satisfied the statutory requirements for suspended deportation. Many children of deportable aliens who face similar hardships will not fare as well.<sup>161</sup> Some, like Lydia's daughters, are U.S. citizens, but their mothers cannot meet the statutory requisites for suspended deportation.<sup>162</sup> These girls, as U.S. citizens, are not deportable, but they will not remain in the United States unless their parents leave them behind.<sup>163</sup> Other young girls are aliens and, because U.S. citizens are not suffering the hardship, the INS is not likely to grant suspended deportation.<sup>164</sup> By allowing an alien mother to base a claim for asylum on a well-founded fear of the gender-based violence against her daughters, the United States would extend human rights protections in a more consistent manner.

Lydia Oluloro and alien women like her live with the traumatic result of gender-based persecution on a daily basis. These women also live with the tormenting knowledge that, if they are returned to their native countries, their daughters will endure the same oppression. Experience tells these mothers that their children may not survive the torture. Yet, U.S. immigration law only offers a slight hope of refuge to such women.<sup>165</sup>

159. See *Safaie*, 25 F.3d at 641 (denying asylum for failure to show particularized fear); see also *Gomez*, 947 F.2d at 665 (upholding burden of alien to prove well-founded fear of persecution).

160. See *Fisher*, 37 F.3d at 1376 (noting that failure to meet lesser standard for asylum results in denial of right to withholding of deportation).

161. See Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 31 (explaining that women often do not even make claim with INS because of lack of financial resources, responsibilities of children, and inability to travel alone in certain countries).

162. See *id.* (noting that some people fear alien women using U.S.-born children as shields against deportation).

163. See *In re IGE*, No. A-27178229, 1994 WL 520996, at \*6 (BIA Sept. 16, 1994) (order denying suspension of deportation) (discussing fact that alien parent's choice to leave U.S.-citizen child behind is not mandated by INA and, therefore, is not extreme hardship).

164. See 8 U.S.C. § 1254(a)(1) (1987) (providing that aliens themselves or U.S.-citizen family members must suffer extreme hardship).

165. See Nena Baker, *A Judge Decides: Lydia Oluloro Stays*, OREGONIAN, Mar. 24, 1994, at A1 (indicating that *Oluloro* is believed to be first INS ruling to specifically deal

The asylum provisions of the INA, therefore, must be amended to provide refuge for alien mothers who have first-hand knowledge of gender-based violence and who can prove with reasonable certainty that their daughters will suffer the same fate.<sup>166</sup>

#### VIII. CONCLUSION

As U.S. citizens, the Oluloro children are not deportable—a fact that would have offered little solace if their native land had deported their mother to Nigeria. Fortunately, the facts of this case worked to the Oluloros' advantage, and these young girls escaped a most unusual ordeal because of the extreme hardship it would have created in their lives. However, not all children who face severe physical or mental torture in another country have parents that satisfy the requirements for suspension of deportation.

The *Oluloro* case briefly focused attention on two intertwining weaknesses plaguing the immigration system: (1) the failure to recognize that some women experience oppression because of gender, and (2) the failure to acknowledge that children also suffer because of this persecution. The United States must recognize that a government's acceptance of private abuse directed at women is no less a violation of human rights than the public persecution of political dissidents. Currently, no statute, regulation, or court interpretation allows the INS to grant asylum or withholding of deportation to a mother based on her well-founded fear of the persecution that her children are likely to endure. Asylum must be available to deportable parents who, while not fearful of persecution for themselves, can demonstrate with reasonable certainty that their children's physical well-being is at risk because of cultural traditions or violence within the country of deportation.

---

with FGM in suspension-of-deportation motion); Clyde H. Farnsworth, *Canada Gives Refugee Status to Somali Pair*, OREGONIAN, July 21, 1994, at A5 (noting that, had Judge Warren granted Lydia Oluloro asylum, new ground would have been broken in U.S. immigration law); Stuart Wasserman & Maria Puente, *Mutilation Fear Wins Halt to Deportation*, USA TODAY, Mar. 24, 1994, at A3 (characterizing *Oluloro* as unprecedented decision that recognizes foreign gender-based persecution as grounds for U.S. protection).

166. See Jennifer B. Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES MAG., Nov. 20, 1994, at 31 (reporting that another Nigerian mother facing deportation from United States is relying on U.N.'s position that threat of daughter's mutilation constitutes grounds for mother's well-founded fear of persecution).



The Editorial Board wishes to thank all those who supported the *St. Mary's Law Journal* this year:

*Benefactors*

- Beirne, Maynard & Parsons, L.L.P.
- Davis Adami & Cedillo, Inc.
- Fulbright & Jaworski, L.L.P.
- Heard, Goggan, Blair & Williams
- Jeffers, Brook, Kreager & Gragg, Inc.
- Law Offices of Pat Maloney, P.C.
- LEXIS®/NEXIS®
- Plunkett, Gibson & Allen, Inc.
- West Publishing Co.

*Contributors*

- Akin, Gump, Strauss, Hauer & Feld, L.L.P.
- Cox & Smith, Inc.
- Joe Christensen, Inc.
- Matthews & Branscomb, P.C.
- Western Newspaper Publishing Co.

Our very special thanks go to Mr. Martin D. Beirne, Editor in Chief of Volume 1, Issue 1, for his continuing and enthusiastic support.



CHIEF JUSTICE ROBERT W. CALVERT  
February 22, 1905–October 6, 1994