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MATTER OF A-T-: OPENING THE DOOR FOR GENDER AS A PARTICULAR SOCIAL GROUP IN ASYLUM APPLICATIONS

KELLEEN O'FALLON*

Ami Doumbouye was 10 years old when five women in her village in the Ivory Coast held her head, arms, and legs as another woman tried to slice her clitoris off with a sharp thumbnail. Thirty minutes later, when that method did not work, the women turned to the knife they had used on seven girls before her.

Doumbouye could not walk for a week. Now thirty-eight years old and living across the world in New York City's South Bronx, she says she does not feel anything between her legs.¹

I. INTRODUCTION

In *Matter of A-T-*,² United States Attorney General Michael B. Mukasey ("Mukasey"), at the request of women's and human rights groups,³ reviewed a 2007 Board of Immigration Appeals ("BIA") decision that denied a Malian woman's asylum claim based on her subjection to female genital mutilation ("FGM").⁴ He concluded that the BIA had made several errors of fact and law.⁵ According to his analysis, the BIA erred in characterizing FGM as a one-time injury as opposed to an ongoing injury with lifelong effects.⁶ In addition, Mukasey concluded that the BIA misinterpreted the law by requiring that the asylum applicant's fear of future persecution be based on

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1. Zainab Zakari, *FGM Asylum Cases Forge New Legal Standing*, WOMEN'S E-NEWS, Nov. 25, 2008, <http://www.womensenews.org/story/the-courts/081125/fgm-asylum-cases-forge-new-legal-standing>.

2. *Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008).

3. Trymaine Lee, *Mukaskey Vacates Panel's Decision Denying Asylum to Malian Woman*, N.Y. TIMES, Sept. 23, 2008, at A18.

4. *See In re A-T-*, 24 I. & N. Dec. 296, 301 (B.I.A. 2007), *vacated*, *Matter of A-T-*, 24 I. & N. Dec. 617, 617 (A.G. 2008).

5. *Matter of A-T-*, 24 I. & N. at 621-22.

6. *Id.* at 621.

exactly the same factual persecution she experienced in the past.⁷ In other words, the BIA erred in holding that because the applicant had already undergone FGM, she could not claim fear of future persecution.⁸ Rather, Mukasey argued, the asylum applicant's fear of future persecution must be based on the same statutory grounds as the past persecution, i.e. asylum law's social-group analysis, and not the same persecution itself.⁹

In his opinion, Mukasey urged the BIA to reconsider its approach to these applications and also provided the federal courts with the proper guidance. First, Mukasey argued against the peculiar position held by FGM-related cases within the context of our asylum law.¹⁰ In so doing, Mukasey prevented the formation of an arbitrary distinction between asylum applicants, whereby all asylum claims brought by victims of past FGM would have been denied, while all asylum claims brought by applicants who had not undergone FGM but feared it, would have been viable.¹¹ In addition, by applying statutory requirements (membership in a particular social group), instead of analyzing only the type of persecution the applicant suffers, FGM can be more readily observed as one of the many types of persecution that women of certain social groups face.¹² The focus turns to the social group of women, and how its members suffer on account of belonging to that group within a particular context, which is the proper interpretation of asylum law's nexus requirement. As a result, social-group asylum claims based on gender may become a viable option for asylum applicants: a needed expansion of the law that has been encouraged by scholars and the international legal community.¹³

II. BACKGROUND

A. FGM Generally

FGM "comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons."¹⁴ There are four types of

7. *Id.*

8. *Id.* at 622.

9. *Id.*

10. *See infra* Part III.A.

11. *See infra* Part III.B.

12. *See infra* Part III.C.

13. *See infra* Part III.D.

14. World Health Org. [WHO], *Female Genital Mutilation: Fact Sheet*, at 1, Fact Sheet No. 241 (May 2008), available at

FGM.¹⁵ The first is a clitoridectomy procedure that involves partially or totally removing the clitoris¹⁶ and, less commonly, the prepuce¹⁷ as well.¹⁸ The second is an excision procedure that consists of partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.¹⁹ The third is an infibulation procedure that involves narrowing the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner, and sometimes outer, labia, with or without removal of the clitoris.²⁰ The fourth type consists of “all other harmful procedures to the female genitalia for non-medical purposes,” such as “pricking, piercing, incising, scraping and cauterizing the genital area.”²¹ This last practice is most prevalent in the western, eastern, and north-eastern regions of Africa, in some countries in Asia and the Middle East, and among certain immigrant groups in North America and Europe.²² There are “[b]etween 100 to 140 million girls and women worldwide living with the consequences of FGM.”²³ Of that total, ninety-two million African girls and women over the age of ten have undergone FGM.²⁴ The procedure is usually carried out on young girls under the age of fifteen.²⁵

FGM provides no health benefits whatsoever.²⁶ FGM actually harms the female body because it interferes with its normal functions by removing and damaging healthy and normal female genital tissue.²⁷ The immediate health consequences of FGM include: “severe pain,²⁸

<http://www.who.int/mediacentre/factsheets/fs241/en/print.html> [hereinafter *Female Genital Mutilation: Fact Sheet*].

15. *Id.*

16. The clitoris “is a small, sensitive and erectile part of the female genitals.” *Id.*

17. The “prepuce is the fold of skin surrounding the clitoris.” *Id.*

18. *Id.*

19. *Id.* “[T]he labia are ‘the lips’ that surround the vagina.” *Id.*

20. *Id.* at 2. Those who experience the procedure often have their legs bound together for several days or weeks thereafter. Office of the High Commissioner for Human Rights, et al., *Eliminating Female Genital Mutilation: An Interagency Statement*, at 11, (2008), available at [http://www.unifem.org/ attachments/products/fgm_statement_2008_eng.pdf](http://www.unifem.org/attachments/products/fgm_statement_2008_eng.pdf) [hereinafter *Eliminating Female Genital Mutilation: An Interagency Statement*].

21. *Female Genital Mutilation: Fact Sheet*, *supra* note 14, at 2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. “Cutting the nerve ends and sensitive genital tissue causes extreme pain. Proper anesthesia is rarely used and, when used, not always effective. The healing period is also

shock, hemorrhage (bleeding), tetanus or sepsis (bacterial infection), urine retention, open sores in the genital region and injury to nearby genital tissue.”²⁹ The long-term physical consequences of FGM may include recurrent bladder and urinary tract infections, cysts, infertility, additional surgeries,³⁰ increased risks of childbirth complications and newborn deaths, painful sexual intercourse, death from hemorrhage or infection, and increased risk of contracting the human immunodeficiency virus (HIV).³¹ In addition, FGM poses negative psychological consequences, including “an increased likelihood of fear of sexual intercourse, post-traumatic stress disorder, anxiety, depression, and memory loss.”³²

FGM is a human rights violation.³³ “Seen from a human rights perspective, the practice reflects deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women.”³⁴ Indeed, social, religious, and cultural factors based on inequality between the sexes explain why FGM is so widely practiced. As to social factors, many communities consider FGM a necessary part of raising a female properly; the procedure is “a way to prepare her for adulthood and marriage.”³⁵ FGM is often motivated by a social belief that females who undergo the procedure exhibit “proper” sexual behavior, including premarital virginity and marital fidelity; communities may believe that FGM helps women resist sexual acts.³⁶ As to religious factors, “[t]hough no religious scripts prescribe the practice, practitioners often believe the practice has religious support.”³⁷ Finally, as to cultural factors, “FGM is associated with cultural ideals of femininity and modesty, which includes the notion that girls are ‘clean’ and ‘beautiful’ after removal of body parts that

painful.” *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 33.

29. *Id.*

30. “Infibulations must be opened (defibulation) later in life to enable penetration during sexual intercourse and for childbirth. In some countries it is usual to follow this by re-closure (reinfibulation) and hence the need for repeated defibulation later. Re-closure is also reportedly done on other occasions.” *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 35.

31. *Id.* at 34–35.

32. *Id.* at 34.

33. *Female Genital Mutilation: Fact Sheet*, *supra* note 14, at 1; *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 9.

34. *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 1.

35. *Female Genital Mutilation: Fact Sheet*, *supra* note 14, at 2.

36. *Id.*

37. *Id.* at 3.

are considered ‘male’ or ‘unclean.’”³⁸ Thus, the international community considers FGM as indicative of patriarchal cultures.³⁹ Within these cultures, women are held victim to a “larger system of female subjugation,” where in addition to FGM, women may also be at risk for forced marriage, domestic violence, marital rape, and other related harms within the practices of that system.⁴⁰

B. Asylum and Other Forms of Immigration Relief

The United States derives its modern asylum law from the 1951 United Nations Convention Relating to the Status of Refugees (“1951 Convention”)⁴¹ and its 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”).⁴² The 1951 Convention and its 1967 Protocol are codified in the Immigration and Nationality Act of 1952 (“INA”)⁴³ and the Refugee Act of 1980.⁴⁴ To be eligible for asylum in the United States, an applicant has the burden of showing that she qualifies as a refugee.⁴⁵ A “refugee,” is any person outside the country of her nationality who can show a well-founded fear of persecution on account of any of the five following grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁴⁶ The “on account of” language is significant. The nexus requirement involves a two-step process: “the identification of the relevant Convention ground, followed by the establishment of the

38. *Id.*

39. “As female genital mutilation is a manifestation of gender inequality, the empowerment of women is of key importance to the elimination of the practice.” *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 15.

40. Lisa Frydman & Kim Thuy Seelinger, Kasinga’s *Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 13 BENDER’S IMMIGR. BULL. 1073, 1075 (Sept. 1, 2008).

41. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

42. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

43. Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) (codified in scattered sections of 8 U.S.C.).

44. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

45. 8 U.S.C. § 1158 (3)(b)(1)(B)(i) (2006); 8 C.F.R. § 1208.13 (a) (2009).

46. 8 U.S.C. § 1101 (a)(42)(A). Although the INA does not define “persecution,” see *Matter of Acosta*, 19 I. & N. Dec. 211, 220 (B.I.A. 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987), the Board of Immigration Appeals (“BIA”) has interpreted persecution to include serious threats to an individual’s life or freedom, or the infliction of significant harm. *Matter of Acosta*, 19 I. & N., at 222.

causal connection between this ground and the persecution.”⁴⁷ The nexus requirement tightened in 2005 with the Real ID Act; asylum applicants must prove that one of the statutory grounds was or would be at least one central reason for the claimed persecution.⁴⁸

If the applicant demonstrates that she has already been subject to past persecution on account of one of the grounds recognized by the 1951 Convention, then the applicant is entitled to a rebuttable presumption of a well-founded fear of returning to her native country based on the same ground.⁴⁹ Conversely, if the applicant’s fear of future persecution is unrelated to the past persecution, the applicant does not receive the benefit of the presumption; she must still show her future fear is well-founded.⁵⁰ In addition, the asylum applicant must show that her native country is unwilling or unable to protect her from the persecution.⁵¹ Thus, the applicant has the burden of demonstrating that her fear is “country-wide.”⁵² This concept is derived from the traditional notion of a refugee as an individual where the “bonds of trust, loyalty, protection and assistance” between her and her country have been broken, and have been replaced by the relation of an oppressor to a victim.⁵³ An asylum applicant must show that the persecution she experienced or fears was inflicted upon her by the government of her country of origin, or was inflicted upon her by a group that the government of her country of origin was unable or unwilling to control.⁵⁴

Finally, the asylum applicant must demonstrate that her application was filed within one year after the date of her entry into the United States.⁵⁵ Due to this limited time requirement, many asylum

47. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 783 (2003).

48. 8 U.S.C. § 1158 (3)(b)(1)(B)(i) (2006) (The Real ID Act of 2005 amended various sections of the INA relating to the adjudication of asylum applications. Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005)).

49. 8 C.F.R. § 1208.13 (b) (2009).

50. *Id.*

51. *Id.* Note as well that asylum is a discretionary form of immigration relief; an applicant who establishes statutory eligibility has to demonstrate that she merits a grant of asylum as a matter of discretion. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427–28 (1987).

52. *Matter of Acosta*, 19 I. & N. Dec. 211, 235 (B.I.A. 1985). A well-founded fear of persecution cannot exist within the asylum schema if the applicant could relocate to another part of her country of origin to avoid the persecution. 8 C.F.R. § 1208.13 (b)(1)(i)(B).

53. *Acosta*, 19 I. & N. Dec. at 235.

54. *See e.g.*, *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990) (concluding that a male applying for political asylum had a well-founded fear of persecution because the government of El Salvador was unable to control his persecutor’s activities).

55. 8 U.S.C. § 1158 (a)(2)(B) (2009).

applications miss the deadline. These applicants then try to qualify for withholding of removal pursuant to 8 U.S.C. § 1158 (a)(2)(B) (2009)⁵⁶ or the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”).⁵⁷ These three forms of immigration relief, asylum derived from the 1951 Convention and its 1967 Protocol, withholding pursuant to 8 U.S.C. § 1158 (a)(2)(B), and withholding under the CAT, are generally pursued by females applying for FGM-based relief, although asylum is generally preferred given its lower burden of proof. Consequently, this Comment will focus more on asylum than withholding.

C. Kasinga as Starting Ground for FGM Claims

FGM-based asylum was first approved by the BIA in *In re Kasinga*,⁵⁸ where a woman who feared subjection to FGM upon her return to her native Togo was granted asylum.⁵⁹ The asylum applicant fled Togo to avoid a polygamous forced marriage; her future husband required that she undergo FGM prior to the wedding day.⁶⁰ The BIA

56. 8 U.S.C. § 1231 (b)(3) (2009). To qualify for withholding of removal, the applicant must establish that her life or freedom would be threatened in her country of origin because of her race, religion, nationality, membership in a particular social group, or political opinion. *Id.* “While closely related to an application for asylum, withholding of removal requires satisfaction of a higher burden of proof.” *Dieng v. Mukasey*, No. 06-1622, 2008 WL 2647575, at *10 (4th Cir. July 7, 2008) (unpublished), *quoting* *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004). An applicant must show that it is more likely than not that her “life or freedom would be threatened . . . because of [her] race, religion, nationality, membership in a particular social group, or political opinion” if she returned to her native country. 8 U.S.C. § 1231 (b)(3)(A) (2009), 8 C.F.R. § 208.16 (b)(1) (2009). Because the burden of proof for withholding of removal is higher than for asylum—even though the facts that must be proved are the same—an applicant who is ineligible for asylum is necessarily ineligible for withholding of removal. *Camara*, 378 F.3d at 367. If an applicant qualifies for withholding of removal, the Attorney General cannot remove her to her native country. 8 U.S.C. § 1231 (b)(3) (2009).

57. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Pub. L. 105-277 (1998) (hereinafter CAT). To qualify for relief under the CAT, the applicant must show that it is more likely than not that she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16 (c)(2) (2009). “Torture” is defined, for the purposes of the FGM analysis, as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for any reason based on discrimination of any kind, when such pain or suffering is inflicted with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 208.18 (a)(1) (2009). In addition, the act must be specifically intended to inflict severe physical or mental pain or suffering on the victim. 8 C.F.R. § 208.18 (a)(5) (2009).

58. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

59. *Id.* at 358.

60. *Id.*

concluded that the applicant qualified as a refugee because FGM constituted “persecution” and the applicant had a well-founded fear of that persecution.⁶¹ The BIA held that she demonstrated her well-founded fear of persecution based on her membership to a particular social group, a group defined as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁶²

The applicant must first identify the persecuted social group in which she alleges she is a member. The members of such a group must “share a common, immutable characteristic.”⁶³ In *Kasinga*, the BIA noted how the characteristics of being a young woman and a member of the Tchamba-Kunsuntu Tribe cannot be changed, and how having intact genitalia is a characteristic “so fundamental to the individual identity of a young woman that she should not be required to change it.”⁶⁴ The BIA particularly emphasized the importance of the nexus between the particular social group and the persecution: “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM.”⁶⁵ Significant also to the BIA’s analysis was Togo’s “minimal effort” or lack thereof to protect women

61. *Id.* at 365. The BIA stated that “persecution” can consist of the infliction of harm or suffering by the government or persons the government is unwilling or unable to control. *Id.* In addition, the BIA noted that a subjective “punitive” or “malignant” intent is not required for harm to constitute persecution. *Id.* This qualification is significant, because the practice of FGM is often culturally condoned and inflicted by the female’s family members. *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 5–6.

62. *In re Kasinga*, 21 I. & N. at 365–66.

63. *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1996). *Id.* at 233. “[W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Id.* Since *Acosta* and *Kasinga*, the BIA has required that the common characteristic lend the group sufficient social visibility to make the group readily identifiable in society. *See Matter of C-A-*, 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007). This Note does not focus on this requirement, because females are generally visible as females within society. *See Matter of C-A-*, 23 I. & N. at 959 (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”). Also, because FGM is culturally condoned, considered a female rite of passage, and is frequently imposed by family or community members, it follows that the women who have experienced or have yet to experience the procedure are generally known by the populace.

64. *In re Kasinga*, 21 I. & N. at 366.

65. *Id.* at 367.

from FGM,⁶⁶ and how women subjected to the practice could experience serious life-threatening health complications.⁶⁷

D. Confusion in Kasinga's Wake

In *Kasinga's* wake, bringing FGM-based asylum claims via the social group analysis became a viable option for applicants. However, *Kasinga* dealt only with asylum applications based on a fear of FGM in the future. As a result, the case law on asylum applications involving FGM in the past became muddled, as the BIA and the circuit courts differed in their treatment of asylum claims brought by women who had already undergone the procedure. The Ninth Circuit in *Mohammed v. Gonzales* has provided the most supportive case from the federal circuits for asylum based on past FGM.⁶⁸ In *Mohammed*, the court held that the Somali applicant was part of a persecuted social group, and, therefore, eligible for asylum either as a young girl of the Benadiri clan, or as a Somali female.⁶⁹ The Ninth Circuit noted how the “possession of the immutable trait of being female is a motivating factor—if not a but-for cause of the persecution [of FGM].”⁷⁰ In another supportive case, the Eighth Circuit in *Hassan v. Gonzalez* reached a similar conclusion.⁷¹ In construing a Somali woman’s application based on past FGM, the court noted that the applicant suffered from the practice on account of being a member of the social group of Somali females.⁷²

66. *Id.* at 362. Thus, under this analysis Togo was unwilling or unable to protect the applicant from FGM.

67. *Id.* at 361.

68. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005). Lisa Frydman & Kim Thuy Seelinger, *Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 13 *Bender's Immigration Bulletin* 1073, 1076 (Sept. 1, 2008) (writing in September 2008 that *Mohammed* is the most supportive case to issue from the federal circuits thus far).

69. *Id.* at 796–98.

70. *Id.* at 798 (“[W]e conclude that Mohammed’s claim that she was persecuted on account of her membership in a social group, whether it be defined as the social group comprised of Somalian females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan, not only reflects a plausible construction of our asylum law, but the *only* plausible construction.”) (emphasis added).

71. *Hassan v. Gonzalez*, 484 F.3d 513, 518 (8th Cir. 2007).

72. *Id.* “[W]e hold that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM.” *Id.* Notably also, the social groups accepted by the 9th and 8th Circuits are not as particularized as the social group accepted by the BIA in *Kasinga*. This difference becomes relevant to the floodgates concern discussed in Part III.D, *infra*.

What is remarkable about the Ninth Circuit's analysis was how it defined FGM as a permanent and ongoing act of persecution, marking a landmark development in how courts have considered FGM.⁷³ For example, the Fifth and Seventh Circuits⁷⁴ have characterized FGM as a one-time injury that cannot be repeated. Thus, these courts have concluded that the applicant cannot be entitled to the presumption of a well-founded fear of persecution based on her past persecution (of FGM)⁷⁵ because there is no chance she would be made to endure the procedure again.⁷⁶ The applicant cannot successfully carry her burden of proof under this analysis without the benefit of the presumption, because she has no persecution left to fear.⁷⁷ Thus, characterizing FGM as a one-time injury prevents applicants already subjected to FGM from obtaining asylum based on a claim of past FGM as persecution.⁷⁸

In concluding that FGM is a permanent and ongoing act of persecution, the Ninth Circuit noted how the procedure permanently disfigures a female, causes long-term health problems, and deprives her of a normal and fulfilling sexual life.⁷⁹ Akin to victims of forced sterilization, females who have suffered FGM “necessarily have an inherent well-founded fear of future persecution because such persons will be persecuted for the remainder of their lives.”⁸⁰ The court stated how, practically speaking, FGM cannot be defined as a one-time injury; in many cultures oftentimes several surgeries are done to “complete” the process of FGM.⁸¹ As a result, the applicant in *Mohammed* may have already undergone FGM, but her subjection to an initial procedure did not prevent her from undergoing a more severe procedure upon her return.⁸² Finally, the court explained how the

73. *Mohammed*, 400 F.3d at 799–800.

74. *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003); *Seifu v. Ashcroft*, No. 03-60142, 2003 WL 22490221 (5th Cir. Nov. 3, 2003).

75. See 8 C.F.R. § 1208.13 (2009).

76. *Oforji*, 354 F.3d at 615; *Seifu*, 2003 WL 22490221 at *323–24.

77. *Oforji*, 354 F.3d at 617; *Seifu*, 2003 WL 22490221 at *323–24.

78. *Oforji*, 354 F.3d at 615; *Seifu*, 2003 WL 22490221 at *323–24.

79. *Mohammed v. Gonzales*, 400 F.3d 785, 799–800 (9th Cir. 2005).

80. *Id.* at 799 (internal citations omitted).

81. *Id.* at 800–01.

82. *Id.* The Somalian applicant in *Mohammed* had been subjected to a procedure that removed her clitoris and her prepuce. *Id.* at 801. Eighty percent of Somalian women are subjected to infibulation, however, where the genital lips are completely stitched together. *Id.* at 800.

conditions in Somalia generally foster an atmosphere where women are at risk for subordination and harm.⁸³

The Ninth and Eighth Circuit's interpretations of gender-based asylum applications suggest that the future persecution the victim fears need not be subjection to the procedure again. Rather, a woman who has already been subjected to FGM could fear other forms of gender-based violence upon her return to her country of origin. For example, by recognizing Somalia's oppressive atmosphere against women, the Ninth Circuit suggested that FGM need not be the only form of persecution that a past victim of FGM may fear. The Eighth Circuit stated a similar idea: asylum law does not require that the applicant fear the repetition of the same actual harm that she has suffered in the past to receive the benefit of the rebuttable presumption.⁸⁴ According to the Ninth and Eighth Circuit's analyses, if the applicant can show she was already persecuted based on her membership in a particular social group, it is presumed that she would have a well-founded fear of persecution if she were forced to return.

E. Matter of A-T-: The BIA and Attorney General Mukasey

1. In re A-T-: The BIA's Analysis of Past FGM Asylum Claims

In *In re A-T-*,⁸⁵ the BIA considered whether an immigration judge erred in denying a Malian woman's⁸⁶ applications for asylum and withholding of removal pursuant to 8 U.S.C. § 1158 (a)(2)(B) (2009) and CAT.⁸⁷ The applicant entered the United States on a visitor's visa on October 4, 2000 and applied for asylum on May 12, 2004⁸⁸ on the grounds that she had been subjected to FGM as a young

83. "[T]he subordination and persecution of women in Somalia is not limited to genital mutilation." *Id.* ("[W]omen are subordinated systematically in the country's overwhelmingly patriarchal culture, and rape is commonly practiced in inter-clan conflicts.") (internal citations omitted).

84. 484 F.3d 513, 518 (8th Cir. 2007) (noting that the INA's definition of persecution is "not that narrow").

85. *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007), *vacated*, *Matter of A-T-*, 24 I. & N. Dec. 617 (A.G. 2008).

86. Her name was not disclosed in the BIA decision or in Mukaskey's Opinion. However, following Mukaskey's Opinion, the New York Times identified her as twenty-eight-year-old Alima Traore. Trymaine Lee, *Mukaskey Vacates Panel's Decision Denying Asylum to Malian Woman*, N.Y. TIMES, Sept. 23, 2008, at A18.

87. Proceedings before immigration judges are oral proceedings, and no written opinion regarding this first proceeding before the immigration judge is available.

88. The one-year bar to asylum claims did apply in her case. Therefore, her actual immigration relief was withholding of removal.

girl.⁸⁹ She said she was opposed to the practice of FGM, and that if she had a daughter in the future she would actively oppose subjecting her child to the procedure.⁹⁰ The applicant said that her father in Mali had arranged for her to marry her first cousin, and that she feared the consequences of refusing to comply with her family's wishes.⁹¹

In its decision, the BIA first distinguished her case from *Kasinga* by noting the factual difference between confronting an imminent threat of FGM and already having been subjected to FGM. The BIA then adopted an approach akin to that of the Seventh and Fifth Circuits, stating that "even assuming *arguendo* that she is a member of a particular social group⁹² who suffered past persecution, 'there is no chance that she would be personally [persecuted] again by the procedure.'"⁹³ The BIA disagreed with the Ninth Circuit's analysis in *Mohammed*, stating that asylum claims based on past FGM do not qualify as "continuing harms."⁹⁴ As a result, the BIA concluded, the government successfully rebutted the applicant's presumption of future harm based on her past persecution of FGM, because "any presumption of future FGM persecution is thus rebutted by the fundamental change in the respondent's situation arising from the reprehensible, but one-time, infliction of FGM upon her."⁹⁵ The BIA required that the persecution the applicant fears factually match the persecution she experienced in the past to receive the benefit of the rebuttable presumption.

89. The applicant had no memory of the mutilation. *In re A-T-*, 24 I. & N. at 296. The World Health Organization has noted, however, that at times victims of FGM block out memories of the experience due to psychological trauma. *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 34.

90. *In re A-T-*, 24 I. & N. at 296.

91. *Id.*

92. The BIA did not analyze whether her social group qualified as a particular social group under the *Acosta* test, and therefore also whether she was persecuted on account of her membership in that social group.

93. *In re A-T-*, 24 I. & N. at 299 (citing *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003)).

94. *Id.* at 300.

95. *Id.* at 299 (citing 8 C.F.R. § 1208.16 (b)(1)(i)(A)(i) (2009) ("If the applicant is determined to have suffered past persecution in the proposed country of removal on account of [one of the five grounds], it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an [] immigration judge finds by a preponderance of the evidence [that] there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country.")).

The applicant filed a motion for reconsideration, which was denied.⁹⁶ In her motion, the applicant asserted that “it is not the means or forms of persecution that must be linked, but the reasons the victim is singled out for harm,” meaning her membership in a particular social group.⁹⁷ She followed by saying that the FGM she experienced as a child and the treatment she feared upon returning to Mali, in the form of a forced, arranged marriage, were linked because she was vulnerable to both as a member of a particular social group.⁹⁸ The BIA denied the motion in an unpublished order, stating that it “was unable to conclude on this particular record that the respondent had met her burden of proof for such a claim.”⁹⁹

2. *Matter of A-T-: Attorney General Mukasey’s Analysis*

In *Matter of A-T-*,¹⁰⁰ Mukasey vacated *In Re A-T-* because he concluded the BIA had made two errors,¹⁰¹ and charged the BIA to reevaluate its decision in accordance with his opinion.¹⁰² First, Mukasey noted that the BIA erred in concluding that FGM cannot occur more than once.¹⁰³ Second, Mukasey concluded that the BIA erred when it required that any future harm to the applicant must take precisely the same form as the past persecution.¹⁰⁴

First, Mukasey stated that FGM is capable of repetition, given the regularity of repeated mutilating procedures.¹⁰⁵ While he did not characterize FGM as an ongoing injury, Mukasey described how women who have already been subjected to FGM frequently undergo further extracting and mutilating procedures.¹⁰⁶ For example, women with partially-removed genitals may be subjected to additional removal procedures or to infibulation.¹⁰⁷ He noted how some women experience multiple infibulation procedures throughout their lives, and cited to a recent BIA decision where an asylum applicant’s vaginal

96. *Matter of A-T-*, 24 I. & N. Dec. 617, 621 (A.G. 2008).

97. *Id.* at 620.

98. *Id.* at 621.

99. *Id.*

100. *Id.*

101. *Matter of A-T-*, 24 I. & N. at 618.

102. *Id.* at 623.

103. *Id.* at 621.

104. *Id.*

105. *Id.*

106. *Matter of A-T-*, 24 I. & N. at 620, n.3.

107. *Id.*

opening was sewn shut approximately five times, after being opened to allow for sexual intercourse and child birth.¹⁰⁸

Second, Mukasey concluded that the BIA “was wrong to focus on whether the future harm to life or freedom that she feared would take the ‘identical’ form—namely, [FGM]—as the harm she had suffered in the past.”¹⁰⁹ Rather, when an applicant shows that she has suffered past persecution, it is presumed her life or freedom would be threatened upon her return to her native country on account of the same statutory grounds.¹¹⁰ Accordingly, Mukasey stated that the applicant’s claim was not FGM persecution, but rather persecution on account of membership in a particular social group.¹¹¹ To rebut the presumption of future persecution, therefore, the government must demonstrate that the applicant no longer is at risk on account of her membership within the particular social group, instead of showing that the particular act of persecution suffered by the victim in the past will not occur again.¹¹²

III. ANALYSIS

Mukasey properly evaluated *Matter of A-T-*, and helped resolve the conflicts that had been developing between the adjudicators of these applications at the administrative and federal appellate levels. He re-positioned asylum applications involving FGM within the proper social-group-analysis framework, correcting its singular or different status from other asylum applications. He correctly interpreted asylum law’s nexus requirement, by concluding that a victim of FGM cannot have her social-group claim rebutted merely on the grounds that she cannot be subjected to the procedure again. In so doing, Mukasey prevented the formation of an arbitrary distinction between asylum applicants: where all applicants fearing FGM in the future on social-group grounds would have viable claims, but those social-group applicants claiming asylum based on FGM in the past would have been denied.

By considering the rebuttal analysis based on the statutory grounds (membership in a particular social group) instead of the type of persecution the applicant suffers, FGM can be more readily

108. *Id.* (citing *Matter of S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008)).

109. *Id.* at 622.

110. *Id.*

111. *Id.*

112. *Matter of A-T-*, 24 I. & N. at 622–23 (citing *Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008)).

observed by adjudicators as one of the many types of persecution women face. FGM serves as an indicator of the widespread and varied forms of subjugation that women within certain societies and cultures confront. FGM is no longer the legal basis of the application; rather, the application's legal basis is the persecution of the female on account of her status as a member of a particular social group. As a result, social-group asylum applications based on gender may become a viable option for asylum applicants, because the social group is necessarily defined by the woman's status as a female.

A. The Problems with Treating FGM Asylum Applications as Different

FGM applications have traditionally been brought via the social-group analysis of asylum law, starting with *Kasinga* and following in its wake.¹¹³ Applicants are granted asylum via the social-group analysis when the applicant shares a common, immutable characteristic with the other members of the social group.¹¹⁴ Examples include a labor activist who is persecuted for organizing activity, or a man, perceived as a homosexual, who is raped and forced into prostitution.¹¹⁵ However, for claimants who have been genitally mutilated, courts traditionally considered only the specific harm and not the basis for the harm.¹¹⁶ Unlike other social-group applications where the applicant's identity is evaluated as a cause of the persecution (i.e., the proper nexus analysis—where the labor activist is persecuted on account of his membership in a particular labor-party social group), in a case involving FGM, the woman's identity does not matter as much as the act of mutilation itself.¹¹⁷ Indeed, the BIA in *In re A-T-* discussed at length whether to characterize FGM as a one-time or an ongoing injury, but only assumed “arguendo” that the applicant was a member of a particular social group.¹¹⁸

113. See e.g. *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

114. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1996).

115. Valena Elizabeth Beety, Comment, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 255 (Winter 2008) (citing *Bu v. Gonzales*, 490 F.3d 424, 426–27 (6th Cir. 2007), *Pozos v. Gonzales*, No. 03-70536, 2005 WL 1901549, at *631 (9th Cir. Aug. 10, 2005)).

116. *Id.* at 240 (citing *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003)).

117. *Id.*

118. *In re A-T-*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007) (“In *Kasinga*, [] the applicant had not yet undergone FGM and was facing an imminent threat of being subjected to the procedure if returned to her country of origin. The respondent in this case has already undergone FGM. Consequently, even assuming arguendo that she is a member of a particular

As a result of this peculiar approach to FGM asylum applications, victims of past FGM have an impossible battle. Our immigration system was designed to grant asylum to those applicants who can prove why they were persecuted and on what statutory basis—i.e., on account of their membership in a particular social group. However, for applicants who are victims of past FGM, their likelihood of success is based on an evaluation of the mutilated act itself rather than the underlying basis for persecution. When the application is based on the act of persecution, rather than the applicant and the reason for the persecution, she cannot prove she was harmed based on her identity: “[t]hus, other persecution she could or did face, such as prostitution or social exile, does not matter because it cannot be connected to female genital mutilation.”¹¹⁹

Mukasey properly repositioned past-FGM claims within the larger structure of asylum law. In his opinion, he instructed immigration judges and the BIA to address “at the outset” whether the applicant has established persecution on account of membership in a particular social group.¹²⁰ According to Mukasey, “[d]eciding that issue—and defining the particular social group of which the applicant is a part—is fundamental to the analysis of which party bears the burden of proof and what the nature of that burden is.”¹²¹ Mukasey recognized FGM as a type or example of the sort of persecution that comes about as a result of the applicant’s status in a particular social group. Asylum cases involving past FGM will be analyzed according to the nexus the applicant presents between the harm and her enumerated, social-group ground: the proper and uniform manner by which all social group asylum claims are analyzed.

social group who suffered past persecution, ‘there is no chance that she would be personally [persecuted] again by the procedure.’”) (citing *Oforji v. Ashcroft*, 354 F.3d 609, 615 (7th Cir. 2003), *vacated*, Matter of A-T-, 24 I. & N. Dec. 617 (A.G. 2008). This was the only part of the BIA’s opinion that approached the applicant’s social group membership.

119. Beety, *supra* note 115, at 241. In her Comment (published in the Winter of 2008), Beety notes the problems associated with the standards of asylum for mutilated women. She suggests bringing political opinion asylum applications based on political persecution, and also social-group applications based on gender and culture. My argument is that Mukasey’s Opinion has made the option of gender-based claims a stronger possibility.

120. Matter of A-T-, 24 I. & N. Dec. 617, 623 (A.G. 2008).

121. *Id.*

B. Correcting an Arbitrary and Unfair Distinction between Asylum Applications

Prior to Mukasey's opinion, an arbitrary distinction had emerged within the FGM-asylum case law as a result of its singular or different status in comparison to other social-group applications. *Kasinga* opened the door for the asylum applications of women of a particular social group who had not yet been subjected to FGM, and who feared and opposed the practice.¹²² However, the BIA and the Fifth and Seventh Circuits' analyses effectively close the door to all applicants who have already been subjected to the practice. The case law was developing so that women fearing persecution in the form of FGM had viable social-group asylum applications, but those women belonging to the same social groups who had already experienced the procedure did not.

According to Mukasey, the BIA should be required to reposition FGM claims within the larger asylum law structure. By characterizing FGM as an injury capable of repetition, Mukasey has prevented the government from succeeding in rebuttal by merely asserting that the persecution already happened and cannot happen again. Mukasey makes clear that the analysis should not rest on the persecution itself, i.e., how it is defined and characterized, whether it is capable of repetition, and the like. Rather, when an applicant shows that she suffered past persecution in the form of FGM based on membership in a particular social group, it is presumed that her life or freedom would be threatened upon her return to her native country on account of the same statutory grounds.¹²³ As a result of his analysis, both asylum claims involving fear of FGM in the future and past occurrences of FGM are analyzed as social-group applications, with FGM qualifying as the persecution on account of membership within that social group, as opposed to FGM-applications that focus solely on the persecution itself.¹²⁴ To rebut the presumption of future persecution in applications involving FGM, the government has to show that the applicant is no longer at risk for persecution on account of her membership within a particular social group, instead of showing that the applicant is no longer at risk because the particular act of persecution suffered by the victim could not occur again.¹²⁵

122. *See generally* In re *Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

123. *Id.* at 622.

124. *Id.*

125. *Id.* (citing *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008)).

C. FGM as Indicative of Larger Cultural and Social Structures and Practices that Subjugate the Female

Mukasey's analysis suggests that adjudicators should recognize FGM applications as social-group applications that carry a particular form of persecution; FGM is an example of the type of persecution that women within certain patriarchal societies and cultures confront. According to various health and human rights organizations, including the Office of the High Commissioner for Human Rights and the World Health Organization, FGM is a "manifestation of gender inequality that is deeply entrenched in social, economic and political structures."¹²⁶ FGM represents society's control over women, much like foot-binding in China and the practices of dowry and child marriage.¹²⁷ In *Mohammed*, the Ninth Circuit noted how an asylum applicant claiming FGM as past persecution creates a presumption that the applicant would be a victim of other human rights violations upon her return to her native country, such as subordination within her society's patriarchal structure and subjection to rape.¹²⁸ In addition, the BIA in *Kasinga* noted how rape, sexual abuse, domestic violence, infanticide, and FGM are all forms of mistreatment primarily directed at girls and women, and they may serve as evidence of past persecution on account of one or more of the statutory asylum grounds.¹²⁹ FGM is not a singular form of persecution, but one that arises for women within certain cultures or societies that either support or tolerate male domination and female subjugation.

D. Matter of A-T- as Making Way for Gender-Based Asylum Claims

By focusing the analysis in past-FGM cases on the nexus between the applicant's membership in the particular social group and the persecution that results,¹³⁰ Mukasey opened the door for bringing gender-based asylum applications on social-group grounds, contributing to a just and natural expansion of our asylum law that has

126. *Eliminating Female Genital Mutilation: An Interagency Statement*, *supra* note 20, at 5.

127. *Id.*

128. *Mohammed v. Gonzales*, 400 F.3d 785, 789–800 (9th Cir. 2005) (citing state department reports on country conditions in Somalia, where over ninety-eight percent of women are subjected to FGM).

129. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

130. Mukasey particularly noted the language in *Kasinga* that explained how FGM is practiced as a part of an overall scheme "to overcome sexual characteristics of young women of the tribe." *Matter of A-T-*, 24 I. & N. Dec. 617, 623 (A.G. 2008).

received worldwide support. For example, the United Nations High Commissioner for Refugees (UNHCR) published guidelines in 2002 on how to bring social-group claims based on gender,¹³¹ and the highest courts of the United Kingdom and Australia, in addition to an influential New Zealand tribunal, have all accepted asylum applications where the social group is defined by gender.¹³² In addition, scholars have long advocated for the widespread acceptance of gender-based asylum applications.¹³³ Finally, the Ninth Circuit in *Mohammed* noted that a social group of “girls or women of a particular clan or nationality (or even in some circumstances females in general). . . is simply a logical application of our law.”¹³⁴

Critics of expanding the particular social group category to allow gender-based asylum applications share a fear of the “floodgates,” namely where all females, or females of a certain tribal affiliation, nation, or culture, could be eligible for asylum if they have been persecuted on account of being a female within that particular

131. United Nations High Comm’r for Refugees, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (May 2002), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf> (“It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status.”). See also United Nations High Comm’r. for Refugees, *Guidelines on the Protection of Refugee Women*, (Jul. 1991), available at <http://www.unhcr.org/refworld/docid/3ae6b3310.html>.

132. Musalo, Karen & Stephen Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, IMMIGRATION BRIEFINGS (Dec. 2003) (citing *Islam v. Secretary of State for the Home Department*, [1999] 2 All E.R. 546, available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm>; *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, available at <http://scaleplus.law.gov.au/html/highcourt/0/2002/0/2002041114.htm>; *Refugee Appeal No. 71427/99* [1999] (New Zealand), available at <http://www.nzrefugeeappeals.govt.nz/default.asp>). See generally Danette Gomez, Comment, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959 (2004). Gomez discusses how the U.S. is generally considered “behind” in accepting gender-based asylum applications. *Id.* at 978. She describes the gender-asylum models used by other countries, and suggests how the U.S. could adopt these approaches to keep pace with international human rights norms. *Id.* at 978–85.

133. E.g. Beety, *supra* note 115, at 263–65; Shanyng Gillespie, Note, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of R-A-*, 71 GEO. WASH. L. REV. 131, 150 (2003); see generally Musalo, *supra* note 53. Others have advocated for amending the asylum statutory grounds to add a “gender” category. E.g. Jenny-Brooke Condon, Comment, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207 (2002); Tanya Domenica Bosi, Note, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 28 N.Y.L. SCH. L. REV. 777, 803–04 (2003–2004).

134. *Mohammed v. Gonzales*, 400 F.3d 785, 797 n.17 (9th Cir. 2005).

group.¹³⁵ The fear of the floodgates originated around *Kasinga*, when those that opposed her grant of asylum argued that millions of women around the world, per year, are subject to female genital mutilation and thus predicted that the U.S. would be flooded with women seeking asylum on that basis.¹³⁶ Those women, however, never materialized.¹³⁷ Canada's experience is also instructive; in the two years following Canada's recognition of domestic violence as a valid basis for asylum, only two percent of the total 40,000 refugee claims filed were gender-based.¹³⁸

There are several explanations for why the number of gender-based asylum seekers does not increase with the legal recognition of their claims.¹³⁹ First, women who have legitimate claims for gender-based asylum are from countries where they have little or no rights, a situation which greatly limits their ability to leave their countries to search for protection.¹⁴⁰ Second, these women are usually the primary caretakers for their children and even extended family; thus they have to make the difficult decision to either leave their family behind, or expose them to the risks of fleeing to another country.¹⁴¹ Finally, female asylum seekers often have little control over family resources, making it nearly impossible for them to have the means to travel to another country to seek asylum unless she has her family's permission or help.¹⁴²

Nevertheless, applications for asylum into the United States based on gender-based harms generally fare better when the particularized social group is highly particularized, such as *Kasinga's* "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."¹⁴³ In her discussion of the "floodgates" concern, Valena Elizabeth Beety, author of the article "Reframing Asylum Standards for Mutilated Women," notes the Tenth and Second Circuit's interpretations of the

135. See Gillespie, *supra* note 133, at 157; Gomez, *supra* note 132, at 985; Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132 (Winter 2007). Its premise is that acceptance of gender-based asylum will result in thousands, or tens of thousands, of women arriving at U.S. borders to request asylum. *Id.*

136. Musalo, *supra* note 135, at 132.

137. *Id.* at 133.

138. Gillespie, *supra* note 133, at 157.

139. Musalo, *supra* note 135, at 133.

140. *Id.*

141. *Id.*

142. *Id.*

143. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

matter.¹⁴⁴ The Second Circuit particularly noted that the “proper balance to strike is to interpret ‘particular social group’ broadly [. . .] while interpreting ‘on account of’ strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution).”¹⁴⁵ Under this analysis, the floodgates will not open to a large group of asylum applicants because the nexus analysis will tighten. The applicant will need to show that she was persecuted on account of her status as a female, because she is a female in a culture or country that acquiesces to the oppression of women on a broad scale.¹⁴⁶ Thus, the bonds of trust, loyalty, protection, and assistance between her and her country have been broken and replaced by the relation of an oppressor to a victim.¹⁴⁷

IV. Conclusion

In conclusion, Mukasey has imposed upon the BIA and has provided to the federal circuits the proper guidance for analyzing asylum applications brought by victims of past FGM. Mukasey corrected the singular and different position held by FGM-related applications, where they were analyzed in terms of the persecution itself instead of their legal bases. He prevented the formation of an arbitrary distinction between asylum applicants, whereby all applications brought by victims of past FGM would have been denied, but applications brought by women who had not yet undergone FGM but feared it would have been viable. By considering the rebuttal analysis in terms of the statutory grounds instead of the type of persecution the applicant suffers, FGM can be more readily observed by adjudicators as one of the many types of persecution that women of certain social groups face. The focus turns to the social group of women, and how its members suffer as a result of belonging to that

144. Beety, *supra* note 115, at 264.

145. *Id.* (citing *Gao v. Gonzales*, 440 F.3d 62, 68 (2d Cir. 2006)). Notably, the Real ID Act of 2005 made this “central reason” analysis mandatory, and thus provides for this tightening of the nexus requirement. *See* 8 U.S.C. § 1158 (3)(b)(1)(A) (2009).

146. Note the difference between an asylum applicant that seeks protection from a country that tolerates a patriarchal culture and an asylum applicant that has personally experienced, or fears personally experiencing, some form of gender-based harm, which the government is unable or unwilling to prevent because of the country’s tolerance of the subjugation of women. The asylum applicant must fear persecution specific to her, and that persecution must be on account of her membership within a subjugated group. Thus, every woman subject to the oppression of a patriarchal culture is not eligible for asylum under this formulation. The applicant must fear or have experienced persecution specific to her person, i.e., persecution that is the result of her status as a female.

147. *Matter of Acosta*, 19 I. & N. Dec. 211, 235 (B.I.A. 1985).

group. Mukasey's opinion opened the door for gender-based asylum applications on particular social-group grounds, applications that would accommodate women who are persecuted and subjugated solely because of their sex.