IMMIGRATION COURT

(b) (6)

Case: A# (b) (6)

In the matter of
Respondent(s): (b) (6)

ORDER OF THE IMMIGRATION JUDGE FOR REMOVAL PROCEEDINGS

This is a summary of the oral decision entered on May 18, 2012. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____.
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ or in the alternative to _____.
[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternative order of removal to_____.
[✓] Respondent's application for asylum was (✓) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for ( )withholding of removal ( ) deferral of Removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's status was rescinded under section 246 of the INA.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $_____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other: _____

Appeal Reserved/Waived by: A / I / B Appeal due by: _____

Date: May 18, 2012

Miriam Hayward
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [ ] PERSONAL SERVICE [X]
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN'S ATTY/REP [X] DHS

DATE: 5/18/12 BY: COURT STAFF

[✓] Other Eligibility for benefits

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT – (b) (6)

In the Matter of:

(b) (6)

In Removal Proceedings

NON-DETAINED

File No.: (b) (6)

Next Hearing Date: 6/29/2012
Immigration Judge: Hayward

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Unopposed Motion to Administratively Close Proceedings, the Court states the following:

1. The parties have agreed to administrative closure of the instant proceedings.

2. Other: _____.

THEREFORE, it is HEREBY ORDERED that the motion be:

[✓] **GRANTED.** These proceedings are hereby administratively closed upon the joint consent and motion of the parties. Proceedings may be recalendared at any time upon either party's motion, and this order does not constitute a final judgment rendered on the merits of these proceedings.

[ ] **DENIED.** _____

_____

_____

_____ Date: 6/29/12
I. Hayward

Certificate of Service

This document was served by: [ ] Mail [✓] Personal Service
To: [ ] Alien [ ] Alien c/o Custodial Officer [✓] Alien's Atty/Rep [ ] DHS

Date: 6/29/12 By: Court Staff _____

Files: (b) (6)

Date: FEB 10 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Robert G. Ryan, Esquire

ON BEHALF OF DHS: Michael Steinberg
Senior Attorney

APPLICATION: Asylum; withholding of removal; Torture Convention; remand

This case is before the Board pursuant to a remand from the United States Court of Appeals for the (b) (6) for further consideration of the respondents' applications for asylum.[1] (b) (6) (b) (6) While the appeal was pending, the respondents filed a motion to remand, which the Department of Homeland Security ("DHS") has opposed. The appeal will be dismissed in part, and the record will be remanded to the Immigration Judge.

The lead respondent, a native and citizen of Indonesia, filed an application for asylum and withholding of removal in August 2002, listing his wife and three children as derivative applicants. The respondent's son and eldest daughter are also citizens of Indonesia, but his wife and youngest daughter are citizens of Venezuela. The respondent asserted that his eldest daughter, (b) (6) suffered persecution in Indonesia by enduring female genital mutilation ("FGM") as an infant, without his consent or that of his wife. He further claimed that he fears that his younger daughter, (b) (6) may face the threat of FGM if the family is forced to return to Indonesia. Finally, he argued that he faced past persecution and the threat of future persecution on the basis of his membership in two particular social groups, namely (1) Muslim men married to Roman Catholic women in Indonesia; and (2) parents who oppose female genital mutilation.

[1] The Court of Appeals did not reach the respondents' withholding of removal or Torture Convention claims.

The Board affirmed the Immigration Judge's finding that the lead respondent had not established that he suffered persecution or that he had a well-founded fear of future persecution based upon the harm or threat of harm to his daughters. The Board also rejected the lead respondent's argument of persecution based on his particular social group membership.

The (b) (6) Court of Appeals upheld the denial of the lead respondent's particular social group claims. However, it found that the FGM that (b) (6) endured undoubtedly constitutes past persecution. It remanded the case for the Board to consider, in the first instance, the following issues: (1) whether a respondent whose alien child faced past persecution may derivatively qualify for asylum; (2) whether a respondent whose alien child faces a threat of future persecution may derivatively qualify for asylum; (3) whether a respondent whose alien child suffered severe persecution may derivatively qualify for a grant of humanitarian asylum; and, if necessary, (4) whether the Immigration Judge was correct in finding that the lead respondent and his family could find a safe haven in Venezuela.

Resolution of the first two issues is governed by our decision in *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007), which has been upheld in several circuits. *See Kane v. Holder*, 581 F.3d 231, 234 (5th Cir. 2009); *Gumaneh v. Mukasey*, 535 F.3d 785, 789 & n. 2 (8th Cir. 2008); *Kechichian v. Mukasey*, 535 F.3d 15 (1st Cir. 2008); *Niang v. Gonzales*, 492 F.3d 505, 513 (4th Cir. 2007); *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *but see Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010) (raising, without deciding, possibility of constructive deportation of USC child when both parents are in proceedings). In *Matter of A-K-*, *supra*, we held that an alien may not establish eligibility for asylum or withholding of removal based solely on the fear that his or her daughter will be forced to undergo FGM. We explained that there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his child, noting that the Act only contemplates that a spouse or child of an alien who is granted asylum may be granted the same status. *Id.* at 278-79; section 208(b)(3)(A) of the Act. We concluded that "allowing an applicant to obtain asylum or withholding of removal through persecution to his child would require granting relief outside the statutory asylum scheme established by Congress." *Id.* at 278. Notably, the (b) (6) does not mention *Matter of A-K-*, *supra*, in its decision to remand.

In its remand, the (b) (6) instructs us to consider the possibility of "constructive deportation" of the non-USC children, noting that "the threat of constructive deportation is more serious where, as here, the children are aliens with no independent right to remain in the country, as opposed to U.S. citizens, who may have alternate means of remaining in the United States, even if their alien parents are deported." (b) (6) *supra*, at (b) (6) The (b) (6) cites to the dissent in *Abebe v. Gonzales*, 432 F.3d 1037, 1048 (9th Cir. 2005), for this proposition, which in turn cites to dicta in *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), which in turn cites to *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995), where the notion finds its origin. However, in that case, the Seventh Circuit Court of Appeals held that the hardship to the non-USC son of alien parents should be considered in adjudicating the parents' suspension of deportation application, as the child was *not* placed in proceedings and thus had no ability to establish any independent right to remain in the United States.

However, in the instant case, there is no "constructive deportation" or removal of the daughters, who are co-respondents in these proceedings. If they establish either past persecution or a well-

founded fear of persecution in their own right, they are entitled to a grant of asylum, authorizing them to legally remain in the United States. At that point, each daughter would be in a position equivalent to that of a United States citizen ("USC") facing FGM whose parents have been ordered removed, a scenario we specifically addressed in *Matter of A-K-, supra.* In that case, we explained that such USC children "could avoid this risk altogether by remaining in the United States, which they are legally entitled to do . . . through the appointment of a guardian to ensure their welfare until such time as they reach majority." *Id.* at 277. *See also Abebe v. Gonzales, supra*, at 1048 (finding that "constructive deportation" does not apply where alien's daughter who is facing FGM is a USC). Moreover, the respondent's oldest daughter, who is an Indonesian citizen, is now 18 years old, and the respondent's other daughter (and his wife) are Venezuelan citizens. These factors further undermine the notion of constructive deportation in this case.

The parents in this case are also precluded from derivatively obtaining "humanitarian asylum" on the basis of the harm suffered by (b) (6) The regulation at 8 C.F.R § 1208.13(b)(1)(iii)(A) provides that such relief is available only to an applicant *"described in paragraph (b)(1)(i) of this section,"* namely, an alien who has been found to have suffered past persecution, but whose presumption of a well-founded fear of persecution has been rebutted. As the parents in this case have not established that they suffered persecution, they would not be eligible for this relief, either independently or derivatively.

The respondents argue that their situation is analogous to that in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), in which we held that an alien whose spouse had suffered a forced abortion or sterilization could establish past persecution on that basis. However, our holding in that case was based, in part, upon the unique statutory scheme created by Congress to address coercive family planning practices in China. Moreover, that holding has since been overruled. *See Matter of J-S-*, 24 I&N Dec. 520 (BIA 2008). The respondents' reliance on *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008), is likewise misplaced. In that case, we found that a mother and daughter from Somalia, who provided sufficient evidence that they both suffered FGM with aggravated circumstances, were eligible for a grant of asylum based on humanitarian grounds pursuant to 8 C.F.R § 1208.13(b)(1)(iii)(A). Unlike that case, neither parent in the case at bar has established any individual persecution.

Furthermore, as the lead respondent and his wife have not established their statutory eligibility for asylum, we need not address the discretionary issue of whether they could seek a safe haven in Venezuela. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). Therefore, the appeal filed by the lead respondent, his wife, and his son,[2] will be dismissed.

The respondents also filed a motion to remand asserting a well-founded fear of persecution. *See* 8 C.F.R. § 1003.2(c)(4). They argue that the Indonesian government has recently made a "public and hostile statement regarding the respondents' asylum claims by singling out the lead respondent and his family members in criticizing them for raising the issue of female genital mutilation" (Motion to

[2] The lead respondent's youngest child, a son born in Indonesia, has not asserted a claim of past persecution or a well-founded fear of persecution. For the same reasons discussed above, he may not obtain derivative asylee status under the law, nor have the respondents made such an argument.

Remand, at 1-2). In support of their motion, they have submitted an article about their case referring to them by name, which was published in the (b) (6) as well as the response from the Indonesian Consulate in (b) (6) which was also published in the paper. Thus, we find it appropriate to remand the record to the Immigration Judge for consideration of this previously unavailable evidence.

We will also remand to allow the daughters to submit their own applications for asylum and withholding of removal. In assessing (b) (6) claim, the Immigration Judge should consider the Attorney General's decision in *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008), in which he articulated a framework within which a claim based on past FGM should be analyzed, and our most recent decision in *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009), which provides further guidance in assessing an applicant's eligibility for relief based on a claim of past FGM. Furthermore, as noted by the (b) (6) (b) (6) we did not address whether (b) (6) has a well-founded fear of future persecution based on the threat that she, like her sister, might suffer FGM. Further fact finding on this issue is needed. However, we reiterate that even if she and her sister are granted asylum, neither her parents nor her brother can derive asylee status. The issue of whether the daughters could seek safe haven in Venezuela could then become determinative, but we need not reach that issue at this point. Accordingly, the following orders shall be entered.

ORDER: The appeal of the denial of asylum filed by the lead respondent, his wife and his son (b) (6) and (b) (6) is dismissed.

FURTHER ORDER: The motion to remand is granted.

FURTHER ORDER: The record is also remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and to allow the daughters (b) (6) and (b) (6) to pursue their own applications for asylum and withholding of removal.

FOR THE BOARD