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

In the Matter of:

(b) (6)

*Respondent.*

File Number (b) (6)

**IN REMOVAL PROCEEDINGS**

CHARGES: INA § 241(A)(1)(b) (1996) - failure to maintain status or comply with the conditions authorized

APPLICATIONS: Asylum, Withholding of Removal, Convention Against Torture

**ON BEHALF OF RESPONDENT**
Philip Hornik
(b) (6)

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Center for Gender and Refugee Studies
(b) (6)

**ON BEHALF OF ICE**
Thomas Day
Office of Chief Counsel
(b) (6)

## DECISION OF THE IMMIGRATION JUDGE

### I. Introduction and Procedural History

This case is on remand from the U.S. Court of Appeals for the (b) (6) to determine whether Respondents qualify for asylum. Respondent (b) (6) entered the United States in New York, New York on January 1, 1990 as a J-1 student visitor. He

was authorized to remain in the United States until July 14, 1993. Respondent (b) (6) Respondent (b) (6) wife, entered the United States in Dallas, Texas on February 22, 1993 as a non-immigrant spouse of an exchange visitor. She was authorized to remain in the United States until July 14, 1993. On July 13, 1993, Respondent (b) (6) filed an affirmative asylum application alleging persecution and fear of persecution on account of his political opinion. The application listed Respondent (b) (6) as a derivative asylum applicant. On January 10, 1996, the Immigration and Naturalization Service ("INS") referred the application to the Immigration Court. Respondents were served with an Order to Show Cause and Notice of Hearing on January 22, 1996. On May 15, 1996 Respondents (b) (6) and (b) (6) gave birth to a daughter, (b) (6)

During Responden (b) (6) merits hearing on May 13, 1997, he raised an additional claim for asylum based on his fear that (b) (6) would be forcibly subjected to female genital cutting ("FGC"). He and Respondent (b) (6) each testified that they shared this fear. He also submitted documentary evidence in support of this claim. On November 17, 1997, the Immigration Court denied asylum on both claims. The Board of Immigration Appeals ("BIA" or "Board") summarily affirmed the denial on July 2, 2002. The (b) (6) heard the case *en banc*. On (b) (6) the (b) (6) reversed the Board's decision and remanded the case to the BIA to determine whether Respondents (b) (6) and (b) (6) would be eligible for asylum based on the harm they would face resulting from (b) (6) cutting.

The BIA granted Respondent (b) (6) unopposed motion to remand the case to the Immigration Court. The remand authorized (1) Respondent (b) (6) to file an asylum application claiming eligibility for relief under new (b) (6) law based on her past genital cutting, and (2) further development of the record in relation to the harm that Respondents would suffer if (b) (6) were forcibly subjected to FGC, or the harm they would suffer in trying to protect her from FGC.

Respondent (b) (6) is now the lead respondent and Respondent (b) (6) is included in her application as a derivative applicant. All references to "Respondent" hereinafter, unless otherwise noted, refer to lead Respondent (b) (6)

Respondent filed an asylum application with this Court on February 13, 2007. The Court conducted a merits hearing on October 31, 2007. Respondent asserts that she is eligible for asylum based on past persecution and a well-founded fear of persecution. First, she asserts that she suffered past persecution when she was subjected to FGC on account of her particular social group of Ethiopian females. Second, she claims that she has a well-founded fear of persecution resulting from the anguish she would suffer if (b) (6) were subjected to FGC or alternately, from the harm she would face for refusing to allow (b) (6) to be cut. Finally, Respondent asserts eligibility for a humanitarian grant of asylum based on the severity of her past persecution or the reasonable possibility that she faces other serious harm upon removal to Ethiopia.

Respondent also asserts eligibility for withholding of removal and protection under the Convention Against Torture ("CAT").

## II. Evidentiary Findings

The record contains the documentary evidence submitted by both parties during the proceedings leading up to this remand, as well as the transcript of Respondent (b) (6) merits hearing and the decisions of the Board and the (b) (6) Respondents have also submitted additional documentary evidence in support of their claim on remand. There is no oral testimony from Respondent's merits hearing. The evidence on remand includes the following:

Exhibit R1: Respondent's I-589 Application for Asylum and supporting documents;

Exhibit R2: Notice of Consequences of Filing a Frivolous Asylum Application;

Exhibit R3: Respondent's Pre-Hearing Statement and Supporting Documents; Respondent's Brief in Support of her Asylum Application.

*A. Summary of Evidence Preceding Remand*

Both Respondents each testified at the initial hearing regarding their opposition to FGC, their fear that (b) (6) would be forcibly subjected to FGC if returned to Ethiopia, and their fear of ostracism if successful in preventing (b) (6) from being cut. They also submitted documentary evidence on the practice of FGC in Ethiopia. Because the Court thoroughly reviews below the more recent documents submitted on remand, the Court notes only that the evidence submitted at the initial hearing is consistent with the findings below.

Respondent (b) (6) testified at the initial hearing that he was concerned for his daughter if he were removed to Ethiopia. He stated that "in Ethiopia like the female circumcision is like a very serious issue and almost practically all females have to undergo through that and I will try to do whatever I can to stop that but if I . . . am unable to protect her she would have to go through that." Tr. at 65. He continued, "there will be pressure from the society, from the grandparents. I mean it's everybody is forced to go through that . . . she would be ostracized and then she would be ridiculed if she doesn't do that." *Id.* at 66. He further testified that neither he nor his wife would be able to stop family and community members who support the tradition from forcing (b) (6) to undergo FGC. *Id.* at 67.

Respondent testified that she underwent FGC when she was a baby in Ethiopia. *Id.* at 92. She explained that she deplores her own circumcision and that she does not believe in the practice. *Id.* at 93. She said that if she returns to Ethiopia and is not willing to subject (b) (6) to FGC, "I will be rejected by my family, my husband's family and my society too." *Id.* at 93. She also testified that because of the FGC performed on her, she is not very active in her sex life. *Id.* at 96-97.

*B. Summary of Evidence Submitted on Remand*

Respondent submitted the following documents on remand: Respondent's I-589 Application for Asylum and Withholding of Removal; individual declarations made by Respondents (b) (6) and (b) (6) psychological evaluation of Respondent; affidavit of (b) (6) expert on Ethiopia; affidavit of (b) (6) expert on FGC; and more than twenty reports, news articles and memoranda related to FGC in general as well as to the practice of FGC in Ethiopia in particular.

1. Respondent's I-589

Respondent asserts that she was subjected to FGC when she was very young. Although she does not remember the procedure when it happened, the procedure has affected her life "in a terrible way." Exhibit R1 at 10. She explains that sexual intercourse is extremely painful and that she suffered substantial complications during childbirth as a result of FGC.[1]

Respondent's daughter has not yet been subjected to FGC. Respondent asserts that she and her husband "strongly oppose" the practice being inflicted on (b) (6) and "will do everything possible to prevent it from happening." *Id.* at 5. However, Respondent believes that she and her husband will face extreme pressure from her family, neighbors and acquaintances to allow (b) (6) to be cut. She notes "I will do my utmost to prevent this from happening to (b) (6) and fears that she will be ostracized from her family and community for her resistance. *Id.* To Respondent, FGC is "torture" and subjecting (b) (6) to FGC would be "extremely traumatic" because she understands the repercussions of FGC from her own experience.[2] *Id.* at 6. Respondent explains that

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[1]The physical and psychological repercussions are best described in Respondent's own words:

> Not only has sex never been pleasurable, but it has been so indescribably painful that I dread it, and then for many hours afterwards, I am in pain that is so bad that it is hard to bear. I cannot sit down comfortably; if I do sit, I have to spread my legs apart to reduce the pressure that comes from the swelling and inflammation I experience from having sex. Standing up doesn't even really give me any relief, although it is better than sitting. It has been this way since I married and had sex with my husband for the first time.
>
> In addition . . . the cutting caused very severe complications during childbirth. From what I understand, the cutting that was done - and the scarring from it - has limited the ability of my vaginal lips to stretch. When my first child . . . was born, I had many painful tears in the skin during childbirth. The hospital had to call in extra doctors to assist and to try to repair the damage, and to stitch me up. It took several hours just for them to stitch me up after the birth. There was also damage to my bowels from all the ripping. When I came home from the hospital, it took me a very long time to recover, and when I was in bed it was painful to even turn from one side to the other.

Exhibit R1 at 10-11.

[2]Respondent says "it will cause me extreme anguish and profound suffering if my daughter undergoes this terrible mutilation." Exhibit R1 at 11.

FGC has "affected me my entire life" and has "destroyed my ability to enjoy sexual intimacy with my husband." *Id.* at 11. For these reasons, Respondent does not want (b) (6) to be "permanently scarred by this damaging and dangerous practice." *Id.*

Respondent asserts that she will suffer persecution both if (b) (6) is cut and if she and her husband succeed in preventing (b) (6) from being cut. Although she thinks it "unlikely" that she and her husband will be able to protect (b) (6), she believes that if she succeeds, the family "would become outcasts in our society" and would be "unable to live a normal life." *Id.* at 11. Such a situation, Respondent asserts, would also cause her great suffering.

2. Respondent's Declaration

In her declaration, Respondent discusses the health problems she has suffered as a result of FGC and her opposition to the practice. She also expresses her fear that (b) (6) would be subjected to FGC if Respondents were removed to Ethiopia. (b) (6) would return to Ethiopia with her parents if they were removed from the United States because they have no family in the U.S. who could care for her.[3]

Respondent explains that in Ethiopia, FGC "is something that is simply expected of all girls, but no one discusses it." Exhibit R3 at 9. To her knowledge, "there is not a single female member in [her] family who has not been cut." Respondent's sister in Ethiopia recently told her that all baby girls born in the family are still being cut. *Id.* at 10.

Respondent also notes "the excruciating pain [she has] from sex and that [she] experienced in childbirth, as well as how sad [she] feel[s] because of [her] own cutting." She further explains that she has "had menstrual problems for all [her life]. . . . [Her] entire vaginal area becomes extremely sensitive and any contact, even with a sanitary napkin, feels very uncomfortable." *Id.* at 9.

The health problems that she has suffered from her own FGC, combined with her knowledge that females in Ethiopia, and in particular in her family, are expected to be cut, "makes [her] so scared for (b) (6) She explains "I would not be able to bear it if (b) (6) is made to suffer like I have my whole life because of this terrible genital cutting. If (b) (6) is cut, it will be like having it done to me all over again!" *Id.* at 10.

3. Respondent (b) (6) Declaration

Respondent (b) (6) also opposes FGC and shares his wife's fear that (b) (6) will be subjected to FGC if they are removed to Ethiopia. He also fears being "outcast

[3]Respondent explained that she has two sisters in the United States but neither would be able to care for (b) (6) One of the sisters has become estranged from the entire family since being in an abusive relationship for years. The other sister has financial difficulties, and Respondent believes that this sister "made the conscious decision not to have children because [her] life is such a struggle."

from society" and relegated to an unsurvivable existence if he and Respondent "by some miracle" succeed in preventing (b) (6) cutting.

He describes in detail the physical and psychological impact that Respondent's cutting has had on both of their lives. He explains that Respondent "has difficulty being intimate and will not initiate sex. I can see the pain and discomfort that she experiences during love making. . . . We sometimes have to stop because the pain and discomfort she feels is so overwhelming and she starts crying." Exhibit R3 at 12. Respondent (b) (6) describes the negative repercussions FGC has had on their marriage.[4]

*Id.* It "frustrates and saddens [Respondent] because she feels that she has failed in her wifely duties." *Id.* He characterizes the birth of their first child, (b) (6) as haunting.[5] Respondent also had difficulty delivering (b) (6) Because of these difficulties, they have decided not to have more children despite Mr. (b) (6) desire "to have a bigger family."

Respondent (b) (6) explains that he deeply opposes FGC, but that he would be unable to protect (b) (6) from "members of the family or community who are determined to have her cut." *Id.* at 13-14. He notes that genital cutting is very common in Ethiopia, in their own families, and amongst their ethnic groups.[6] Throughout his years in Ethiopia, he "ha[s] never met an uncut female. It is a given in the society that all females will be cut, and our families are influenced by, and comply with these societal values." *Id.* at 14.

Respondent (b) (6) believes that their refusal to cut (b) (6) "will not be tolerated" because societal values trump parents' rights in Ethiopia. He explains that (b) (6) will be at risk of being taken to be cut by our family members. . . . This can happen at any time that [Respondent] and I are out of the house - when we go to work,

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[4]Respondent (b) (6) explains that "I try to be understanding and sensitive. . .. This frustrates me because on the one hand, I realize that this is a result of the terrible thing that was done to her and she was not responsible for this, and on the other hand I feel that I was robbed of experiencing the joy of one of the highest rewards of a loving relationship."

[5]"[Respondent's] pain was so incredible that the doctors called for additional help. Ten to fifteen medical professionals were in the room, trying to determine how to proceed, and whether to perform an emergency cesarean section. . . . the multiple vaginal and bowel tears that [Respondent] sustained made it impossible for her to have any control over her bowel movement. . . . After [the birth], [Respondent] was unable to move around for days because she was in such great pain; she could not even turn on her side without my help." *Id.* At 13.

[6] Respondent (b) (6) entire family lives in Ethiopia and most of Respondent's family also live in Ethiopia. Every female born on both sides of the family continues to be cut.

to the market, anywhere."[7] *Id.* at 14. He "will be in constant fear for (b) (6) safety." *Id.* at 15.

If (b) (6) is not cut, he fears that the family will have difficulty surviving and will be vulnerable to severe discrimination and physical violence. He explains that they "will be completely outcast from society for going against tradition and values." *Id.* at 15. Noting that "life is virtually impossible in Ethiopia" without the support and protection of the community, the family "will face terrible insults . . . [and] will also be at risk of physical violence either by family or community members" as well as by members of other communities. *Id.* at 15-16.

4. Respondent's Psychological Examination

Respondent underwent a psychological evaluation conducted by Dr. (b) (6) (b) (6) a clinical psychologist in (b) (6) on (b) (6) The evaluation included a clinical interview, review of Respondent's asylum application, and psychological testing using MPPI.[8] Dr. (b) (6) concluded that Respondent "suffers from (b) (6) (b) (6) Exhibit R3 at 17. According to Dr. (b) (6) it is both "reasonable to conclude" and "likely" that these mental health disorders result in part from the aftereffects of FGC. Dr. (b) (6) reports that Respondent experiences "a myriad" of mental health symptoms, including (b) (6) (b) (6) (b) (6) (b) (6) *Id.* at 19. She notes that Respondent is "markedly distressed" and explains that "it is generally accepted among mental health professionals that . . . living with the physical/sexual impairments of the kinds [Respondent] experiences are associated with (b) (6) symptoms and diagnoses that can significantly affect the quality of life." *Id.* at 17, 19.

5. Updated Affidavit of Professor (b) (6)

(b) (6) currently serves as an Assistant Professor and Director of the African Studies Program at the College of Charlston. He has also served as a Visiting Professor of History at Addis Ababa University in Ethiopia. Since 1993, he has lived in Ethiopia on and off for more than four years, during which time he studied languages, performed historical and anthropological fieldwork, and traveled throughout the country. He has researched and written extensively on Ethiopian history and focused

[7]Respondent (b) (6) describes a recent conversation with his sister in which she explained that "Even if someone in the family questioned genital cutting, the cost of going against it would simply be too great to bear." Exhibit R3 at 14.

[8]Dr (b) (6) labels MPPI "the most widely-used and researched objective personality inventory." Exhibit R3 at 17.

his Ph.D dissertation on the comparison between the political ideologies of Ethiopia's central government and the actual practices of regional administration in the country's peripheral and rural areas. He notes that he is "very familiar with the similarities and differences between central/urban practices and those in the periphery/rural areas." Exhibit R3 at 28. Based on these credentials, the Court qualifies Professor (b) (6) as an expert.

Professor (b) (6) notes that FGC is widely practiced in Ethiopia, both in urban centers and throughout the rural countryside. *Id.* at 34. The type of FGC most commonly practiced in Ethiopia is infibulation, which is "far more drastic" than other forms of FGC. *Id.* at 32. Infibulation consists of cutting away the prepuse, the clitoris, the labia minor and the labia majora; the two sides of the vulva are then sutured together, leaving a small opening for menstrual fluid and urine. Alluding to reports which estimate that FGC in the region is performed on 70 percent to 90 percent of girls and women, Professor (b) (6) believes that "the higher estimates are most likely the most accurate" in Ethiopia. *Id.* at 31-32.

He describes in great detail the factors underlying the practice of FGC in Ethiopia. FGC is "nearly universal" in Ethiopia and "a girl's parents' religion, level of education, socio-economic class, and other factors do not seem to make a meaningful difference in whether or not they subject their daughter to genital cutting or are able to prevent it from taking place." *Id.* at 34. Professor (b) (6) describes conversations that he has had with his Ethiopian colleagues, who are educated professionals, in which "most of [his] male friends said their sisters had been, or would be cut, and that they would not consider marrying an uncut woman" based on their "fear of social ostracism and fear of a woman's unchecked sexuality." *Id.* They further explained that "while society would definitely condemn them for marrying an uncut woman, they were primarily concerned with being cuckolded by an unchaste or loose (read: uncut) woman - an event they considered to be virtually inevitable." *Id.* at 35. His male friends felt compelled to subject their daughters to FGC because otherwise "the family would acquire a pariah status and no man would be willing to marry the uncut girl, nor even one of her cut sisters." *Id.* Even if a family opposes FGC, the daughters' cutting "is practically inevitable" because extended family or community members would arrange for the cutting, regardless of the parents knowledge or consent. *Id.* at 37.

Based on his research, observations, and discussions with Ethiopian nationals, Professor (b) (6) concludes that FGC is used as a means to uphold the prevailing social norms that uncut women would otherwise disrupt through their unchecked sexuality. Girls who are not cut "face ostracism, ridicule, scorn and derision." *Id.* at 36. In addition,

> parents who go against the custom and refuse to have a daughter cut face extreme ostracism in their own right; they risk insult and social debasement, and (even in a city like Addis Ababa) would have difficulty finding employment. . . .

Their status in the community would plummet, and they would be viewed as something like untouchables, making social life virtually impossible.

*Id.* at 37. He notes that "in a society where social status is everything" and where "communal support networks are critical," such ostracism "is an extremely harsh punishment." *Id.* at 37-38. Furthermore, "though the Ethiopian government technically outlawed FGC in 2004, the practice remains widespread . . . . The government does not put resources into enforcing the law [and] stopping FGC is not a government priority." *Id.* at 32.

Professor (b) (6) believes that if Respondents were removed to Ethiopia, they will face significant pressure from family and society to subject (b) (6) to FGC. If (b) (6) remains uncut, she risks ridicule and scorn, and is vulnerable to sexual violence from boys and men who would consider her "loose" based on her uncut status. Respondents "would be shunned" by their family and community, would have difficulty securing employment and would be deprived of all community support and existence. These circumstances make survival "exceedingly difficult." *Id.* at 38-39.

6. Affidavit of (b) (6)

(b) (6) is an expert on the issue of FGC.[9] He has studied the subject for more than 26 years, has published three books, and has received numerous awards and fellowships for his scholarship on FGC.

Of most relevance to this case, his affidavit describes the reasons for and the repercussions of FGC. He notes that "a predominant reason for performing genital cutting is to reduce a woman's sexual sensitivity and because a 'decent woman' must feign a total lack of interest" in sexual activity. Exhibit R3 at 157. Women experience significant physical, sexual and psychological complications from FGC, including problems with sexual health, extreme anxiety, phobia and depression, as well as serious complications during childbirth. Id. At 157-158.

7. Country Reports, Articles, and Memoranda

Respondent submitted more than twenty reports, news articles and memoranda related to FGC in general as well as to FGC in Ethiopia in particular. The Court finds that these documents clearly establish the following: (1) that the overwhelming majority of girls and women in Ethiopia undergo FGC; (2) that FGC may cause serious physical and psychological harm, often permanent in nature; (3) that the values underlying the practice of FGC in Ethiopia include the desire to perpetuate traditional gender roles and ideas regarding the value of women; (4) that persons in Ethiopia who oppose FGC face

[9]Mr. (b) (6) uses the term "female genital mutilation" (FGM) in his affidavit. For consistency, the Court will use the term "female genital cutting" (FGC).

ostracism, extreme discrimination and harm; and (5) that the Ethiopian government remains complicit in the practice of FGC.

*a. Prevalence of FGC in Ethiopia*

The documents are consistent in reporting that the overwhelming majority of girls and women in Ethiopia have undergone some form of FGC. Estimates range from seventy-four percent to ninety percent of girls and women.[10] For girls and women from Respondent's tribe, estimates are even higher. According to a UNICEF report, figures from the Ethiopian government show that ninety-two percent of girls in the Amhara tribe are subjected to FGC. Exhibit R3 at 99. A U.S. State Department report places the number of girls and women cut in the Amhara region to be more than eighty percent. Exhibit R1 at 99. More than seventy percent of the female population in the capital, Addis Ababa, have been cut. *Id.*

*b. Physical and Psychological Effects of FGC*

The documents are also consistent in reporting myriad forms of physical and psychological harms associated with FGC. Most of these harms are undeniably serious, and many are permanent in nature. A World Health Organization (WHO) fact sheet on Female Genital Mutilation reports that immediate complications of FGC include severe pain, shock, hemorrhage, urine retention, ulceration of the genital region, and injury to adjacent tissue. Exhibit R3 at 114. Long-term consequences include cysts and abscesses, keloid scar formation, damage to the urethra, urinary incontinence, dyspareunia (painful sexual intercourse), sexual dysfunction, and difficulties with childbirth. *Id.* In addition, "women may suffer feelings of incompleteness, anxiety and depression." *Id.* In sum, "genital mutilation may leave a lasting mark on the life and mind of the woman who has undergone it." *Id.* An alert published by the INS Resource Information Center specifically designed to help asylum officers understand FGC confirms that FGC results in "serious and often fatal" consequences, both immediate and long-term.[11] *Id.* at 120.

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[10] *Country Urged to Take Strong Action to Stop FGM* ("Currently the lowest estimate of 74 percent of all girls undergoing this horrific experience should mean something"); *World health Organization: Female Genital Mutilation (FGM)* (80 percent of women in Ethiopia undergo FGC); *Global Consultation on Female Genital Mutilation/Female Genital Cutting (FGM/FGC)* (July 30th - Aug. 3rd, 2007) (80 percent of women in Ethiopia undergo FGC); *Country Report on Human Rights Practices: Ethiopia* (2006) (according to a Ministry of Health Demographic and Health survey released in 2005, the practice of FGM among all women had decreased from 80 to 74 percent); *Ending Female Genital Mutilation* (about 80 percent of the women in Ethiopia have been subjected to FGM); *Razor's Edge: the Controversy of Female Genital Mutilation* (an estimated 90 percent of women in Ethiopia are circumcised).

[11] The alert explains that "immediate consequences can include excruciating pain, hemorrhage, tetanus, vesicula-vaginal fistulae (rupture of vaginal walls), septicemia, and death. The long-term consequences can include scarring, infertility, painful sexual intercourse, long and obstructed labor, chronic uterine and vaginal infections, HIV infection from contaminated instruments, bladder incontinence, dysmenorrhea, and obstruction of the flow of menstrual blood. During childbirth, the risks

FGC also has serious consequences for childbirth. A recent study conducted by the WHO to assess the effects of FGC on obstretric outcomes found that "deliveries to women who have undergone [FGC] are significantly more likely to be complicated by caesarean section, postpartum haemorrhage [sic], epistomy, extended hospital stay, resuscitation of the infant, and inpatient perinatal death, than deliveries to women who have not had [FGC]." *Id.* at 110.

*c. Values and Beliefs Underlying FGC*

The documentary evidence suggests that FGC is practiced for many reasons. These include psychosexual reasons (to attenuate female sexual desire, maintain female chastity and virginity before marriage and fidelity during marriage, and increase male sexual pleasure); sociological reasons (to identify with cultural heritage, initiate girls into womanhood, maintain social cohesion, and increase a woman's value to her family and marriage prospects); hygenic reasons (external female genitalia is often seen as ugly and unsanitary); and religious reasons.

Of particular relevance in the asylum context, the documents unequivocally establish that the practice of FGC is substantially linked to the maintenance of gender roles and the value of women in Ethiopian society. The INS Resource Information Center alert states that FGC "has been used to control women's sexuality. . . ." Exhibit R3 at 121. A report by CARE explains that

> FGC ensure[s] that a girl would remain a virgin until married. Once married, FGC would ensure that she remains faithful to her husband. Underneath these concerns was an underpinning of socially acceptable gender roles of men and women. . . . FGC was proof of a girl's virginity, thus her value. FGC served as a deterrent for males trying to engage in pre-marital sex, as men would be hesitant about engaging in sex with a circumcised girl. A girl who was not circumcised was perceived as a prostitute or loose woman. . . .

*Id.* at 78. An article quoting Dr. (b) (6) project officer with the Ethiopian National Committee on Traditional Harmful Practices notes that the practice is "seen as part of womanhood." Exhibit R1 at 96. He explains that Ethiopians "cite traditional beliefs that [FGC] ensures moral behaviour by women, preserves virginity [and] increases matrimonial opportunities." *Id.* at 97. A detailed report by Norwegian Church Aid elaborates that

> in societies where [FGC] takes place, gender roles are quite clear cut. Patriarchal family structures and the idea of male supremacy reinforce gender imbalances in power, rights and duties. . . . A "no" to [FGC] may be perceived as a revolt

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of maternal death, stillbirths, hemorrhage, and infection are greatly increased."

against existing roles and relations, a devaluation of community heritage and a threat to those who hold power with family and community. . . . It is marriage and control over women's fertility and sexuality which commonly underpins the cultural practice. . . . A woman's sexual desires are perceived as a threat to the status quo.

*Id.* at 120. In light of the substantial documentation in the record, the Court finds that FGC is conducted in Ethiopia as a means to define and control a woman's role in society and is used to subjugate a women within that role.

*d. Ostracism of Persons Who Oppose FGC*

The record is clear that FGC is perpetuated in part to avoid social exclusion. The ostracism faced by uncut girls and their families can be life-threatening. One report notes that "a woman who has not undergone genital mutilation may be considered a social outcast or as someone who has destroyed the family honor and deserves to be killed." Exhibit R3 at 121-22. Because FGC is tied to a woman's chastity, uncut women "are considered more likely to be promiscuous, and therefore, unworthy of marriage." Exhibit R1 at 93. As a result,

> there is literally no place for a woman who has not undergone the procedure. Such societies have sanctions, which are brought to bear on the woman and her family, ensuring that the woman's relatives enforce compliance. Other circumcised girls will no longer associate with her. She is called derogatory names, and is often denied the status and access to positions and roles that "adult" women in the community can occupy.

*Id.* at 99.

Because FGC is so embedded in Ethiopian culture, the uncut status of a girl incurs consequences not just for herself, but also for her family. As one report explains, "a girl's behavior is understood to reflect whether she comes from a 'good family' or not. Hence, [FGC] becomes an issue of family shame or honor. . . . Through her deviant behavior [she will] bring shame upon her family." *Id.* at 119. Another report explains that "girls who refuse the procedure, but still reside in communities embracing the tradition, face a diminished quality of life. For these girls and their immediate families, noncompliance incurs harassment and possible ostracism from their communities." Exhibit R3 at 69. The consequences of non-compliance can be "severe," including "insults, shame, stigmatization, a decrease in marriage prospects, rejection if married without being first cut, possible ostracism of the girl's family and the inability to participate fully in community activities." *Id.* at 79.

*e. Government Complicity*

Although the Ethiopian penal code criminalizes FGC, the government remains complicit in its practice. Despite the criminalization of FGC and its widespread

practice, there have been no criminal prosecutions under the law. Exhibit R3 at 56. In one article, the executive director of an Ethiopian nonprofit organization states that "the Ethiopian government has yet to be serious enough to take stronger action to deter [FGC]. . . . In our community, the law is not deterrent [sic]. When the law is not deterrent people are not afraid of breaking that law [sic]." *Id.* at 91. In a report published by UNICEF, a representative from Ethiopia's Women's Affairs Office explains that "female genital mutilation and cutting is against the law. However, here tradition is stronger than the law." *Id.* at 93. Another report adds that "law enforcement remains a challenge in Ethiopia, where limited socio-economic development opportunities leave room for continuing traditional and cultural values incompatible with gender equality." *Id.* at 101.

Because entrenched traditional values overwhelm the willingness and ability of the government to enforce prohibitions against FGC, cessation of the practice does not appear imminent. During a meeting considering the report submitted by Ethiopia for the Convention on the Elimination of All Forms of Discrimination Against Women, the government's own representative stated that "without significant economic growth and development . . . [the] country's harmful practices would be unlikely to change." Exhibit R1 at 79. Another article explains that "the real struggle is changing the tide of tradition - the greatest hurdle in bringing an end to [FGC]. Communities that perform [FGC] sometimes resist change because they have felt all their customs - whether good or bad - are threatened." *Id.* at 97.

III. Credibility

The Court must make a threshold determination regarding an applicant's credibility. INA § 208(b)(1)(B)(iii). The credibility provisions of the REAL ID Act of 2005[12] apply in this case because Respondent filed her application after May 11, 2005. *Matter of S-B-*, 24 I&N Dec. 42, 43 (BIA 2006). The REAL ID Act specifies the standards that a court should consider in assessing credibility. These factors include: demeanor, candor, responsiveness, the inherent plausibility of the claim, consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements. INA § 208(b)(1)(B)(iii).

Although Respondent did not provide additional oral testimony during her remand hearing, the Court can still make the type of credibility determination called for under the statute and regulations. The Court notes that the Immigration Judge who conducted the original hearing did not question Respondent's credibility. A review of the transcript and voluminous corroborating documentation supports finding the Respondent credible. This corroboration includes consistent country and background

[12]Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005).

reports, personal medical psychological records, and expert witness testimony. Likewise, the Government has not challenged Respondent's credibility on remand. Therefore, the Court finds Respondent, and indeed all of the witnesses, to be credible.

## IV. Asylum

The Immigration and Nationality Act authorizes the Attorney General to grant asylum to a non-citizen who qualifies as a refugee. INA § 208(b)(1). A refugee is an individual who is unable or unwilling to return to his country of nationality because she either has experienced past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42); *Yazitchian v. INS*, 207 F.3d 1164, 1167-68 (9th Cir. 2000).

An applicant may qualify as a refugee in two ways. *Deloso v. Ashcroft*, 393 F.3d 858, 863-64 (9th Cir. 2005). First, the applicant may demonstrate that she has suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* Once past persecution is demonstrated, fear of future persecution is presumed. *Id.* The burden shifts to the government to show, by a preponderance of the evidence, that circumstances have fundamentally changed such that the applicant no longer has a well-founded fear of persecution, or that the applicant could avoid future persecution by relocating to another part of the applicant's country. *Id.* Alternatively, the applicant may demonstrate that she has a well-founded fear of future persecution on account of a protected ground. *Id.* A "well-founded fear" is a fear that is subjectively genuine as well as objectively reasonable. *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004).

An applicant bears the burden of establishing that she is eligible for asylum through credible, direct, and specific evidence. 8 C.F.R. § 208.13(a); *Hernandez Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000).

### *A. Persecution*

To establish persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is unable or unwilling to control. *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000).

#### 1. Harm, Violence, Threats, or Other Mistreatment

Asylum law defines persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997). Persecution is "an extreme concept that does not include every sort of treatment that our society regards as offensive." *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998). Both the BIA and the Ninth Circuit have held that female genital cutting may constitute persecution. *Matter of Kasinga*, 21

I&N Dec. 357, 361, 368 (BIA 1997) (the practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution); (b) (6) (b) (6) ("we have no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law"). In its published decision ordering the remand of this case, the (b) (6) stated that FGC "constitutes persecution sufficient to support an asylum claim." (b) (6) (b) (6)

Respondent was subjected to FGC as an infant in Ethiopia. In light of Board and (b) (6) precedent, the Court concludes that Respondent has suffered harm that rises to the level of persecution.

2. On Account of a Protected Ground

Demonstrating the requisite level of harm alone is not sufficient to carry Respondent's burden. She must also show that this harm was inflicted on account of her race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). Because a persecutor may have multiple motives for inflicting harm on an applicant, the applicant need only produce evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in part, by a protected ground. *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997); *Norja v. INS*, 175 F.3d 732, 736-37 (9th Cir. 1999). A protected ground must be at least one central reason for the persecutor's infliction of harm. INA § 208(b)(1)(B)(i). Evidence of the persecutor's motive may be direct or circumstantial. *INS v. Elias-Zacharias*, 502 U.S. 478, 483 (1992). Evidence of the socio-cultural context in which the persecution occurs is relevant in establishing nexus. *Matter of S-A-*, 22 I&N Dec. 1328, 1332-33 (BIA 2000).

Respondent asserts that she was persecuted on account of her membership in a particular social group comprised of Ethiopian females. She contends that "Ethiopian females" constitutes a legally cognizable particular social group within the parameters of asylum law. She also reasons that the traditional values underlying the practice of FGC in Ethiopia – including the belief that women's genitalia are unclean, that women's sexuality must be repressed, and that women are subservient to men - establish the requisite nexus.

*a. Membership in a Particular Social Group*

The (b) (6) defines a "particular social group" as "one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." *Hernandez-Montiel v. INS*, 225 F.3d at 1092-93. In deciding whether a particular social group exists, courts must consider whether the group's shared characteristic gives the members the social visibility

necessary to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-75 (BIA 2007). Large, internally diverse demographic groups rarely constitute distinct social groups for the purpose of establishing refugee status. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986).

Clan membership has been held to constitute a protected social group. (b) (6) *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996). Gender may also constitute membership in a social group. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (overruled on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987)). The combination of clan membership or nationality and gender within the context of FGC claims has been held to constitute a particular social group. (b) (6) *v. Gonzales* (b) (6) *Matter of Kasinga*, 21 I&N Dec. at 365.

In (b) (6) *v. Gonzales*, the (b) (6) held that "Somalian females" constitute a particular social group because of the socio-cultural context in which the persecution took place. Finding that "the practice of female genital mutilation in Somalia is not clan specific, but rather is deeply embedded in the culture throughout the nation," the Court concluded that "girls or women of a particular clan or nationality" or even in some circumstances "females in general" could constitute a particular social group because "few would argue that sex or gender, combined with clan membership or nationality, is not an innate characteristic, fundamental to individual identity." (b) (6) *v. Gonzales* (b) (6)

In line with the (b) (6) rationale in (b) (6) , this Court concludes that "Ethiopian females" constitutes a particular social group. "Ethiopian females" form a group of persons connected by the immutable characteristics of nationality and gender. These shared characteristics make the group socially visible and readily identifiable to the general population. The documentary evidence uniformly establishes that FGC is practiced on the overwhelming majority of females in Ethiopia. Because the practice is "deeply embedded" in the socio-cultural context of Ethiopia, the particular social group of "Ethiopian females" is legally cognizable when evaluating the claim of FGC in Ethiopia. Respondent is a member of this group.

The Court further concludes that Respondent has shown that her persecutors were centrally motivated by her membership in the protected group. The documentary evidence establishes that the practice of FGC is substantially linked to the maintenance of gender roles and the valuation of women in Ethiopian society. The sheer volume of reports, articles, memos, and written expert testimony compels the conclusion that Ethiopians practice FGC in order to define and control a woman's role in society and to subjugate women within that role. Had Respondent not been an Ethiopian female, her persecutors would not have been motivated to harm her.

3. By Government or Forces the Government is Unable or Unwilling to Control

Persecution must be inflicted by the government or by forces the government is unable or unwilling to control. *Navas v. INS*, 217 F.3d at 655-56 & n.10. "There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it." *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004). Respondent has established that the persecution she suffered was inflicted by forces that the government is unable or unwilling to control.

Although Ethiopia passed a law criminalizing the practice, no one has been prosecuted for violating the law. The evidentiary record clearly shows that the government is not serious or capable of deterring the general population from practicing FGC, in part because the strength of traditional beliefs overwhelms the government's desire or ability to enforce prohibitions. The totality of the facts demonstrates that Respondent suffered persecution as a result of the government's knowing complicity.

*B. Well-Founded Fear of Future Persecution*

Establishment of past persecution triggers a rebuttable presumption that the applicant also has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1). The burden shifts to the Government to demonstrate (1) that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear, or (2) that the applicant can avoid future persecution by relocating to another part of the applicant's home country. 8 C.F.R. § 1208.13(b)(1)(i)(A) & (B). If the Government does not rebut the presumption, the applicant is statutorily eligible for asylum. *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004).

To demonstrate a fundamental change in circumstances, the Government "is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution." *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001) (internal quotation marks omitted). Information about general changes in the country is not sufficient. *Garrovillas v. INS*, 156 F.3d 1010, 1017 (9th Cir. 1998).

1. Well-Founded Fear Based on Respondent's Past Persecution

The Government argues that Respondent does not have a well-founded fear of persecution because the very process of FGC constitutes a fundamental change in circumstances: FGC can only be performed once and because Respondent has already been cut, she has no basis to fear future cutting. This Court must carefully review this argument because the Board and the (b) (6) have reached different conclusions on this issue.

In (b) (6) *v. Gonzales*, the (b) (6) held that FGC is a "permanent and continuing" act of persecution. (b) (6) *v. Gonzales* (b) (6) Because of the continuing nature of the harm, the government cannot rebut a well-founded fear on the theory that FGC is a one-time act that cannot give rise to a fear of future persecution. *Id.* In rejecting the claim that "there is no chance that [an applicant who has suffered FGC] would be personally [persecuted] again by the procedure," the Court expressly disavows the Seventh Circuit's decision in *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003), that FGC itself constitutes a fundamental change in circumstances. *Id.* at 799.

The (b) (6) analogizes FGC to forced sterilization because both cause permanent disfiguration and long-term health consequences, both deprive women of a normal and fulfilling sexual life, and both involve drastic and emotionally painful consequences that are permanent in nature. *Id.* The (b) (6) Court acknowledges that asylum law expressly recognizes forced sterilization as a form of persecution but does not similarly recognize FGC. *Id.* at 800. After reviewing the history of the forced sterilization language, the (b) (6) nonetheless concludes that the reasoning behind both types of claims applies equally.[13] *Id.*

The (b) (6) also concludes that FGC is a "permanent and continuing" form of persecution without relying on the forced sterilization analogy. *Id.* at 800 ("even were female genital mutilation not analogous to forced sterilization and therefore the presumption of a well-founded fear was rebuttable, the government might still have some difficulty in establishing that [the applicant] would not be subjected to further violence that is related to her past persecution)."

In its recent decision in *Matter of A-T-*, the Board came to the opposite conclusion. The Board held that an applicant who has already experienced FGC does not have a well-founded fear of future persecution arising from FGC because the procedure itself constitutes a fundamental change in circumstances. *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007). The Board relies on the *Oforji* premise that the applicant faces no threat of future persecution related to FGC because she has already been cut. *Id.* at 299.

The Board explicitly disagrees with the (b) (6) conclusion in (b) (6) *v. Gonzales* that FGC constitutes a continuing form of persecution. Distinguishing FGC from forced sterilization, the Board explained that

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[13]Congress added forced sterilization to the refugee definition in order to create a legal basis for establishing nexus to a protected ground, not to provide for automatic asylum upon a showing of past sterilization. *Id.* Courts must still conduct the well-founded fear inquiry to determine eligibility on the basis of the past sterilization. *Id.* The Board and courts adopted the "continuing persecution" rationale to ensure that the government could not negate the statutory recognition of sterilization by alleging a fundamental change in circumstances based on the very act giving rise to the persecution. *Id.* Accordingly, as long as FGC is shown to constitute persecution on account of a protected ground, the reasoning behind forced sterilization cases applies equally to FGC claims.

> in *Matter of Y-T-L-*, we treated sterilization as continuing persecution because it would have contradicted Congress's purpose to find that the very act that constituted persecution under the coerced population control provisions was itself a 'fundamental change in circumstances' that obviated a future well-founded fear.

*Id.* at 300. The Board differentiates FGC from sterilization because asylum law does not contain a separate statutory ground of persecution predicated on FGC as it does for sterilization. To conclude that FGC constitutes a continuing harm, the Board reasons, would equate to a general repeal or revision of the law outlining the inquiry required for claims based on past persecution. *Id.* Because FGC does not receive special statutory recognition, the Board states that there is no reason to follow "an approach outside the regulatory formula for assessing persecution claims founded on past persecution alone." *Id.*

Although the Board does not expressly state that its holding in *Matter of A-T-* does not control in the (b) (6) its directly contradictory ruling compels that conclusion. Because this Court is bound by (b) (6) precedent, this Court concludes that the government in this case cannot rebut Respondent's claim of a well-founded fear of persecution on the theory that her FGC constitutes a fundamental change in circumstances.

Respondent's circumstances are consistent with the permanent and continuing harms described by the (b) (6) in (b) (6) She suffers from permanent disfiguration and long-term health consequences, has been deprived of a normal and fulfilling sexual life, and still experiences the severe and emotionally painful consequences of FGC more than forty years after being subjected to the procedure.

The government has not submitted any evidence showing that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear, or that Respondent can reasonably relocate internally to a safe area. More importantly, the Government has not submitted evidence that the Respondent no longer suffers the consequences of FGC or that she has any means to ameliorate its effects. Because the Government has failed to meet its burden, Respondent is presumed to have a well-founded fear of future persecution based on her past persecution.

2. Well-Founded Fear Based on Persecution of (b) (6) or Persecution Suffered for Opposing FGC

Respondent also argues that she has a well-founded fear of persecution that is independent from the past persecution she suffered as a result of FGC. This claim is based on two separate grounds. First, Respondent asserts that it is likely that (b) (6) will be forcibly subjected to FGC in Ethiopia and that this harm to (b) (6) constitutes persecution to Respondent. Second, Respondent argues that even if she were able to

protect (b) (6) from FGC, the harm that Respondent would suffer as a result of her opposition to the procedure rises to the level of persecution.

*a. Reasonable Fear of Persecution*

To be well-founded, an applicant's fear of persecution must be both subjectively genuine and objectively reasonable. *Velarde v. INS*, 140 F.3d 1305, 1309 (9th Cir. 1998). An applicant may satisfy the subjective component by providing credible testimony that she genuinely fears persecution. *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (internal quotation marks and citations omitted). The objective component requires a showing by credible, direct, and specific evidence in the record of facts supporting a reasonable fear of persecution. *Id.* Objective circumstances "must be determined in the political, social and cultural milieu of the place where the petitioner lived." *Montecino v. INS*, 915 F.2d 518, 520 (9th Cir. 1990). In determining whether fear of persecution is objectively reasonable in light of current country conditions, courts must conduct an individualized analysis of how such conditions will affect the applicant's specific situation. *Marcos v. Gonzales*, 410 F.3d 1112, 1121 (9th Cir. 2005).

A well-founded fear neither requires certainty of persecution nor probability of persecution. *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003). In the (b) (6) "even a ten percent chance of persecution may establish a well-founded fear." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

An applicant may demonstrate a well-founded fear by showing that she has been targeted for persecution, *Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004), or that his family members and friends have been subject to physical violence that creates a pattern of persecution closely tied to the petitioner, *see Arriaga-Barrientos v. INS*, 937 F.3d 411, 414 (9th Cir. 1991). The applicant is not required to show that she would be singled out individually for persecution if she can instead demonstrate a pattern or practice of persecution in her country directed at a group of persons on account of a protected ground. 8 C.F.R. § 1208.13(b)(2)(iii). The applicant basing her claim on pattern or practice must also establish her "inclusion in, and identification with such group of persons such that his . . . fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii).

Respondent has sufficiently established the subjective component required for a showing of well-founded fear. She expressed in her declaration ". . . . This makes me so scared for (b) (6) I would not be able to bear it if (b) (6) is made to suffer like I have my whole life because of this terrible genital cutting. If (b) (6) is cut, it will be like having it done to me all over again." Exhibit R3 at 10. In her asylum application, Respondent wrote that she considers FGC to be "torture" and that subejcting (b) (6) to the procedure would be "extremely traumatic" because she understands the repercussions of FGC from her own experience.

Respondent has also sufficiently established the objective component required for a well-founded fear, on both asserted grounds.

Respondent's first claim of well-founded fear rests on the likelihood that (b) (6) will be forcibly subjected to FGC in Ethiopia. Respondent asserts that this harm to (b) (6) constitutes persecution to Respondent. There is no question that (b) (6) is likely to face FGC if she accompanies her parents to Ethiopia. In its published remand order for this case, the (b) (6) noted that "the evidence indicates that the probability that (b) (6) would have to undergo this ritual greatly exceeded the threshold required to establish eligibility for asylum." (b) (6) Since that order, Respondent has submitted additional documents showing that FGC is inflicted on seventy-four to ninety percent of the female population in Ethiopia. The evidence also indicates that more than eighty percent of females from Respondent's tribe undergo FGC and that every female in Respondents' families have been subjected to FGC. Respondent (b) (6) declared that he has never met an uncut female in Ethiopia. Exhibit R3 at 14. Accordingly, this court finds that (b) (6) faces a likelihood of persecution sufficient to meet asylum standards.

The next question is: Does (b) (6) persecution constitute persecution to *Respondent*? In the (b) (6) persecution may arise from mental, emotional or psychological harm. *Kovac v. INS*, 407 F.3d 102, 105-07 (9th Cir. 1969) (physical harm is not required for a finding of persecution); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 903 (9th Cir. 2004); *Matter of Chen*, 20 I&N Dec. 16, 20 (BIA 1989). In addition, persecution to an applicant's close family member may constitute persecution as to the applicant directly. *Mashiri v. Ashcroft*, 383 F.3d at 1120; *Salazar-Paucar v. INS*, 281 F.3d 1069, 1075 (9th Cir. 2002); *Matter of Chen*, 20 I&N Dec. at 19-20.

This case is legally and factually distinguishable from the Board's recent decision in *Matter of A-K-*, which denied relief to a father who applied for withholding of removal and protection under the Convention Against Torture based on his fear that his daughters would be subjected to FGC in Senegal.[14] *Matter of A-K-*, 24 I&N Dec. 275 (BIA

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[14]The Board held as a matter of law that a parent cannot seek relief based solely on the psychological suffering he or she would experience as a result of a child's FGC. In so holding, the Board agreed with the Fourth Circuit's decision in *Niang v. Gonzales*, a factually similar claim which held that "because 'persecution' cannot be based on a fear of psychological harm alone, Niang's withholding claim fails as a matter of law because it focuses solely on the psychological harm she claims she will suffer if her daughter accompanies her to Senegal and is there subjected to FGM." *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2004). This holding directly contradicts the (b) (6) precedent described above.

Moreover, the Board suggests that persecution of an applicant's family member, if inflicted with the purpose of causing emotional harm to the applicant, may give rise to a claim. However, the Board is careful to explain that such a claim would not be derivative, but rather would be a claim of direct harm to the applicant. In this case, the evidence establishes that Respondent would not suffer harm solely of a derivative nature. Rather, the subjection of (b) (6) to FGC serves, at least in part, as a means of harming

2007). Given the severe anguish that Respondent would suffer from the persecution of her daughter, the Court concludes that the cutting of (b) (6) would harm the Respondent to the extreme level necessary to constitute persecution.[15]

Respondent's second claim of well-founded fear rests on the contention that, even if she were able to protect (b) (6) from FGC, the harm that Respondent would suffer as a result of her opposition to the procedure rises to the level of persecution. Persecution generally "does not include mere discrimination, as offensive as it may be." *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996). However, discrimination combined with other harms may be sufficient to establish persecution. *See e.g. Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2004) (anti-Semitic harassment, sustained economic and social discrimination, and violence against Russian Jew and her family compelled finding of persecution); *Korablina v. INS*, 158 F.3d 1038, 1044-45 (9th Cir. 1998) (discrimination, harassment, and violence against Ukranian Jew can constitute persecution). Moreover, severe and pervasive discrimination can amount to persecution. *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995). Substantial economic deprivation that constitutes a threat to life or freedom may also constitute persecution. *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004) (severe harassment, threats, violence, and discrimination made it virtually impossible for Israeli Arab to earn a living).

The evidence overwhelmingly indicates that Respondent would face extreme harassment, threats, possible physical violence, ostracism, discrimination and severe economic deprivation were she to succeed in preventing (b) (6) from being cut. Indeed, the record is clear that many Ethiopians perpetuate the practice specifically *in order to avoid* social exclusion. Several articles and reports explain that families who do not cut their daughters face severe consequences including insults, shame, stigmatization, a decrease in marriage prospects for the daughter, and the inability to participate fully in community activities. Expert witness Professor (b) (6) declared that families with uncut daughters acquire a pariah status. The record indicates that in a society where social status and community membership are essential to mere survival, the extreme and sustained level of discrimination, economic deprivation, harassment, and physical

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Respondent for her resistance.

The facts in *Matter of A-K-* are also materially different than the facts in this case. In *A-K-*, the Board found that the daughters were not likely to experience FGC in Senegal, that the daughters could eliminate all risk of FGC by remaining in the United States (which they were legally entitled to do as U.S. citizens), and that only one parent was in removal proceedings. In this case (b) (6) is highly likely to experience FGC in Ethiopia, the record establishes that (b) (6) would return to Ethiopia with her parents despite being entitled to remain in the U.S. as a U.S. citizen because she has no other appropriate family with whom to live, and both parents are in removal proceedings.

[15]The Court notes that Respondent's anguish is partially a function of the fact that she has personally experienced severe and long-term physical and psychological complications from FGC. This personal knowledge of the life-threatening risks and dangers of FGC reasonably feeds the anguish that she would suffer were her daughter to undergo the procedure.

threats faced by families with uncut daughters constitutes a form of persecution recognized by the (b) (6) Respondent has established the existence of a pattern or practice of persecution in Ethiopia against families who do not allow their daughters to be cut. She has also shown her inclusion in, and identification with, such a group.

*b. On Account of a Protected Ground*

Respondent asserts that the persecution she fears would be inflicted on account of her political opinion as well as her membership in a particular social group. She defines the social group as parents of Ethiopian females who oppose genital cutting and are from ethnic groups that practice it.

To establish persecution on account of political opinion, an applicant must satisfy two requirements. First, the applicant must show that she held a political opinion. Second, she must show that she faces the prospect of persecution because of the political opinion. *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000). Political opinions encompass more than electoral politics or formal political ideology or action. *See e.g., Al-Saher v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001), amended by 355 F.3d 1140 (9th Cir. 2004) (holding that statements regarding unfair distribution of food in Iraq constitutes a political opinion); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc) (refusal to pay revolutionary tax constitutes expression of political beliefs). In *Matter of A-K-*, the Board suggests that opposition to FGC constitutes a political opinion.[16]

This Court holds that opposition to FGC constitutes a political opinion in the context of this case. In Ethiopia, FGC is a deeply entrenched and nearly universal practice representing traditional social norms and cultural values. Opposition to FGC represents a resistance to traditional values and norms that is so unacceptable in Ethiopia that persons professing this resistance face severe ostracization, harassment, insults, threats, and potential physical violence. Respondent holds this political opinion. She notes in her asylum application that "my husband and I strongly oppose this practice," and that "I do not want FGC to happen to my daughter." Exhibit R1 at 5. She also notes that "I will do my utmost to prevent this from happening to (b) (6) *Id.* The Respondent has also shown that she will be persecuted on account of her political opinion. Considering the substantial evidence in the record, there is no question that the harm she faces arises directly from the expression of her political opinion by not permitting (b) (6) to be cut.

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[16]The respondent in *Matter of A-K-* argued that he would be persecuted in Senegal on account of his political opinion opposing FGC. The Board denied this claim because they found "no evidence to indicate that the respondent himself would be subject to any substantial harm . . . on account of his personal opposition to this tribal practice." This reasoning implies that the Board recognizes opposition to FGC as a political opinion, but that the respondent's claim failed because he could not satisfy the second prong of the political opinion analysis: that he would be persecuted because of that political opinion. *Matter of A-K-*, 24 I&N Dec. at 280.

Respondent has also shown that she would be persecuted on account of her membership in a particular social group comprised of parents of Ethiopian females who oppose genital cutting and are from ethnic groups that practice it. Family can constitute a social group for purposes of asylum. *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) ("we have held that a particular social group implies a collection of people closely affiliated with each other, with the prototypical example of a particular social group consist[ing] of the immediate members of a certain family"); *Matter of Acosta*, 19 I. &. N. Dec. 211, 233 (BIA 1987), overruled on other grounds by *Matter of Mogharrabi*, I. &. N. Dec. 439 (BIA 1987) (listing "kinship ties" as an innate characteristic that may qualify to constitute a particular social group). As previously discussed, clan, gender and nationality have been found to comprise a particular social group. In *Matter of Kasinga*, the Board held that "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" constitutes a particular social group. *Matter of Kasinga*, 21 I&N Dec. at 365. The Board has also suggested that a social group defined by "fathers of daughters who have not been subjected to FGM, but who nonetheless oppose the practice" may suffice in certain circumstances.[17] Respondent has established that she is a member of the particular social group defined. Respondent has also shown that her social group is legally cognizable under asylum law. Parentage, gender and nationality are each immutable characteristics. Respondent's opposition to FGC is so fundamental to her identity and conscience that she should not be required to change it. Her role as parent and protector of her children is also so fundamental to her identity that she should not be required to change it. Members of this group are easily

[17]The respondent in *Matter of A-K-* claimed eligibility for asylum based on his membership in a particular social group comprised of "fathers of daughters who have not been subjected to FGM, but who nonetheless oppose the practice." The Board "decline[d] to find such a social group in this case" because "he has not shown that it is more likely than not that his life or freedom would be threatened on account of his opposition to this practice, particularly in light of his repeated and specific testimony that he has no fear of any persecution to himself" and because the issue of whether the daughters would actually return to Senegal with the father "is highly speculative." Accordingly, the Board denied this claim not because it found that the particular social group does not exist, but rather because the respondent did not establish that he would be persecuted on account of his membership in the group. *Matter of A-K-*, 24 I&N Dec. at 280.

identifiable within Ethiopian society.[18] The group is not so large and internally diverse as to nullify distinction as a particular group.

*c. By Government or Forces the Government is Unable or Unwilling to Control*

As previously discussed, Respondent has shown that the persecution would be inflicted by forces the government is unable and unwilling to control.

*C. Humanitarian Asylum*

An applicant who has demonstrated past persecution but cannot show a well-founded fear of persecution may still qualify for asylum under humanitarian grounds. To be eligible, the applicant must (A) show compelling reasons for being unwilling or unable to return arising out of the severity of the past persecution or (B) establish that there is a reasonable possibility that she may suffer other serious harm upon removal to that country. 8 C.F.R. § 1208.13(b)(iii); *Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004). The Ninth Circuit has restricted this avenue for asylum to "rare situations of 'atrocious' persecution, where the alien establishes that, regardless of any threat of future persecution, the circumstances surrounding the past persecution were so unusual and severe that [the applicant] is unable to return to his home country." *Vongsakdy v. INS*, 171 F.3d 1203, 1205 (9th Cir. 1999).

Respondent argues that she is entitled to humanitarian asylum on both grounds. This Court agrees.

In (b) (6) *v. Gonzales*, the (b) (6) expressed that female genital cutting may qualify an applicant for a grant of humanitarian asylum. The Court concluded that "female genital mutilation is a particularly severe form of past persecution because of its many continuing effects." (b) (6) *v. Gonzales*, (b) (6) Respondent has persuasively established the substantial and unusually severe continuing effects of FGC on her life. She has experienced pain and discomfort on a monthly basis with the onset of her menstruation. She also experiences physical pain so intense during sexual intercourse and childbirth that she tries to avoid physical intimacy with her husband and has decided not to have any more children. She suffers from several psychological ailments, including post traumatic stress disorder, major depressive disorder, and recurrent and generalized anxiety disorder. Accordingly, Respondent has shown that the FGC she experienced "is a particularly severe form of past persecution."

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[18]The evidence indicates that Ethiopians live in close-knit communities in which family members and the larger community would become aware of a girl's or woman's status as uncut. It is reasonable to conclude that Respondent's immediate family would find out, if they do not already know, that (b) (6) is uncut and that Respondent does not want her to be cut. Respondents have each discussed FGC over the phone with family members in Ethiopia during the pendency of these proceedings. It is also reasonable to conclude that Respondent's family would enlist friends and community members to force (b) (6) cutting.

The (b) (6) also indicated that (b) (6) might qualify for humanitarian asylum based on the risk that she would suffer other serious harm. The (b) (6) court reasoned that because her clan had been so decimated by violence, female members of her tribe were particularly vulnerable to harm. Although Respondent in this case is not vulnerable for the same reason as the respondent in (b) (6) she has adequately shown that she faces a reasonable possibility of suffering other serious harm either based on (b) (6) persecution or based on her opposition to FGC.

While not bound by the holdings of other circuits, this Court can look to sister circuits for persuasive support for a legal argument. At least two circuits have specifically expressed that "a grant of humanitarian asylum may be warranted in circumstances where a mother, who has been subjected to FGC fears her daughter will be subjected to FGC if she accompanies her mother to the country of removal." *Niang v. Gonzales*, 492 F.3d 505, 509 n. 4 (4th Cir. 2004), citing *Osigwe v. Ashcroft*, 77 Fed. Appx. 235 (5th Cir. 2003)(unpublished). This is precisely the situation in this case. Respondent has adequately shown that she faces a reasonable possibility of serious psychological harm if (b) (6) is cut. She has also shown that she faces a reasonable possibility of suffering other serious harm if she were to succeed in preventing (b) (6) cutting. The cumulative effect of extreme ostracization, serious economic deprivation, harassment, threat of violence, and other harms undoubtably rises to the level of "serious."

V. Withholding of Removal

To qualify for withholding under INA §241(b)(3), an applicant must demonstrate that her life or freedom would be threatened in her home country because of her race, religion, nationality, membership in a particular social group, or political opinion. To make this showing, the applicant must establish a "clear probability" of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). A "clear probability" means that it is "more likely than not" that the applicant will be subject to persecution on account of a protected ground if returned to the home country. *Id.* The clear probability standard is more stringent than the well-founded fear standard governing asylum. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). The agent of the persecution must be the government or persons that the government is unable or unwilling to control. *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004).

Past persecution generates a presumption of eligibility for withholding of removal. *Baballah v. Ashcroft*, 367 F.3d 1067, 1079 (9th Cir. 2004). As with asylum, the Government may rebut this presumption by establishing that there has been a fundamental change in circumstances or that the applicant could reasonably relocate internally to avoid a future threat to life or freedom. 8 C.F.R. § 1208.16(b)(1)(i). When an applicant has demonstrated eligibility for withholding of removal, the Court must grant relief. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001).

The Court concludes that Respondent qualifies for withholding of removal to Ethiopia. Respondent has established past persecution and the Government has not shown that a fundamental change in circumstances or internal relocation negates the presumption of future persecution. Furthermore, Respondent has established a clear probability of persecution on two separate grounds independent from her past persecution claim. Respondent's declaration and application for asylum, the expert written testimony, as well as the more than twenty reports, articles, and memoranda in the record, undeniably establish a clear probability that Respondent would suffer persecution if returned to Ethiopia.

## VI. Conclusion

Having considered the totality of the evidence, the Court grants Respondent's applications for asylum and withholding of removal to Ethiopia. Due to the resolution of this case, it is unnecessary to reach Respondent's application for relief under the Convention Against Torture. Based on his derivative applicant status, the Court also grants asylum to Respondent (b) (6) Derivative status for withholding of removal is not available.

## ORDER

It is HEREBY ORDERED that Respondents' Application for Asylum is GRANTED.

It is FURTHER ORDERED that Respondent (b) (6) Application for Withholding of Removal is GRANTED.

Dated: Dec. 19, 2007

Michael H. Bennett

*Immigration Judge*

(b) (6)

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: (b) (6)

Date: SEP 2 1 2006

In re: (b) (6)

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Philip Hornik, Esquire

ON BEHALF OF DHS: Thomas L. Day
District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] -
In the United States in violation of law (both respondents)

APPLICATION: Asylum; remand

ORDER:

PER CURIAM. This case was last before the Board on July 2, 2002, when we adopted and affirmed an Immigration Judge's decision finding that the respondents had not demonstrated a well-founded fear of persecution on account of any protected asylum ground. The matter is now before us pursuant to a remand from the United States Court of Appeals for the (b) (6) dated (b) (6) Although the Circuit Court upheld the determination that the respondents had not established a well-founded fear of persecution on account of the respondents' political activities, it vacated the portion of the Immigration Judge's decision which found that the respondents had not established that their United States citizen daughter had a well-founded fear of female genital mutilation (FGM) if the respondents were removed to Ethiopia.

However, the Circuit Court remanded the record to the Board for a determination of whether the respondents, as parents of a United States citizen child who is likely to face persecution in her parents' native country, may derivatively qualify for asylum. A briefing schedule was set by the Board, but the respondents have submitted an unopposed motion to defer the briefing schedule. They request, also in an unopposed motion, that the record instead be remanded to the Immigration Judge to allow the female respondent to file her own asylum application based upon her past FGM. *Accordingly, the motion to remand is hereby granted, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.*

FOR THE BOARD