Files: (b) (6)

Date: JUN - 1 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENTS: Isuf Kola, Esquire

ON BEHALF OF DHS: Anastasie M. Senat
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The case is before us pursuant to a remand by the United States Court of Appeals for the (b) (6) (b) (6) *v. Holder*, (b) (6) The respondent is a native and citizen of Mali. In a June 17, 2009, decision, when this case was last before us, we dismissed the respondent's appeal of an Immigration Judge's denial of the above-captioned claims.[1] With the matter now before us again, the Department of Homeland Security (the "DHS") has moved to dismiss the respondent's appeal based upon new evidence. The motion will be denied and the record will be remanded.

It is undisputed that the respondent, as a member of the Bambara tribe, underwent female genital mutilation in Mali as a child, as did her co-respondent daughter. The respondent, however, has not requested asylum based either upon her past experiences or upon a fear that the procedure might be repeated. Nor has she filed an asylum claim on behalf of her daughter, (b) (6) Rather, the respondent bases her claims upon her fear that her other daughter, (b) (6) a United States citizen, will be subjected to female genital mutilation against the respondent's wishes, should the family relocate to Mali. *See* (b) (6) *supra*, (b) (6) (regarding the parameters of the respondent's claims and arguments). The court noted that the Immigration Judge found it more

[1] Unless otherwise indicated, the term "respondent" herein refers to the lead respondent, (b) (6) (b) (6) The other respondents are the lead respondent's husband, (b) (6) (b) (6) and their daughter, (b) (6) who were derivative applicants of the respondent's asylum claim. In our last decision, we also upheld the Immigration Judge's pretermission of the respondent's asylum claim as untimely. The circuit court held that the asylum claim was not before it. Thus, the asylum claim is no longer before us.

likely than not that (b) (6) would be subjected to female genital mutilation should she be relocated to Mali. *Id.* at (b) (6)

In our prior decision, we upheld the Immigration Judge's denial of the respondent's claims because the respondent is ineligible to premise her own claims for withholding of removal and protection under the Convention Against Torture upon potential mistreatment of her United States citizen daughter, regardless of the likelihood that (b) (6) will undergo female genital mutilation. Section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 1208.16(c); 1208.18. *See Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003); *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007). The court noted, however, that the present case differs from the respective situations in *Olowo* and *Oforji*, since both parents here are in proceedings. Thus, it would be expected that (b) (6) would accompany her family to Mali. This involves questions of fact, and the court directed here that the *Olowo* decision be specifically addressed in light of that decision's "implication that there may be a claim for constructive deportation when both, not just one, parent is in proceedings." (b) (6) *supra*, (b) (6) As these issues were not explored below, it is appropriate that they be addressed by the parties first before the trier-of-fact.[2]

The circuit court also held that this agency must address the argument which the respondent raised concerning whether genital mutilation of a family member could constitute direct, as opposed to "derivative persecution" of the respondent herself. *Id.* at (b) (6) The court observed that in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir.2009), it held that female genital mutilation of a claimant's spouse could constitute persecution of the claimant himself. *Id.* (citation omitted). While the court in the present case indicated that it saw no evidence (on the current record) that (b) (6) would be subjected to female genital mutilation as a way to "punish" her family, the concept that genital mutilation of claimant's family member can constitute direct persecution (or torture) must nonetheless be addressed as the respondent had previously raised the argument. The court indicated that one area of concern might be the potential mental anguish of the respondent, who was herself a victim of female genital mutilation and who might face the choice of either seeing her daughter either suffer the same fate, or having to separate herself from the child to avoid that outcome. *Id.* at (b) (6) (citation omitted). We again note that this directive from the court may involve fact-finding, and it would therefore be appropriate for the parties to first address these consideration before the trier-of-fact. We also note that protection under the Convention Against Torture involves a different burden of proof than asylum or withholding of removal under section 241(b)(3) of the Act, without a requirement of proving that the potential harm might relate to a protected ground. As the court noted, "harm to a child can constitute direct persecution [i.e., and potential torture] of the parents who are unable to stop it." *Id.* at (b) (6)

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[2] Unlike the provisions for asylum, neither the Act nor the regulations provide derivative status for family members of applicants for withholding of removal. Thus, the court's use of the term "derivative claim" in this context appears to refer to the likelihood of the respondent's own suffering, for purposes of eligibility under section 241(b)(3) of the Act and potentially under the CAT as well, in light of the concern (b) (6) will be subjected to female genital mutilation in Mali, rather than harm directly aimed at the respondent's herself. *See* (b) (6) *supra*, (b) (6)

With the case now before us again, the DHS moves to dismiss, alleging that on or about November 29, 2007, prior to this Board entering its last decision, that the respondent voluntarily departed the United States for France. The DHS submitted evidence in support of this assertion. This issue implicates our jurisdiction under 8 C.F.R. § 1003.4. While we might ordinarily be able to resolve this question on legal grounds at this stage, 8 C.F.R. § 1003.1(d)(3)(ii), the respondent denies that she has ever left the United States since her arrival in 2001. *See* Respondent's Brief, attached affidavit. This factual dispute also raises the question of whether the respondent abandoned her application–if she did, in fact, leave the United States. *See* 8 C.F.R. § 1208.8.[3] *Cf. Matter of F-P-R-*, 24 I&N Dec. 681, 683-85 (BIA 2008) (concerning timeliness of an asylum application after an alien's "last arrival" in the United States). As this Board has a limited fact-finding authority in deciding appeals, this issue should be explored before the Immigration Judge. *See* 8 C.F.R. § 1003.1(d)(3); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).

In light of the foregoing, the following orders will be entered.

ORDER: The DHS's motion to dismiss is denied.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing and with the court's order.

FOR THE BOARD

[3] *But see* section 241 of the Act, Note 1.4, "(a) Policy. It shall be the policy of the United States not to expel...or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Act Oct. 21, 1998, Pub. L. 105-277, Div. G, Subdiv. B, Title XXII, Ch 3, Subch. B, § 2242, 112 Stat. 2681-822.