

Falls Church, Virginia 20530

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Files: [REDACTED] - Cleveland, OH

Date: DEC 12 2013

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Matthew L. Benson, Esquire

ON BEHALF OF DHS: Bruce D. Imbacuan  
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -  
In the United States in violation of law (both respondents)

APPLICATION: Asylum; withholding of removal

This case was previously before us on February 24, 2010, when we remanded the record to the Immigration Court for further assessment of the lead respondent's claim based on past female genital mutilation. In a written decision dated July 2, 2012,<sup>1</sup> the Immigration Judge denied the lead respondent's<sup>2</sup> application for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3), as well as her alternative request for protection under the Convention Against Torture ("CAT"), 8 C.F.R. § 1208.16(c).<sup>3</sup> The respondents, both natives and citizens of Senegal, have appealed from the Immigration Judge's July 2, 2012, written decision. The Department of Homeland Security ("DHS") has submitted a brief in opposition to the appeal. The appeal will be sustained. The respondent will be found eligible for asylum. The record will be remanded for any necessary background and security investigations.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. See 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues,

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<sup>1</sup> All references herein to the Immigration Judge's decision shall relate to the July 2, 2012, written decision, unless otherwise indicated.

<sup>2</sup> Only the lead respondent [REDACTED] filed an asylum application, of which the co-respondent [REDACTED], the lead respondent's spouse, is a derivative beneficiary. Any references to "the respondent" therefore shall relate to the lead respondent.

<sup>3</sup> The respondent has not appealed from the denial of her CAT claim. Her CAT claim has therefore been waived.

including, whether the parties have met the relevant burden of proof, and issues of discretion. See 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent submitted her asylum application before May 11, 2005, it is not governed by the provisions of the REAL ID Act. See *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

At the remanded proceedings, the Immigration Judge held that the respondent's asylum application was not barred by the 1-year filing deadline (I.J. at 8-9). He further held that the respondent established past persecution on account of a protected characteristic in light of her subjection to female genital mutilation in Senegal (I.J. at 9-10). The DHS has not contested either of those rulings in the context of the present appeal. The respondent therefore benefits from a rebuttable presumption of a well-founded fear of future persecution. See 8 C.F.R. § 1208.13(b)(1).

The DHS did not satisfy its burden of rebutting this presumption. Contrary to the Immigration Judge's finding (I.J. at 10-11), the fact that the respondent does not fear being subjected to female genital mutilation upon her return to Senegal is insufficient to rebut the presumption of future persecution.<sup>4</sup> Rather, an asylum applicant who has suffered female genital mutilation on account of a protected characteristic is presumed to risk future persecution on the basis of that protected characteristic, regardless of whether any future harm will likely be identical in form to the harm previously suffered. See *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008) (vacating in part *Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007)). Consequently, the respondent established her eligibility for asylum.

Notwithstanding the prior Immigration Judge's limited adverse credibility finding (I.J. at 9), and the respondent's single return to Senegal (I.J. at 12), the respondent merits asylum in the exercise of discretion. See generally *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996) (stating that in the asylum context, the danger of persecution will outweigh all but the most egregious factors); *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

Moreover, even assuming that the DHS had satisfied its burden of rebutting the presumption of future persecution, the respondent would nevertheless merit a humanitarian grant of asylum. See 8 C.F.R. § 1208.13(b)(1)(iii)(A). As indicated above, the respondent suffered female genital mutilation in Senegal (I.J. at 10), which is a "deplorable and extremely harmful" form of persecution. See *Matter of A-T-*, 25 I&N Dec. 4, 10-11 (BIA 2009). Moreover, the respondent was harmed to such a degree that she was unable to return to school for an entire year after being subjected to this form of persecution (I.J. at 13). The respondent also continues to suffer ongoing consequences as a result of her past persecution, including urination problems and sexual problems (I.J. at 13). She has also had to undergo two episiotomies each time she has given birth (I.J. at 58).

Considering the foregoing, and in particular the continuing nature of the physical consequences of the respondent's forcible subjection to female genital mutilation, we conclude

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<sup>4</sup> It appears that the Immigration Judge may have misallocated onto the respondent the burden of establishing future persecution on account of the same protected characteristic, as he stated that the respondent "has not established that the act of past persecution she suffered in undergoing [female genital mutilation] is related to her fear of future persecution."

██████████ et al.

that the respondent has established compelling reasons for being unwilling to return to Senegal irrespective of whether she has a well-founded fear of future persecution. The adverse factors noted above do not overcome the severity of the persecution that the respondent has suffered. Therefore, we would conclude that the respondent is eligible for and deserving of asylum even in the absence of a well-founded fear of future persecution. *See, e.g., Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008). Accordingly, the following orders will be entered.

ORDER: The respondents' appeal is sustained.

FURTHER ORDER: On this record, the respondents are eligible for and deserving of asylum.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

  
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