Author: Karen Musalo
Source: Southern California Review of Law & Women's Studies
Citation: 7 S. Cal. Rev. L. & Women's Stud. 357 (1998).
Title: Ruminations on In Re Kasinga: The Decision's Legacy

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RUMINATIONS ON IN RE KASINDJA: THE DECISION'S LEGACY

KAREN MUSALO*

I. INTRODUCTION

Fauziya Kassindja’s quest for refugee protection became one of the most highly publicized political asylum cases since the passage of the 1980 Refugee Act. The story of the young Togolese woman’s flight from her home country to escape the dual fates of female genital mutilation (FGM) and life in a forced polygamous marriage ended up on the front pages of The New York Times and The Washington Post, and was covered by most of the major television networks. Ms. Kassindja herself was interviewed by Ted Koppel on Nightline, Barbara Bradley of National Public Radio, and Judy Woodruff of CNN International.

* Karen Musalo, director of the International Human Rights and Migration Project at the Markkula Center for Applied Ethics, Santa Clara University, was lead attorney for Ms. Kassindja. She developed the case strategy, authored the appellate briefs, and argued the case before the Board of Immigration Appeals.

1. The correct spelling of Fauziya’s last name is “Kassindja.” When Ms. Kassindja arrived in the United States on December 17, 1994, the Immigration & Naturalization Service (INS) erroneously recorded her name as “Kasinga.” This misspelling was carried through to INS documents, briefs and the court decision in the case. It was not corrected until September of 1996 when New York Times reporter Celia Dugger traveled to Togo to do an extensive story on the refugee’s family and reported the correct spelling as “Kassindja.” Celia W. Dugger, A Refugee's Body is Intact but Her Family is Torn, N.Y. Times, Sept. 11, 1996, at A1.


5. Nightline (ABC television broadcast, May 2, 1996) (broadcast on file with author) (featuring Ms. Kassindja’s case, and including a one-on-one interview of Ms. Kassindja by Mr. Koppel).

6. All Things Considered: Female Genital Mutilation Case Goes to INS Board (National Public Radio broadcast, May 1, 1996).

By April 1996, when Ms. Kassindja’s personal odyssey became the subject of intense media coverage, the eighteen year old woman had been shut up in—and shuttled amongst—four Immigration and

8. The net result of such extensive publicity was overwhelmingly positive — both for Ms. Kassindja and for public attitudes towards immigrants and asylum seekers. There were, however, some troubling ethical issues which arose as a result of the media frenzy. Ms. Kassindja was represented at her hearing before the immigration judge by a then-student, Layli Miller Bashir. After Ms. Kassindja was denied asylum by the immigration judge, Ms. Miller Bashir asked the International Human Rights Law Clinic at Washington College of the Law, American University, to undertake her representation. The author of this article was visiting director of the Clinic that academic year, and agreed to take on Ms. Kassindja’s representation as part of the Clinic’s caseload. The representation was undertaken pro bono, as are all cases in the International Human Rights Law Clinic.

A total of five students, including Ms. Miller Bashir, worked on various aspects of Ms. Kassindja’s representation. When Ms. Kassindja became a well-deserved cause-celebre, she was deluged by offers to buy the rights to her life story. Ms. Kassindja made a decision to enter into a book contract for the publication of her story, which has now come out under the title, “Do They Hear you When you Cry?” What raises troubling ethical issues is the fact that during the negotiation of this book contract, Ms. Miller Bashir maintained that because of her involvement in the representation of Ms. Kassindja, she was entitled to a substantial portion of the advance and royalties for the book. In my opinion, Ms. Miller Bashir’s belief that she was entitled to payment for “selling” the story of her work on the case was inappropriate, even if Ms. Kassindja — out of a sense of friendship, gratitude and generosity — agreed to the sharing of the royalties. During the book contract negotiation, Ms. Miller Bashir also fought with Ms. Kassindja over editorial control. The contracts which were ultimately negotiated prevented anyone else on the legal team — myself and the other law students — from having editorial control over the recounting of the story during the process of the book’s drafting by two different “ghost writers.”

As a result, the description of the legal battle contained in the original manuscript of “Do They Hear You When you Cry?” bore small resemblance to the actual events which had transpired, and the contributions of the other Clinic students, as well as the many colleagues who had assisted, were minimized or left out of the recounting. Ultimately the threat of legal action was necessary to force the rewriting of large portions of the manuscript. Even with the rewriting, the telling of the legal story remained somewhat skewed — a fact which did not escape the notice of those in the legal community with firsthand knowledge of the litigation. See e.g., Pamela Goldberg, Do they Hear You When You Cry?, N.Y.L.J. at THE LAW BOOKSHELF, 2 (June 5, 1998) (reviewing FAUZIYA KASSINDJA, Do THEY Hear You When You Cry (1998)).

There are lessons to be learned from what happened in this case — not the least of which is the need for law school clinics to consider developing policies covering situations such as the one described above. In developing such policies, Clinics should question whether it is appropriate that students ever be permitted to profit from cases on which they work as part of their clinical education. In addition, this experience has convinced me that there is much that legal education needs to do in the way of teaching about ethics and values. Students should reflect on the inherently unequal power dynamic between attorney and client, and should be pushed to question whether it is ever really fair play for the student-attorney in this type of situation to turn around and take on the role of potential adversary to her former client — hiring an attorney and negotiating hard over percentages of royalties and editorial control — such as happened in this case.
Naturalization Service (INS) detention facilities and jails for approximately sixteen months. She had been denied asylum by an immigration judge who ruled that she was not credible, and even if she were, she did not qualify for protection as a refugee. By the time *The New York Times* reported her story, Ms. Kassindja had lived through a prison riot at Esmor during which she was tear-gassed and beaten. She was suffering from severe gastrointestinal disorders, and her frame of mind and physical health were so poor that she decided it would be better to return to Togo and suffer the fate which awaited her, rather than spend another day in U.S. jails.

One can scarcely imagine a more dramatic turn of events than that which befell Ms. Kassindja. Within ten days of her story first appearing on the front page of *The New York Times*, the INS reversed its long-standing decision not to release Ms. Kassindja while her appeal of the immigration judge's denial of asylum was pending. On April 25, 1996, Ms. Kassindja walked out of the York County Prison into the light of day, where hordes of reporters and photographers awaited. In response to the intense public interest in her case, Ms. Kassindja and her legal team called a press conference a few days after her release. The conference, which took place on April 29, 1996 at the National Press Club in Washington, D.C., was well attended. The resulting coverage was uniformly sympathetic. A little less than two months after her release, on June 13, 1996, a nearly unanimous

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9. Ms. Kassindja was detained at Esmor Immigration Detention Center from her date of arrival, December 17, 1994, until Esmor erupted in a riot on June 18, 1995. Independent reports documented abusive conditions at Esmor, which resulted in the inmates rioting. See *Women's Commission for Refugee Women and Children, An Uncertain Future, A Cruel Present: Women in INS Detention* (1995). After the riot at Esmor, Ms. Kassindja was transferred to Huston County Correction Facility. She remained there until June 23, 1995, when she was moved to York County Prison. On August 2, 1995 she was moved to Lehigh County Prison. On January 23, 1996 she was returned to York County Prison.


11. Details regarding Ms. Kassindja's medical condition are contained in a Motion for a Temporary Restraining Order submitted to the U.S. District Court in Pennsylvania on April 12, 1996 (on file with author).

12. After spending approximately a year in detention, Ms. Kassindja submitted a request to the INS to be returned to Togo. Counsel was able to persuade her to reconsider this request and to pursue her claim for political asylum.

Board of Immigration Appeals\textsuperscript{14} ruled that Ms. Kassindja was credible, and granted her request for political asylum.

The decision of the Board of Immigration Appeals in her case, \textit{In re Kasinga},\textsuperscript{15} has been hailed as a landmark opinion which broke new ground in the developing jurisprudence of gender-based claims for asylum, and was welcomed for its holding that an accepted cultural practice—FGM—may nonetheless constitute persecution.\textsuperscript{16} Commentators have also noted that beyond the decision's significance for gender asylum claims and women's human rights, the case and the publicity which surrounded it raised important policy questions regarding the United States' treatment of asylum seekers.\textsuperscript{17}

Almost two years have elapsed since the decision in \textit{In re Kasinga}, and interest in the case has continued. It is in response to this interest that the opening appellate brief and its two main exhibits—

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14. The Board of Immigration Appeals, sitting en banc, ruled 11-1 in favor of Ms. Kassindja. The one Board member who dissented did not draft a written opinion so his rationale is unknown.


16. \textit{See}, e.g., Arthur C. Helton & Alison Nicoll, \textit{Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches}, 28 Colum. Hum. Rts. L. Rev. 375 (1997); Tia Juana Jones-Bibbs, Casenote, \textit{United States Follows Canadian Lead and Takes an Unequivocal Position Against Female Genital Mutilation: In re Fauziya Kasinga}, 4 Tulsa J. Comp. & Int'l L. 275 (1997); John Linarelli, \textit{Violence Against Women and the Asylum Process}, 60 Alb. L. Rev. 977, 979 (1997); Linda A. Malone & Gillian Wood, \textit{Immigration - Refugee Act of 1980 - Resistance to Female Circumcision as Grounds for Political Asylum in the United States}, 91 Am. J. Int'l L. 140, 147 (1997) (stating that "\textit{In re Kasinga} is... the first time a court with national jurisdiction has recognized that the circumcision of women can be a form of persecution." Malone and Wood further note that: "[t]he importance of BIA decisions should not be underestimated. Federal district and circuit courts of appeals have been very deferential to the BIA..."

17. \textit{Id.} at 147 n.32; Mary M. Sheridan, \textit{Comment; In re Fauziya Kasinga: The United States Has Opened its Doors to Victims of Female Genital Mutilation}, 71 St. John's L. Rev. 433, 460 (1997) (stating that "[t]he Kasinga ruling represents a long overdue effort by the INS to expand antiquated laws to afford women protection from gender-related persecution such as FGM.")
\end{flushright}
Ms. Kassindja’s affidavit and the affidavit of Professor Merrick Posnansky, an academic expert on Togo—are being published in this journal. In addition to publication of the brief and exhibits, it is appropriate from this vantage point of time to consider the effect which the decision and its attendant publicity have had on relevant law and policy. A reflection on the case’s impact is the substance of this Prologue to the brief.

II. *IN RE KASINGA’S CONTRIBUTION TO ASYLUM JURISPRUDENCE AND GENDER-BASED CLAIMS*

The *Kasinga* decision established the principle that a successful asylum claim may be premised upon flight from female genital mutilation. This is an important precedent, and since the ruling was issued protection has been granted in a number of cases involving FGM. In one of the cases the facts were similar to those in *In re Kasinga*, in that the woman, who was also from Togo, feared prospective mutilation. 18 In four other cases19 of which the author is aware,20 the applicants had already been subjected to FGM, establishing that a claim may be based on past persecution, or past persecution in combination with additional factors. The decisions in these cases, although they are non-binding as precedent, may be read as a repudiation of the position that the past persecution of FGM generally may not form

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19. See *In re S-C*, A75 402 354 (Immigr. Ct., Boston, Feb. 19, 1998 (counsel for the applicant was Kenneth Lehman of Boston); *In re S-G* (Asylum Officer, S.F., Feb. 13, 1998)(counsel for the applicant was Yemi Getachew of San Jose); *In re A-C* (Asylum Officer, N.Y., Sept. 22, 1997)(counsel for the applicant was Professor Pamela Goldberg, City University of New York School of Law, Queens College); *In re U-S*, No. A29 638 351 (Immigr. Ct., Anchorage, Dec. 19, 1996)(counsel for applicant was Margaret Stock of the law firm of Atkinson, Conway & Gagnon).

20. Decisions of asylum officers and immigration judges are not published and therefore, are not easily accessible to researchers. There may be more decisions than those referred to in this article; however, these are the only ones known to the author.
the basis for a viable claim to protection. In *In re U-S—*, the applicant, a Nigerian woman, had continuing physical and psychological problems as a result of the procedure. The applicants in *In re A-C- and In re S-G-*, from the Ivory Coast and Eritrea, respectively, had female daughters who they were trying to protect from the procedure. The applicant in *In re S-C-*, a member of the Malinke/Mandingo tribe in Guinea, had been subjected to forced polygamy in addition to genital mutilation, and had also suffered harsh punishment for refusal to conform to social norms applicable to women.

The ruling in *In re Kasinga* helped prepare the ground for these claims involving FGM; yet the principles established in *Kasinga* have broader significance beyond FGM cases. The *Kasinga* decision contributed to the interpretation of two key terms in the refugee statute. While the decision's interpretation of these terms may be seen as most relevant to gender-based claims, it is clearly relevant to asylum jurisprudence in general. First, the *Kasinga* decision contributed to the interpretation of the concept of persecution, a key element in every claim for refugee protection. Second, the decision more firmly established the social group category as an appropriate nexus in claims where the persecution is imposed, in part, because of the victim's gender.

A. Rejecting a "Punitive Intent" Element from the Concept of Persecution

The refugee definition requires proof of persecution, which the applicant either has endured in the past or is reasonably likely to suffer in the future. Case law has evolved over time regarding the nature of harms constituting persecution. It is generally accepted that

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21. During the Board of Immigration Appeals' consideration of Ms. Kassindja's appeal, the INS urged the Board not to rule only on Ms. Kassindja's claim of prospective FGM, but to adopt a broad framework which would also address the claims of women who had already been mutilated. The framework which the INS proposed would have precluded protection in the majority of cases where women had already undergone the procedure. The Board refused to rule more broadly, and in doing so, left the door open for the claims of women who had already been mutilated, allowing for grants of asylum in cases such as these. A finding of eligibility for asylum on the basis of past FGM is consistent with the refugee definition, which permits protection in the cases of past or future persecution. See infra note 23. Where the claim is based on past persecution alone, asylum may be denied in the exercise of discretion unless the past harm was severe or atrocious — adjectives which may apply to the ritual practice of FGM. See Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.13(b)(1)(ii) (1997).

22. For a fuller discussion of this case, see KAREN MUSALO, The Developing Jurisprudence of Gender-Based Claims, in 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 513, 518 (1997).

physical harms (assassination, torture and beatings) rise to the level of persecution and, depending on the circumstances, non-physical harms, such as economic deprivation, discrimination and forced conscription, may also come within the rubric of persecution.\(^{24}\) Notwithstanding that the harm which Ms. Kassindja feared, FGM, was physical, the INS argued that it was difficult to call it persecution where it was “an important cultural right” carried out without a “malignant or punitive” intent.\(^{25}\) The INS proposed that harms which lack a malignant or punitive intent should only be considered persecution where they are so extreme as to “shock the conscience of the society from which asylum is sought.”\(^{26}\) The INS further argued that the mutilation of small female children would not “shock the conscience” since they would be presumed to have consented to the procedure.\(^{27}\)

The author of this article argued against the punitive intent requirement,\(^{28}\) and the Board of Immigration Appeals ultimately rejected the INS’ argument that a punitive or malignant intent is a requisite element for a finding of persecution.\(^{29}\) In so doing, they also declined to adopt a “shock the conscience” rule.\(^{30}\)

The significance of the Board’s holding that a punitive intent is not required for a finding of persecution is underscored by a subsequent Ninth Circuit decision addressing a Russian lesbian’s claim for

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27. Id.

28. The following is excerpted from the author’s oral argument to the BIA against the adoption of a punitive intent requirement:

If a punitive or malignant intent were required to prove persecution... the subjective beliefs of a persecutor, no matter how misguided, could deprive the victim of refugee protection. The results would be cruel and absurd....

[Imagine a society where the majority race believed that the minority race were inferior, and that they could only be purified by physical deprivation and punishment. Imagine further that the minority race were brainwashed into believing that the deprivation and punishment was for their own good. Imagine a particular victim from the minority race who did not believe she needed such punishment and purification. Would her claim of persecution... be defeated by the persecutor’s assertion that his intentions were benign rather than punitive or malignant? ... Whether or not the mutilators in Togo act with a benign intent... the harm which they inflict is persecution....]


29. See In re Kasinga, No. A73 476 695, at 12.

30. See id. at 13.
asylum. The asylum seeker in *Pitcherskaia v. INS*\(^{31}\) had been arrested and beaten a number of times for her sexual orientation and activities on behalf of gay rights. On one occasion she was arrested and beaten for protesting the beating of a gay friend; another time it was for participating in a demonstration demanding the release of the leader of a lesbian youth organization to which she belonged.\(^{32}\) In a later incident she was grabbed and interrogated when she visited an ex-girlfriend at a psychiatric institution.\(^{33}\) The friend had been sent to the institution against her will, and subjected to electric shock and other "so-called ‘therapies’ in an effort to change her sexual orientation."\(^{34}\) Pitcherskaia herself was forced to attend therapy as a "suspected lesbian."\(^{35}\) After several other arrests, Pitcherskaia fled her home country.\(^{36}\)

In a pre-*Kasinga* decision, the Board ruled that the harm which Ms. Pitcherskaia had suffered was not persecution because the government’s intent was to "cure" and not to punish her.\(^{37}\) The Ninth Circuit, quoting *In re Kasinga*, ruled that a "subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution."\(^{38}\) In language which applies to FGM, as well as to other forms of persecution, the Ninth Circuit ruled:

> The fact that a persecutor believes the harm he is inflicting is ‘good for’ his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. . . . Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as “curing” or “treating” the victims.\(^{39}\)

One can imagine the potential consequences had the INS’ proposed requirement of punitive intent, with its “shock the conscience” exception, been adopted. First, there would have been numerous circumstances in which FGM would not be considered persecution. Second, it would have been quite possible that women objecting to institutionalized discrimination under fundamentalist Islamic regimes would have had their claims denied. This could have been the case.

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31. 118 F.3d 641 (9th Cir. 1997).
32. See id. at 644.
33. See id.
34. Id.
35. Id.
36. See id. at 643-44.
37. See id. at 645.
38. Id. at 646.
39. Id.
even in situations where women are prohibited from all educational and employment opportunities, as is the case of women under Taliban rule in Afghanistan, because, arguably, the authors and enforcers of such societal restrictions lack punitive intent and simply believe the discriminatory measures are for the greater good.

The Board of Immigration Appeals’ rejection of a punitive or malignant intent requirement for a finding of persecution is all the more consequential in light of judicial trends which make other elements of the refugee definition more difficult to establish. For example, in order to qualify for protection, the feared persecution must be on account of, or bear a nexus to one of the statute’s five enumerated grounds: race, religion, nationality, political opinion or membership in a particular social group. The U.S. Supreme Court’s 1992 decision, INS v. Elias-Zacarias imposed an intent requirement on the “on account of” element of the refugee definition. Prior to the decision in Elias-Zacarias, an asylum seeker could establish the feared persecution’s nexus to one of the enumerated grounds without proof of the persecutor’s intent. For example, the harm could be deemed “on account of” one of the five grounds if a “but for” relationship could be established, i.e., the harm would not have occurred but for the asylum seeker’s race, religion, nationality, political opinion or membership in a particular social group. After INS v. Elias-Zacarias the only proof which is adequate to establish nexus is proof of the persecutor’s intent or motivation. This has resulted in a substantial narrowing of protection under the Refugee Act. Following the decision in INS v. Elias-Zacarias, which has made it more difficult to establish the “on account of” element of the refugee definition, the adoption of a “punitive or malignant” intent element for persecution would have resulted in an even greater narrowing of protection under the Refugee Act. The significance of this aspect of In re Kasinga was overshadowed by its pronouncement on FGM. The decision’s rejection of a punitive intent requirement, however, may be seen as an even more substantial contribution to asylum jurisprudence.

B. Affirming Social Group Membership as a Means to Establish Nexus in Gender Cases

As discussed above, in order to qualify for protection as a refugee, the feared persecution must be causally linked to one of the statute's five enumerated grounds. In many cases, women asylum seekers are persecuted for the same reasons as their male counterparts; for instance, they are persecuted for their race, religion, nationality or political opinion. However, in numerous other cases, the harm which women asylum seekers fear is not linked to these traditional grounds, but is imposed because of their gender. Gender is not one of the enumerated grounds and failure to establish nexus is fatal to a claim for protection. The United Nations High Commissioner for Refugees responded to the potential failure of women refugees to qualify for protection by suggesting that the social group category be used as a basis for establishing the required nexus in cases of gender-related persecution.\(^{43}\) Canadian Guidelines addressing the claims of women asylum seekers adopted this approach,\(^{44}\) as did Gender Considerations released by the U.S. INS in 1995.\(^{45}\)

In *In re Acosta*, the BIA's earliest decision interpreting "particular social group," the Board ruled that group membership may be defined either by characteristics that an individual cannot change, or that are so fundamental to one's identity that one should not be expected to change them.\(^{46}\) Notwithstanding that gender is an immutable characteristic, the use of the social group theory in gender-related claims proved to be more thorny in practice than in theory. Although it was raised throughout the 1990's in a number of cases, *In re Kasinga* was the first published decision granting protection in a gender-related claim on the basis of social group membership.

The social group in *Kasinga* was defined not only by gender, but also by ethnicity and opposition to FGM. The Board found that Ms.

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44. *See* IMMIGR. AND REFUGEE BOARD OF OTTAWA, CAN., GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER RELATED PERSECUTION (Mar. 9, 1993).

45. INS Considerations for Asylum Officers Adjudicating Asylum Claims From Women, Resp't Br. Ex. 4(3).

Kassindja belonged to the social group of “young women of the Tchamba-Kunsuntu tribe who have not had FGM as practiced by the tribe, and who oppose the practice.”\textsuperscript{47} The majority decision in \textit{Kasinga} did not engage in an extensive discussion of social group, but a concurrence by Board Member Rosenberg provided direction in this developing area of jurisprudence. Board Member Rosenberg’s opinion emphasized the use of the social group category to provide protection “for individuals not falling into the first four specifically enumerated categories,”\textsuperscript{48} which is often the situation of women fearing persecution for gender-specific reasons.

Board Member Rosenberg’s concurrence suggested that the social group theory could be utilized whenever an individual is targeted for persecution because of her \textit{status} as a woman. Applying this analysis, she wrote that:

\begin{quote}
[I]t is surplusage to define the social group in this case [\textit{Kasinga}] by including as an element the applicant’s opposition to the practice of female genital mutilation. . . . [t]he applicant’s political or social views—her attitude or intent—is not relevant to our definition of the social group to which she belongs. . . .\textsuperscript{49}
\end{quote}

Board Member Rosenberg’s discussion of social group appears to have been intended to address an analytical approach in some gender cases where relief was denied because the applicant was not found to have demonstrated sufficient opposition to the particular harm at issue.\textsuperscript{50} Pursuant to Board Member Rosenberg’s approach, if a harm constitutes persecution and the harm is imposed on the woman because of her gender, relief may not be denied simply because the victim failed to express strong opposition to the persecution.

The analytical framework suggested in Board Member Rosenberg’s concurrence has been applied by at least one immigration judge in a decision rendered after \textit{In re Kasinga}. The case involved the claim of a woman fleeing repressive social norms under the Taliban in Afghanistan.\textsuperscript{51} The judge found that these norms, which limited women’s activities in every sphere, amounted to “virtual slavery.”\textsuperscript{52}

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\textsuperscript{48} \textit{Id.} at *44.
\textsuperscript{49} \textit{Id.} at *46.
\textsuperscript{50} See, e.g., Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233, 1240-42 (3d Cir. 1993).
\textsuperscript{51} See \textsc{Musalo}, supra note 22 at 521-22 (citing to Matter of W-D-, No. A73 490 183 (Immigr. Ct. July 3, 1996))(counsel for the applicant was Nancy Hormachea of Oakland, California).
\textsuperscript{52} \textsc{Musalo, supra} note 22 at 521.
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Having found the norms to be unquestionably persecutory, the judge ruled that “[N]either opposition nor abhorrence is necessary. . . . [A]s a member of a particular social group of Afghan women, who are subject to unconscionably restrictive gender-specific laws, the Applicant qualifies for asylum simply because such laws will be applied to her.”

III. BEYOND CASELAW

This Prologue provides a thumbnail sketch of In re Kasinga’s two major contributions to jurisprudence—the rejection of the punitive intent requirement and the firm establishment of social group in gender cases. The decision also added to the developing precedent on credibility in the asylum context. However, no discussion of Ms. Kassindja’s plea for asylum would be complete without considering its consequences beyond caselaw—in other words, its impact on public discourse and policy deliberations.

A. IMMIGRATION POLICY AND THE TREATMENT OF ASYLUM SEEKERS

Ms. Kassindja’s plight rocketed into public consciousness as Congress was considering major reforms to the Immigration and Nationality Act (“INA”), reforms which were subsequently enacted as the Illegal Immigration Reform and Responsibility Act of 1996. One of the most controversial amendments to the INA was a provision, which is now law, mandating expedited removal procedures for arriving noncitizens not in possession of valid travel documents. These expulsion procedures are combined with prescreening measures for asylum seekers.

Pursuant to this statute, an immigration officer may order immediate removal “without further hearing or review” of an individual who arrives without proper documents. There is an exception to immediate removal for individuals who indicate an intent to apply for

53. Id. at 522.
54. The Board did not engage in an expansive discussion of the immigration judge’s credibility determination, but it did explain why none of the factors relied upon by the Immigration Judge were sufficient for disbelieving Ms. Kassindja.
57. See id.
58. Id. § 1225(b)(1)(A).
asylum or a fear of persecution. These individuals are then referred to an asylum officer to determine if they have a "credible fear of persecution." There is only one level of review of the asylum officer's decision regarding an individual's establishment of a credible fear. That review is conducted by an immigration judge, and there is no recourse to the Board of Immigration Appeals or the federal courts.

Opponents of expedited removal pointed to Ms. Kassindjja's case as illustrative of the need for administrative and judicial review, and the dangers of expedited removal. Although expedited removal procedures were ultimately adopted, Ms. Kassindjja's experience contributed to and helped to shape the national debate. In addition, Ms. Kassindjja's story focused attention on the U.S. policy of detaining asylum seekers. Commentators decried the young woman's imprisonment, and raised questions about the wisdom of U.S. detention policy.

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59. See id.

60. See id. § 1225(b)(1)(B). Pursuant to 8 U.S.C. 1225(b)(1)(B)(v), a credible fear of persecution "means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum...."

61. See, e.g., 142 Cong. Rec. 11902 (statement of Sen. Leahy):

Let me share with you the stories of some of those who have recently succeeded in gaining asylum in this country who would most likely have been denied [under the proposed expedited removal law]...

....

I first brought this young woman's case [Ms. Kassindjja's] to the attention of the Senate back in April.... She had sought for 2 years to find sanctuary in the country only to be detained, tear-gassed, beaten, isolated and abused....

Her case established new law.... Hers was a precedent setting case. Does anyone doubt that she would have been returned to Togo if the summary exclusion provision of the bill had been the law? Does anyone honestly think that the immigration agents with whom she came in contact at the border or the immigration judge who denied her claim would have established such a precedent as a case of first impression and rescued her?

See also Anthony Lewis, Slamming the Door, N.Y. Times, Apr. 19, 1996, at 29 (observing that "we are not likely to know about desperate people like Ms. Kasinga [if the legislation is approved]. If their pleas for asylum are turned down... they will not be allowed to appeal.... They will be sent back at once to the land where they face persecution."); Not So Harsh on Refugees, N.Y. Times, Apr. 22, 1996, Editorial, at A12.

62. See sources cited supra note 61.

63. See, e.g., 142 Cong. Rec. E1103 (1996) (statement of Rep. Patricia Schroeder honoring Fauziya Kasinga) (noting that she had been "shackled in chains, tear-gassed and beaten, and forced to spend her 18th and 19th birthdays in prisons intermingled with drug users and murderers."); Linda Bursten, Asylum in America: Does Fear of Female Mutilation Qualify?, Wash. Post, Mar. 17, 1996, at C5 (urging that "Kasinga should be released from prison, and she and other women like her—women who might become victims of what has been called the most harmful custom routinely practiced on earth—should be protected, not further brutalized, by the United States."); Judy Mann, When Judges Fail, Wash. Post, Jan. 19, 1996, at E3 (referring to
Paradoxically, although Ms. Kassindja's case arose in a period of anti-immigrant sentiment, there was an outpouring of sympathy, as well as indignation regarding her long months of detention. Literally hundreds of people from across the country called the offices of her legal team to ask what measures they could take on her behalf to release her from detention. Notwithstanding that the detention policy has not softened since Ms. Kassindja's experience, she continues to serve as a point of reference in discussions regarding U.S. treatment of asylum seekers. In its decision, the Board of Immigration Appeals felt compelled to criticize INS detention policy as applied to Ms. Kassindja.64

B. FGM: Domestic and International Repercussions

The fact that Ms. Kassindja was forced to flee her home to escape female genital mutilation had a powerful impact within the United States. The sustained media coverage broadened the public’s awareness of the ritual practice. It also served to focus attention on the ongoing controversy between cultural relativism and the countervailing universality of human rights perspective. Proponents of a universality approach believe that the rights guaranteed in international treaties apply to all countries and must prevail even when they conflict with cultural or religious practices, while advocates of cultural relativism argue that international norms should not override cultural and religious dictates. At least in the halls of Congress, the concept of universality prevailed, with the enactment of a federal law criminalizing the ritual practice.65 Numerous commentators attributed Ms. Kassindja’s well-publicized struggle against FGM as a contributing factor to the passage of the federal law.66

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64. The majority noted that “the applicant’s detention obviously had an impact on the trial and presentation of this case.” In re Kasinga, 1996 BIA LEXIS 15 (No. A73 476 695). The INS had characterized Ms. Kassindja’s case as one posing an issue of “great importance.” The BIA observed: “In light of that characterization, the applicant’s young age, and her lack of any known criminal record, it is not apparent how the resolution of such important issues was facilitated by the applicant’s long-term detention. The [INS] Commissioner and the General Counsel might well wish to review this policy such future cases of this type arise.” Id.


66. See Thomas Burmeister, “Grit Your Teeth”—Protests Against Female Circumcision Growing, DEUTSCHE PRESSE-AGENTUR, Feb. 1, 1997 (observing that “[t]he bill was triggered by the case of a young woman from Togo in West Africa who fled to the United States to escape circumcision.”); Celia W. Dugger, New Law Bans Genital Cutting in United States, N.Y. TIMES, Oct. 12, 1996, at 1 (stating that “support for [the legislation] . . . included in an end-of-session
In addition to the impact Ms. Kassindja’s struggle for protection had in the United States, it also reverberated beyond the borders of this country. Details of her case were widely reported outside the United States. Ms. Kassindja’s interview on CNN International, for example, broadcast her image and plight across the world, including in her home country.67

But, perhaps most gratifying to Ms. Kassindja is the fact that her well-publicized flight to escape FGM has had an impact very close to home. A number of reporters journeyed to Togo to interview Ms. Kassindja’s family—her aunt, her uncle and the man to whom she had been sold in marriage. Celia Dugger of The New York Times reported on her conversation with the patriarch of the Kassindja family:

Just as Miss Kassindja has brought an awareness of Togo to America, so America has begun to seep into the life of the Kassindja family. The patriarch has been shaken by the persistent queries about a tradition he himself had never questioned.

“Don’t say I’m a bad person,” he pleaded. “This practice came from my forefathers.” He said he would summon family elders to a council, where he said he would argue that genital cutting should end so that no more girls run away.68

IV. CONCLUSION

Ms. Kassindja’s flight from persecution, and the legal decision which resulted from her plea for protection had a broad impact on legal and policy issues which continue to be debated in our society. Her contribution to these ongoing discussions on the domestic and international arenas was substantial. Regardless of the ultimate resolution of many of these issues, the young woman from Togo who refused to accept the norms of her culture has left an indelible mark on history.

67. Members of Ms. Kassindja’s family later told her that they had seen the CNN interview, or spoken to others who had. Moreover, a search in the news file of LEXIS-NEXIS yields hundreds of articles about Ms. Kassindja’s plight, many of which appeared in foreign publications.

68. See Dugger, supra note 1.