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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

A#

IN THE MATTER OF

Binata F

Respondent

Not Detained

AMICUS CURIAE BRIEF

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	v
STATEMENT OF <i>AMICUS CURIAE</i>	ix
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	17
ARGUMENT	19
I. The IJ’s Credibility Finding is Clearly Erroneous	19
A..... Ms. F’s Claim is Detailed, Consistent, Plausible and Candid	19
B..... Summary of the Board’s Standards when Reviewing an IJ’s Credibility Finding	19
CThe IJ’s Credibility Finding is Based on Personal Speculation and Conjecture, not Demeanor, Candor, or Plausibility	
1..... Summary of the IJ’s Credibility Findings	20
2..... The IJ’s Demeanor Finding Has No Explicit or Implicit Basis	21
3..... The IJ’s Plausibility Finding is Baseless	21
a.Plausibility findings must be made in light of country conditions under the Boar’s precedents	
b.The IJ’s conclusion that an educated Senegalese diplomat would not force his daughter into marriage is implausible	
c.The IJ’s conclusion that a man who would force his daughter into marriage would not allow her to marry is implausible	
d.The IJ’s conclusion that Mr. F would not force his oldest daughter to marry when he had other daughters is implausible	
e.The IJ’s conclusion that Ms. F’s insecurity in France is implausible is baseless speculation	
f.The IJ’s conclusion that Ms. F’s urgency in seeking asylum is implausible is baseless speculation	
4.The IJ Ignored the Substantial Corroboration of Record and Failed to Identify Missing Corroborating Evidence	
D.The IJ Erred when He <i>Per Se</i> Rejected Corroborating Affidavits from Ms. F’s Family and Friends as Inconsistent	

E.....	E.	The IJ's	
F.	Ms. F Has Carried Her Burden of Providing Detailed, Persuasive and Consistent Testimony		36
II.....	Ms. F Experienced Past Persecution when She Was Repeatedly Battered		37
A.....	Severe, Repeated Physical Abuse Constitutes Persecution		37
B.	The IJ Erred as a Matter of Law when He Required Ms. F to Demonstrate that Her Father Inflicted Harm		
C.	Because Ms. F Has Demonstrated Past Persecution, a Presumption Arises that She Has a Well-Founded Fear of Future Persecution		
III.....	Ms. F was Persecuted on Account of her Political Opinion		39
A.....	The IJ Wholly Failed to Consider Ms. F's Political Opinion Claim		39
B.....	Ms. F Possesses a Political Opinion and Expressed it Frequently		40
.....	C.	Mr. F's	
IV.	Ms. F was Persecuted on Account of Her Membership in the Particular Social Group of Young, Single Daughters		
A.....	Ms. F's Particular Social Group is Legally Cognizable		45
B.	Ms. F's Father Harmed Ms. F on Account of Her Membership in the Particular Social Group of Young, Single Daughters		
V.....	The Harm Ms. F Fears Rises to the Level of Persecution		50
A.....	Forced Marriage Constitutes Persecution		50
	1. The IJ Erred in Law and Fact when He Concluded that Forced Marriage is Not Persecution		
	2. Forced Marriage Constitutes Persecution under Long-Established Asylum Jurisprudence		
	3. Forced Marriage Constitutes Persecution under International Human Rights Law		55
	4. Forced Marriage Constitutes Persecution under Refugee Jurisprudence from Other Countries		
B.....	Rape Constitutes Persecution		58
C.....	Abduction and Enslavement Constitute Persecution		59
D.....	Serious Physical Abuse Constitutes Persecution		60
VI.	Even Absent the Presumption, Ms. F's Fear of Future Persecution in Senegal is Well-Founded		60

A.....	Ms. F’s Fear is Genuine	62
B.....	Ms. F’s Fear is Reasonable	63
VII.	The Harm Ms. F Fears Will Be on Account of Her Membership in the Particular Social Group of Senegalese	
A.....	Ms. F’s Particular Social Group is Legally Cognizable	64
B.	The Harm Ms. F Fears Will Be on Account of Her Membership in Her Particular Social Group	65
C.	Ms. F will be Subjected to a Forced Marriage on Account of Her Membership in the Particular Social G	
D.	Ms. F will be Subjected to Abduction, Enslavement, Rape and Physical Abuse on Account of Her Men	
VIII.....	The Harm Ms. F Fears will be on Account of Her Political Opinion	67
IX.	The Harm Ms. F Fears will be on Account of her Religion	68
X.....	Senegal is Unwilling or Unable to Protect Ms. F from Her Father and Her Future Husband	70
XI.	Ms. F’s Asylum Application Warrants the Favorable Exercise of Discretion	71
XII.	Ms. F is Eligible for a Humanitarian Grant of Asylum	72
XIII.....	Ms. F is Entitled to Withholding of Removal under the INA	73
A.	Because Ms. F has Established Past Persecution, a Presumption Arises that it is More Likely than Not that Her Life or Freedom Will be Threatened in the Future	73
B.	Even Absent the Presumption, Ms. F is More Likely than Not to Face Threats to Life or Freedom	
XIV.	Ms. F is Entitled to Withholding of Removal under the CAT	74
A.....	The IJ Applied an Incorrect Legal Standard to the Issue of Official Acquiescence	74
B.	Contrary to the IJ’s Finding, the Record Indicates that Official Acquiescence to Ms. F’s Torture is Mor	
C.	The IJ’s Determination that the Severe Beatings Ms. F Endured Were Not Torture is Clearly Erroneous	
D.	The IJ Wholly Failed to Consider whether Forced Marriage, Rape and Domestic Violence Constitute T	

CONCLUSION.....75

TABLE OF AUTHORITIES

U.S. CASE LAW

<i>Al-Saher v. INS</i> , 268 F.3d 1143 (9th Cir. 2001)	42
<i>Arulampalam v. Ashcroft</i> , 353 F.3d 679 (9th Cir. 2003)	21
<i>Avetova-Elisseva v. INS</i> , 213 F.3d 1192 (9th Cir. 2000)	38
<i>Benslimane v. Gonzales</i> , 430 F.3d 828 (7th Cir. 2005)	66
<i>Bolanos-Hernandez v. INS</i> , 767 F.2d 1277 (9th Cir. 1985).....	35
<i>Camara v. Ashcroft</i> , 378 F.3d 361 (4th Cir. 2004).....	20
<i>Cordejo-Trejo v. INS</i> , 40 F.3d 482 (1st Cir. 1994).....	21
<i>Chand v. INS</i> , 222 F.3d 1066 (9th Cir. 2000)	61
<i>Dankam v. Gonzales</i> , 495 F.3d 113 (4th Cir. 2007)	33
<i>Daubert v. Merrell Dow Pharma., Inc.</i> , 509 U.S. 579 (1993).....	65, 66, 77
<i>Del Valle v. INS</i> , 776 F.2d 1407 (9th Cir. 1985)	63
<i>Escobar v. I.N.S.</i> , 896 F.2d 564 (D.C. Cir. 1990).....	57
<i>Fatin v. INS</i> , 12 F.3d 1233 (3rd Cir. 1993)	42, 49
<i>Figeroa v. INS</i> , 886 F.2d 76 (4th Cir. 1989)	22
<i>Gandziami-Mickhou v. Gonzales</i> , 445 F.3d 351 (4th Cir. 2006).....	34
<i>Gao v. Board of Immigration Appeals</i> , 482 F.3d 122 (2d Cir. 2007) <i>vacated, remanded by</i> <i>Keisler v. Gao</i> , 2007 U.S. LEXIS 10267 (Oct. 1, 2007)	21, 49, 50, 56, 68
<i>Ge v. Ashcroft</i> , 367 F.3d 1121 (9th Cir. 2004)	66
<i>Gomez v. INS</i> , 947 F.2d 660 (2nd Cir. 1991)	68
<i>INS v. Elias-Zacarias</i> , 502 U.S. 478 (1992)	45, 74
<i>Koval v. Gonzales</i> , 418 F.3d 798 (7th Cir. 2005)	38

<i>Krastev v. INS</i> , 292 F.3d 1268, 1277 (10th Cir. 2002).....	62
<i>Lian-Jiang v. Gonzales</i> , 489 F.3d 182 (4th Cir. 2007)	23, 35
<i>Lopez-Galarza v. INS</i> , 99 F.3d 954 (9th Cir. 1996).....	62
<i>Lukwago v. Ashcroft</i> , 329 F.3d 157 (3rd Cir. 2003)	63
<i>Matter of Acosta</i> , 19 I. & N. Dec. 211 (BIA 1985)	39, 48, 55
<i>Matter of A-H-</i> , 23 I. & N. Dec. 774 (A.G. 2005)	21
<i>Matter of A-S-</i> , 21 I. & N. Dec. 1106 (BIA 1998)	20
<i>Matter of Chen</i> , 20 I. & N. Dec. 16 (BIA 1989).....	76
<i>Matter of C-A-</i> , 23 I. & N. Dec. 951 (BIA 2006)	51
<i>Matter of DV</i> , Interim Dec. 3252 (BIA 1993)	62
<i>Matter of H-M-V-</i> , 22 I. & N. Dec. 256 (BIA 1998)	40
<i>Matter of J-E-</i> , 23 I. & N. Dec. 291 (BIA 2002)	35
<i>Matter of Kasinga</i> , 21 I. & N. Dec. 357 (BIA 1996)	39, 47, 49, 58
<i>Matter of Pula</i> , 19 I.&N. Dec. 467 (1987).....	74, 75
<i>Matter of S-A-</i> , 22 I. & N. Dec. 1328 (BIA 2000).....	72
<i>Matter of S-M-J-</i> , 21 I. & N. Dec. 722 (BIA 1997)(en banc)	22, 24
<i>Matter of T-Z-</i> , 2 I. & N. Dec. 163 (BIA 2007)	40, 53
<i>Matter of T-</i> , 20 I. & N. Dec. 571 (BIA Oct. 13, 1992).....	55
<i>Matter of [name redacted]</i> , A# redacted, (Atlanta, GA, Imm. Ct., July 3, 2002)	56
<i>Matter of [name redacted]</i> , A#76-512-001 (Chicago, IL, Imm. Ct., Oct. 18, 2000)	56
<i>Menendez-Donis v. Ashcroft</i> , 360 F.3d 915 (8th Cir. 2004)	62
<i>Meyer v. Nebraska</i> , 62 U.S. 390 (1923)	60

<i>Niang v. Gonzales</i> , 422 F.3d 1187 (10th Cir. 2005).....	50
<i>Pitcherskaia v. INS</i> , 118 F.3d 641 (9th Cir. 1997)	39
<i>Sangha v. INS</i> , 103 F.3d 1482 (9th Cir. 1997).....	63
<i>Tadesse v. Gonzales</i> , 492 F.3d 905 (7th Cir. 2007).....	62
<i>Tewabe v. Gonzales</i> , 446 F.3d 533 (4th Cir. 2006)	23
<i>Theck v. Warden, I.N.S.</i> , 22 F. Supp. 2d 1117, 1122 (C.D. Cal. 1998)	57
<i>U.S. v. Farah</i> , Slip op., No. 06-4712 (Aug. 14, 2007).....	36, 38
<i>Zablocki v. Redhail</i> , 434 U.S. 374, 386 (1978).....	61

U.S. STATUTORY MATERIAL

INA § 101(a)(42); 8 U.S.C. § 1101(a)(42)	50, 51, 68
INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii)	30, 36
INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).....	60

OTHER U.S. MATERIAL

8 C.F.R. § 1003.1(d)(3)(i).....	20
8 C.F.R. § 1003.1(d)(3)(ii).....	20
8 C.F.R. § 1208.13(b)(1).....	64, 76
8 C.F.R. § 1208.15	30
8 C.F.R. § 1208.16(b)(1)(i).....	77
<i>Asylum Procedures</i> , 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000).....	30
Federal Rules of Evidence 701-702.....	35
Phyllis Coven, U.S. Dept. of Justice, <i>Considerations for Asylum Officers Adjudicating Asylum Claims from Women</i> , at 9 (May 26, 1995) (U.S. Gender Guidelines)	54

INTERNATIONAL CASE LAW

Decision 01-0668/F1356/cd, Commission Permanente de Recours de Réfugiés, Mar. 8, 2002 ...	60
Entscheidungen und Mitteilungen der Asylrekurskommission [EMARK] [Swiss Asylum Appeal Commission] 93/9 (Switz.)	60
Entscheidungen und Mitteilungen der Asylrekurskommission [EMARK] [Swiss Asylum Appeal Commission] 96/16 (Switz.)	60
MA1-8227, [Aug. 19, 2002] Refugee Protection Division (Can.)	60
Mlle Ayten Tas., Commission des Recours des Réfugiés (CRR), March 4, 2005, 489014. (Fr.).....	60
Mlle Noreen Niaz, Commission des Recours des Réfugiés, SR, Oct. 15, 2004, 444000 [Refugee Appeals Board] (Fr.)	61
Mlle T, Commission des Recours des Réfugiés, SR, July 29, 2005, 519803 [Refugee Appeals Board] (Fr.)	61
TA2-00417, [Nov. 13, 2002] Refugee Protection Division (Can.)	60
TA1-21612, [Sept. 9, 2002] Refugee Protection Division (Can.)	60
T99-07761, [Sept. 27, 2000] Convention Refugee Determination Division (CRDD)	60
T99-098877 [May 17, 2000] Convention Refugee Determination Division (Can.).....	60
T99-14088, [June 2, 2000] Convention Refugee Determination Division (Can.).....	60
<i>Vidhani v. Canada</i> , [1995] 3 F.C. 60 (Can.)	60
V 96/04445, (July 23, 1996) Refugee Review Tribunal (Austl.).....	60

OTHER INTERNATIONAL MATERIALS

Canadian Gender Guidelines, Immigration Refugee Board, <i>Women Refugee Claimants Fearing Gender-Related Persecution</i> § B (1996)	61
U.K. Home Office, Dealing with cases of Forced Marriage - Guidelines for Police, (available at http://www.lbp.police.uk/publications/dealing_with.htm , last visited September 3, 2007)	32, 53

Amicus Center for Gender & Refugee Studies (CGRS), based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-related harm. As recognized experts on asylum issues regarding persecution specific to women and with an interest in the development of U.S. jurisprudence consistent with relevant domestic and international refugee and human rights law, the questions under consideration implicate matters of great consequence to *amicus*, involving important principles of jurisprudence and statutory construction, with broad ramifications for the uniform administration of the laws.

STATEMENT OF FACTS

Respondent, Binata F, (Ms. F), is a twenty-nine year-old woman who was born in Dakar, Senegal on January 19, 1978. *See* Transcript of the Hearing (TR) at 24:15, 17. Ms. F is the daughter of BF (Mr. F) and KSF (Mrs. F). TR 24:20-22; Personal statement of Binata F, Exh. 4, Tab A at 1 (Aff. S. F). She is the oldest of four children. (Aff. S. F); TR 26:6-14. Her father, Mr. F, is a diplomat with Senegal's Ministry of Foreign Affairs. TR 24:22-23. Due to her father's occupation, Ms. F lived overseas for much of her life. Ms. F is a Muslim woman who believes in a moderate, tolerant form of Islam. She supports a woman's right to self determination which encompasses her right to chose her spouse. TR 60:2-5. TR 25:19. Ms. F traveled to Mecca and Medina with her mother and two sisters in August of 2004. TR 25:20-25. Ms. F's father, on the other hand, while he supports a woman's education, believes strongly in traditional gender roles. TR 33.

In January of 1996, Ms. F's father informed her that he had decided that she would marry her cousin, MS. TR 34:1-5. At the time, Ms. F was living with her parents near the capital Dakar. TR 32-33. Ms. F was seventeen years-old, in her final year of high school, and was preparing for her diploma. TR 33:21-22. Her father informed her that the decision was his, had already been made, and that she had no choice in the matter. *Id.* The wedding was to take place in August of 1996, after Ms. F completed her high school education. Aff. S. F at 1.

Ms. F explained her reaction to this news: “[i]t was like a nightmare; I just could not believe that my parents were able to marry me to someone I had never met to that point.” *Id.*

Ms. F immediately told her father that she would not agree to marry her cousin because she did not know M.S. and she did not want to be married yet. TR 34:17-19. She also told her father that he needed her consent in order to marry her. TR 34:19-20. As Ms. F continued to repeat her opposition to the marriage, her father flew into a rage. TR 34:25 - 35: 1. He started to beat her violently: punching her body and slapping her face. TR 35:1-3. When Ms. F tried to run away from him she fell on an earthenware furnace filled with hot embers and burned the back of her right hand, leaving her permanently scarred. TR 35:3-9; October 6, 2007 Aff. S. F at 1. Despite the serious burn, Mr. F continued to beat Ms. F in the stomach and on the face. Aff. S. F at 1. Ms. F sought medical treatment in a nearby clinic for head pain and for the resulting painful bruises that covered her body. TR 35:13-17.

Ms. F explains that, within her Lebou ethnic group, marriage is part of a Muslim woman's religious duty. *Id.* Ms. F's mother opposed the marriage to MS but was powerless to stop it. *Id.* at 6; *see also* Affidavit of Mrs. F, Exh. 4, Tab A at 1 ("I could not express opposition to this marriage . . . [i]n our traditional Muslim culture, to do so would be to go against the will of my husband and also demonstrate a lack of respect towards him.") By the time Mr. F told his daughter of her impending marriage to her cousin, he had already essentially sold her freedom; during an engagement ceremony conducted by the local tribal Chief, Mr. F received a substantial piece of land from MS's family as part of the bride price. *Id.* at 2. Shortly after receiving the land, Mr. F built apartments on it and began to collect rent. *Id.*

Before January of 1996, Ms. F and her father often discussed women's roles, traditions and controversial issues in Senegalese society. TR 59:17-20. Ms. F believes that as a woman, she

has a right to make her own decisions, particularly those as elemental as who to marry, and when to marry. Aff. S. F at 5. Her father always told Ms. F that she had “too westernized, too modern views about women’s role in Senegal, in the Senegalese society.” TR 60: 18-19. He told her that Senegalese daughters should respect their parents’ decisions. TR 67: 20-21. Though Ms. F felt badly about rejecting her father’s customs, she could not tolerate his traditional views on the role of Muslim women in Senegalese society, especially not when it came to her own freedom to choose. Aff. S. F at 5.

Following her father’s harsh beating for her refusal to marry her cousin, Ms. F tried to change her father’s mind on numerous occasions, to no avail. TR 36:21-22. With the help of her mother and sister, she was eventually able to convince him to delay the wedding so that she could pursue her education in France. The expert witness testified that an educated woman is prized as a “trophy wife,” in Senegal (*infra*). TR 91:1-8 Ms. F would only be permitted to study in France if four conditions set by her father were met: (1) M. S. and his family agreed, (2) she was admitted to a University in a city where one of Mr. F’s brothers live (2 of his brothers live in France and each of them is a traditional Muslim), (3) she agreed to be formally “presented” to M S’s family before she left, and (4) she agreed to return to Senegal at the end of her studies. TR 38:3-5, 23-25.

Though she agreed to the conditions, Ms. F dreaded meeting her cousin, who she felt she could never marry. Ms. F was formally presented to her cousin in July of 1996. TR 39:12-16. The day before the presentation ceremony, Ms. F told her father that she did not want to attend. TR 39:25. Her father became furious and beat her very hard, punching her in the stomach, slapping her face and slamming her head into the wall. TR 40:4-10. Ms. F’s head was swollen,

her body was bruised and her mouth was bleeding after this attack, but her father forbade her from seeking outside medical treatment. TR 40:10-21. Ms. F wanted to run away but she knew that the police would not assist her. Aff. S. F at 2. She explained that the Senegalese police do not intervene in family affairs, and that if they did, they would simply have called her father's cousin who works in the Ministry of Internal Affairs, which would have only resulted in further abuse by her father and her immediate marriage to M. S., against her will. *Id.* Ms. F was not aware of any women's shelters in Senegal. TR 50:22-25.

Fearful for Ms. F's life, her mother advised Ms. F to submit to the presentation so that her father would stop beating her. TR 41:2-3; *see also* Affidavit of Mrs. F, Exh. 4, Tab A at 2 ("I was afraid that my husband's violence could wound Binata severely, or even be fatal"). Ms. F followed her mother's counsel. *Id.*

The extended F family attended the presentation ceremony, after which, MS and his family agreed to allow Ms. F to study in France. TR 70:16-18, 41:6-7. At the ceremony, Ms. F learned that MS was fourteen years her senior and already had a first wife. Aff. S. F at 2. She observed that the women in his house all wore veils and understood that she too would be required to do so. Aff. S. F at 2. She later learned that MS regularly beats his current wife. Affidavit of Mrs. F, Exh 4, Tab A at 3. After meeting her cousin and learning about his intended polygamy, his abusive treatment of his wife, his requirement that all women in the home wear veils, and the significant age difference between them, Ms. F's opposition to the marriage was heightened.

Ms. F commenced her studies at a university in the city of Bordeaux, France. TR 41:10-11. As mandated by her father, she lived with her paternal uncle MF for two years. TR 41:19-23. M

was very controlling, pursuant to Mr. F's instructions. TR 42:5-9. Mar placed many restrictions on Ms. F in order to preserve the forced marriage to M S. *Id.* Ms. F was not allowed to go outside the home without her uncle's permission. TR 42:11-13. M monitored her phone calls to prevent communications with males. TR 42:14. Ms. F and M argued on many occasions about these restrictions. TR 42:19-20. He beat her on at least five occasions. *Id.* He punched her stomach and slapped her very hard. TR 42:21-22.

Her uncle's beatings and the impending forced marriage interfered with Ms. F's ability to concentrate on her studies and Ms. F switched her area of study from economic administration to foreign languages because of this. TR 43:14-16; 41:19-22. She constantly felt distressed and experienced stomach pains. Cite. To ease her stress, Ms. F's maternal uncle JS, who lives in the United States, gave Ms. F money to allow her to move into one of the university dormitories for the next two years. TR 43:19-22. Though she lived on her own, she was still under close watch by her uncles. Ms. F obtained her associate's degree in foreign languages with an application in business and international trade in 2000. TR 44:8-10.

Ms. F next attended the University of Lyon in 2001. TR 44:17-22. In Leon, Ms. F was required to live with her paternal uncle, M B F. TR 44:25. Ms. F lived under similar restrictions in M B F's home as in MF's home. TR 45:3-6. She argued often with MBF, who was also very controlling and felt responsible for preserving the marriage. TR 45:3-9. Ms. F obtained her bachelor's degree and master's degree in foreign languages with an application in business and international trade from the University of Lyon in 2001 and 2003, respectively. TR 45:14-18. Ms. F also had a two-month internship in Lyon for which she received a 600 Euro stipend. TR 55.

Ms. F and her mother continued to hope that Mr. F would change his mind about the marriage, especially if Ms. F succeeded academically. *See* Affidavit of Mrs. F, Exh. 4, Tab A at 2; *see also* Affidavit of MT F, Exh. 4, Tab A at 2. Mr. F requested that Ms. F return home to Senegal every summer. TR 46:20. Terrified of the forced marriage, Ms. F managed to consistently avoid doing so by telling him that she had an internship or had to study more for her exams. TR 46:20-22, 25. Finally, in the summer of 2001, Ms. F felt she had no choice but to return to Senegal as her father demanded. TR 47:4-6. Ms. F's father supported her financially during all of her studies. TR 30:25.

Ms. F returned to Senegal for six weeks in the summer of 2001. TR 46:15-16. She hoped that she could change her father's mind about the marriage during this visit and attempted to do so. TR 47:12-14. Not only did Ms. F fail to change her father's mind, she also suffered physical and verbal abuse by her father, as well as domination and confinement for her efforts to do so. She told her father that she would return to Senegal after her studies, but that she would never marry her cousin. TR 47:15-17. Ms. F's father became enraged. TR 47:14. He told her that it was not her decision to make and that he did not need her consent for the marriage to take place. TR 47:17-18. They argued and he beat Ms. F all over her body. TR 47:20-21. He slapped her so hard that she lost her balance, hit her forehead on the wall, and almost lost consciousness. TR 47:21-23.

During this visit, Mr. F beat Ms. F "whenever [she] disagreed with him . . . [b]ecause he wanted [her] to agree with all his decisions . . ." TR 48:10-11. Ms. F was not permitted to leave the house without family supervision, generally a male cousin or uncle. TR 48:17-23. Ms. F's father had taken all of her identity documents from her and used his possession of these documents

to intimidate and coerce her into complying with his demands. TR 49:1-2. He told Ms. F that she had “better behave” if she wanted to return to France to finish her degree. TR 49:6-10. He warned her that as soon as she finished her studies in May of 2006, he would come to France to take her back to Senegal with him to marry, and that if she didn’t come with him at that time, he would beat her again until she accepted. TR 49:12-14. He also told her that the French authorities would not protect her because of his connections to the French government. TR 49:14-15. Ms. F’s mother advised Ms. F to pretend to agree to the marriage to stop the beatings and avoid an immediate wedding. Aff. S. F at 3.

After repeated attacks and degradation by her father, Ms. F took her mother’s advice and pretended to agree with everything her father told her in order to secure her return to France. TR 51:25 - 52:1. Ms. F did return to France in 2001 and has never been back to Senegal since. TR 52:5-13.

After Ms. F finished her studies in Lyon in 2003, she moved to Paris where she obtained an MBA degree in management and international trade in 2005. TR 53:1-2. In Paris, she lived with another paternal uncle, named TF. TR 53:22-25. T also placed extreme restrictions on Ms. F. TR 54:5-6.

Ms. F did not apply for asylum in France. TR 31:4. She felt unsafe there because she was afraid that her three paternal uncles would help her father kidnap her and return her to Senegal. TR 31:6-9. Ms. F believed that the French authorities would not protect her from her father because he is well-connected in France due to his history of diplomatic service there. TR 49-50. Mr. F’s two close friends work in the Ministry of Internal Affairs and the Ministry of Foreign

Affairs in France. The expert witness testified that African immigrants in France do not receive protection from the authorities (*infra*). TR 112-15.

Ms. F received her MBA in 2005. She had an eight-month internship at a car company in the suburbs of Paris. TR 54:13-19. She was paid a nominal stipend of 1,000 Euros for this work. TR 55:1-5.

Ms. F traveled to the United States in August of 2005 to visit her maternal uncle, LS, and her friend and relative, AS. TR 29:1-20. She sought their advice about the looming forced marriage. TR 29:1-5. Ms. F stayed in the United States for five weeks. TR 29:25. Her uncle advised her to apply for asylum at the American Embassy in Paris when she returned. Aff. S. F at 6. Ms. F returned to France and busied herself renewing her French student visa and preparing to start her courses

In September of 2005, Ms. F enrolled in an eight-month masters degree program in management of developing projects in Africa at the University of Paris 11. TR 55:8-10. Ms. F never finished the program because she fled France in December of 2005 after learning that her father had changed his mind and intended to return her to Senegal four months earlier than originally planned. TR 55:19-20.

On November 19, 2005, Ms. F received a phone call from her mother, warning Ms. F that her father would arrive in France in January of 2006, to bring her back to Senegal and enforce the marriage. TR 27:19-23. The wedding was scheduled for June 10, 2006. TR 61:1-2. Ms. F panicked at the news that her father was arriving four months earlier than planned and knew she would not find safety in France. TR 28:3-5. Ms. F understood that she had to flee France. TR

28:12-13. She was in possession of a tourist visa permitting multiple entries to the United States. TR 28:22-23. She left France on December 10, 2005. TR 28:18-20.

Ms. F arrived at Dulles International Airport. TR 31:25. An immigration officer inspected Ms. F upon entry and told her that everything was in order. TR 32:1-2. Ms. F immediately asked him where she could request an application for asylum. TR 32:3-4.

Ms. F is sure that if she returns to Senegal, she will be beaten for her disobedience and forced to marry M S. Aff. S. F at 4. Mr. F is furious with his daughter and even more determined to force the marriage and to physically punish Ms. F for her disrespect and the public humiliation that her fleeing caused him. Affidavit of MT F, Exh. 4, Tab A at 3. Within the Lebou ethnic group, wives and daughters are not to challenge their husbands and fathers. Aff. S. F at 5. Mr. F also fears that he will not be able to become chief if marriage is not performed. Affidavit of Mrs. F, Exh. 4, Tab A at 3.

Ms. F's maternal uncle, LS,¹ is from the same tribe as Mr. F. *See* Affidavit of LS, Exh. 4, Tab A at 2. He explains that Mr. F does not want to be seen as westernized after living so many years abroad as a diplomat. *Id.* He cannot give back the land that he obtained as part of Ms. F's bride price because he built his own house on it. *Id.* The tribal Chief, who is extremely powerful, and who ensures that customs and rules are enforced, can also blackmail Mr. F if he tries to back out of the engagement. *Id.* Mr. F's pension is also at risk because the tribal Chief could easily put pressure on the government to punish Mr. F if Ms. F does not comply. *Id.* Mr. F wants to become

¹LS testified at Ms. F's hearing before the Immigration Judge. Due to a recording or transcription error, this testimony is missing from the transcript. *See* TR 80-81.

a tribal Chief when he retires and must therefore be perceived as someone who keeps his word. *Id*

Ms. F's sister, M T F ("M T"), describes their father as "always loyal to tradition and African culture." *See* Affidavit of MT F, Exh. 4, Tab A at 1. Ms. F's sister fears that a forced marriage lies in her own future. *Id.* She explains that Ms. F begged their father to give up on the marriage but that her father was intransigent. *Id.*

Ms. F has learned that M S has become impatient and angry with her resistance. *Aff. S. F* at 4. The S family has been telling the community that Ms. F will have to be a very submissive, respectful wife or "it will be terrible" for her. *Id.*

Ms. F cannot lawfully return to France with any lasting status because her prior stay in France

was authorized for study only. *TR 30:17-22.* Furthermore, she cannot safely return to France because her uncles and father will be able to find her there. *Aff. S. F* at 4.

M S is a member of an Islamic sect which has a very strict fundamentalist view of Islam and reserves a very restricted role for women. *TR 62:18-20.* M S is already married and has children with his first wife, who opposes the marriage to Ms. F. *TR 62:21-24; Affidavit of M T F, Exh. 4, Tab A at 3.* M S believes that he has the right to beat his wife to make her accept his opinions or to punish her. *TR 63:3-6.* Ms. F explains:

I know that I would never accept his views because I have my own and I believe that I have the right to have my own views and my own views of my tradition and also of my religion. So I would never accept his views of Islam and women's role in that country.

TR 63:10-14.

M S will not allow Ms. F to work outside the home. TR 63:15-17. He will require her to wear a veil and a long body-cover. TR 63:20-25. She will only be allowed to leave the house with permission and supervision. TR 64:1-11.

She fears being forced into a marriage she does not want, with a spouse she did not choose, as well as repeated emotional, physical and sexual abuse at M S' hands. *Id.* Ms. F explains that she "will never accept the marriage and even less be a submissive wife." *Id.* Her disobedience and refusal of his domestic demands are sins under the tenets of Ibadu Rachman. *Id.* Ms. F believes that Islam "teaches us that a man should treat his wife with respect, and that men and women should be viewed as equals in the eyes of God. I believe that, as a woman, I have the right to be treated as a human being." Aff. S. F at 4. Ms. F believes M S will use his Islamic beliefs to control and abuse her. She believes that the authorities will not protect her, that she will be isolated in M S's small village, that she will not be permitted to have a profession and she will be confined to the house and forced to wear a veil. Aff. S. F at 4. She also fears conflict that could arise with M S's first wife who opposes the marriage. Affidavit of M T F, Exh. 4, Tab A at 3.

Ms. F's educational plan had been to obtain a degree that would make her employable in a Senegalese company, an international organization or a non-profit organization. TR 58:5-8. She dreams of obtaining a degree in international studies. TR 65: 11-13. Many of Ms. F's former classmates have gone on to good positions in Senegalese companies. TR 58:13-18. Marriage to her cousin would deprive her of any and all career opportunities. Ms. F has not spoken to her father since November of 2005. TR 59:2. Ms. F explained that it was very difficult and

distressing for her to reject all of her father's beliefs. TR 60:2-4. She has withdrawn from the whole family and is profoundly hurt by her experiences. Affidavit of Mrs. F, Exh. 4, Tab A at 3.

Ms. F would like to be married someday but not right away. TR 65-66. She will choose the person with whom she is married and choose the time for marriage as well. *Id.* She feels that women's rights are respected in the United States and that the country is large enough to allow her to effectively hide from her father.

Ms. F's friend AM (Ms. M), submitted an affidavit describing how she was forced into an unwanted marriage and had to flee to Italy to hide from her family. *See* Affidavit of AM, Exh. 4, Tab A at 1. Ms. M was also born in Dakar, Senegal and is just a few months older than Ms. F. *Id.* She witnessed Ms. F's uncle's possessiveness and was privy to Ms. F's distress about the forced marriage she faced in Senegal. *Id.* Ms. Mane herself returned to Senegal in July of 2004, ostensibly to attend a cousin's wedding. *Id.* at 2. When she arrived in Senegal, her parents informed her that they had decided to marry her to a friend of theirs and that the wedding would be celebrated in two weeks. *Id.* Ms. M's mother confiscated her papers, passport and money and told Ms. M that she would never return to France. *Id.*

When Ms. M objected to the marriage and asked why she had not been consulted, her parents told her only that she had become too westernized and that she would bring shame to the family if she were to marry a white man or non-Muslim. Affidavit of AM, Exh. 4, Tab A at 2. Her parents told her that she had no choice and that they did not need her consent. *Id.* They told her that she would be locked up or physically forced into the marriage if she did not submit, and that no one would help her. *Id.*

Ms. M was kept under constant supervision but managed to communicate with a good friend, who contacted Italian friends of Ms. M's. *Id.* at 3. Ms. M was forced into the marriage against her will on July 22, 2004. She was brought to the house of her new husband who physically and sexually assaulted her. *Id.* She explains that the "after-effects of that night will stay with [her] for [her] entire life." *Id.* With the aid of her Italian friends, who obtained a letter from Ms. M's French doctor, Ms. M escaped under pretense of needing medical care in France. *Id.* Once in Paris, Ms. M narrowly evaded her husband's cousin with whom she was staying, and hid at a friend's house until she escaped to Italy. *See* Affidavit of AM, Exh. 4, Tab A at 3-4. Her father and husband came to Paris to look for her. *Id.* She knew that she would not be safe in France because the French authorities are not concerned with the domestic affairs of foreigners living in their country. *Id.*

Ms. F presented the testimony of Diane Baird, N'Diaye, Ph.D, a cultural anthropologist who works as a Curator and Cultural Specialist at the Center for Folklife and Cultural Heritage at the Smithsonian Institution. TR 81-119. Both parties and the IJ accepted Dr. N'Diaye as an expert in "Senegalese culture," "the role of women [in Senegal]," "the role of women in religious practices in Senegal," and also the "Senegalese immigration communities in the U.S. and France." TR 81:23, 82: 13, 23-25; 83:2, 83:23.

Dr. N'Diaye testified that much controversy surrounds forced marriage in Senegal today. TR 85:10-13. The Senegalese constitution and legislation prohibit forced marriage in name. TR 85:18-21. Within the domain of customary law, however, forced marriage is commonplace. TR 86:1-7. The bride and groom do not even need to be present to be married under customary law.

Id. Polygamy is common. TR 86:21-23. A wife has little say over whether her husband may take a second or third wife. TR 87:9-12. Within a polygamous household, the fist wife has the highest status and the last wife the lowest. TR 87:18-21.

If a woman objects to a forced marriage, she is often socially ostracized and kept in the marriage against her will. TR 13-16. Seeking protection from Senegalese authorities is not a viable option for a young woman fleeing a forced marriage. TR 88. Social networks of families influence how the law actually functions. TR 88:17-19. Authorities often side with family members who are older, wealthier, or better-connected.

Dr. N'Diaye testified that Senegalese women who gain access to modern education and intellectual and professional freedom are valued as “trophy wives” but are also viewed as threats to religious and patriarchal power structures. TR 89:1-6, 91:1-8. If a woman refuses to give her consent to an arranged marriage, she is likely to be viewed as upsetting the patriarchal family order. TR 89:19-25. By resisting, she is not only disagreeing with one person, but with the entire society and the role it has made for her. *Id.*

In the Senegalese culture, great value is placed on the community’s perception of an individual. TR 90:3-9. The father of a daughter who disagrees with him will “lose face” and be perceived as someone who is unable to control his family. TR 90:3-20. On the other hand, it is a point of pride to have an educated daughter who submits to her father’s will. *Id.* Even more pressure is therefore applied to an educated woman, in order to prove that she is still governable. TR 90:17-20. Because Senegal is poised between modernity and tradition, an educated woman is prized as a “trophy wife,” but still expected to remain in the home, raise the children, and to be

ruled by her father and husband. TR 91:1-8. An educated woman is valued more for her status than for the practical application of her studies. TR 91:24-25. She is, however, prized for her ability to educate her male children. TR 92:1-3.

Dr. N'Diaye read the affidavits submitted in this case and spoke to Ms. F. TR 92:4-10. She noted that Ms. F and her father have diametrically opposing opinions on gender roles and marriage. TR 92:14-25. Mr. F wants his daughter to obey his will. *Id.* Ms. F feels that it is her unalienable right to choose who, when, and whether to marry. *Id.* Dr. N'Diaye noted that this is unsurprising because Ms. F lived outside of Senegal during her formative years and because her social setting is more cosmopolitan than the average Senegalese woman. TR 94:15-20. Dr. N'Diaye noted that other young women of Ms. F's generation feel this way. TR 92-93.

The oldest child in Senegal is referred to as the *Tauw*. TR 95:1-16. This is a formal, institutionalized social role which endows the child with special rights and responsibilities. *Id.* Even if the *Tauw* is female, she will be given more education than her younger siblings. TR 95:21-25. The oldest daughter is also married first. TR 96:1-4. The *Tauw* sets the example for all the other children. TR 96:14. Dr. N'Diaye noted that Ms. F's father is likely very concerned that if Ms. F, as the *Tauw*, succeeds in resisting the forced marriage, it will reduce his ability to force his other daughters into marriages of his choosing. TR 96:14-18.

Dr. N'Diaye has performed anthropological field work in Senegalese immigrant communities. TR 97:4-5. She noted that emigrants in these communities tend to become re-traditionalized in their new home. TR 97:2-18. Senegalese individuals who have lived abroad and return to Senegal frequently want to show that they are equally traditional as those who remained

in Senegal. TR 109:1-7. Senegal is ninety-five percent Muslim. TR 93:6-7. When Ms. F's father grew up, traditional patriarchal views of Islam were more popular. *Id.* Dr. N'Diaye noted that Ms. F's uncles in France would have felt the family responsibility to act as guardians while Ms. F was in France, and to control and monitor her activities. TR 98:1-12.

Dr. N'Diaye noted that the Senegalese community in the United States is a younger community without colonial ties and is very different than the Senegalese community in France. TR 98-99. Dr. N'Diaye testified that the French police are not very responsive to the African immigrant community in France. TR 112:18-22. She explained that the colonial background leads to an attitude that domestic violence is just "something that Senegalese or Africans do." TR 115-116. According to Dr. N'Diaye, there is a reluctance to provide social services to the Senegalese French community, much less control domestic violence. *Id.*

Dr. N'Diaye described Ibadu Rachman as a religious ideology that was imported from Pakistan to Senegal. TR 99:11-24. Ibadu Rachman is one of the smallest and most conservative Islamic groups in Senegal. *Id.* In the view of Ibadu Rachman followers, women should remain veiled and their activities outside the house should be curtailed. *Id.* Ibadu Rachman's interpretation of Islam permits a husband to beat his wife if the wife is disobedient. TR 100-01. This is contrary to more moderate readings of Islam. *Id.* A wife within an Ibadu Rachman marriage can be expected to be beat for refusal to engage in sexual relations or for any challenge to her husband's authority. TR 101:5-7. The number and timing of pregnancies is the prerogative of the Ibadu Rachman husband. TR 101:17-25. Birth control is discouraged. TR 101:22. Dr. N'Diaye noted that if Ms. F is returned to Senegal, she would expect M S to react to Ms. F's

disobedience by displaying his dominance over her and punishing her in order to save face in the community. TR 103:10-22.

Dr. N'Diaye stated that, given the societal context, if Ms. F is returned to Senegal she will be subjected to beatings and psychological abuse, physical restrictions, and forced marriage. TR 102:7-16. She stated that it would likely be impossible for a woman to flee a forced marriage in Senegal because Senegal is a small country which functions by virtue of a family-based social network. TR 110:14-25. The police might assist a powerful patriarch by returning his daughter to him if she runs away. TR 111:2-16. Dr. N'Diaye also testified that, because Senegal is a developing country, most of the professional work is centered in Dakar. TR 111:14-16.

Dr. N'Diaye's testimony is further substantiated by the country conditions reports of record. *See* Exh 4, Tab D.

SUMMARY OF ARGUMENT

The IJ's adverse credibility finding, which rests on baseless speculation about the plausibility of Senegalese culture, is clearly erroneous. Country conditions reports and expert testimony of record directly contradict each instance of the IJ's unfounded conjecture. The IJ's rejection of expert witness testimony for lack of personal acquaintance with the applicant contravenes controlling authority. Contrary to the IJ's finding, Ms. F has carried her burden of providing detailed, persuasive, consistent and substantiated testimony.

The opinion below omits any consideration of Ms. F's claims that she was persecuted on account of her political opinion and her religion. Ms. F firmly believes that a woman should have

the right to make her own decisions about marriage and sex, as well as the right to express her opinion about these issues. Ms. F did express this opinion on numerous occasions and was viciously and repeatedly attacked because of it.

Ms. F was also persecuted on account of her membership in the particular social group of young, single daughters from the Lebou ethnic group in Senegal who oppose forced marriage. Because of her membership in this group, Ms. F's father subjected her to physical and emotional abuse.

Ms. F is entitled to a presumption that she has a well-founded fear of future persecution. Ms. F reasonably and genuinely fears future persecution in the form of forced marriage, domestic violence and rape. The IJ's determination that the forced marriage under those circumstances does not constitute persecution contravenes long-established asylum jurisprudence, international human rights law and international refugee jurisprudence.

Ms. F fears that her father will beat her severely on account of her political opinion and membership in the particular social group articulated above if she returns to Senegal. Ms. F also fears persecution at the hands of her father and future husband on account of her membership in the particular social group of Senegalese women from the Lebou ethnic group who have been sold into marriage (whether or not the marriage has taken place). She also fears that her future husband will beat her because of her religion, which differs from his in its views of the role of women in a Muslim society.

The IJ concluded, against the vast weight of the evidence, that Ms. F was safe in France. He further failed to consider the discretionary component of Ms. F's application under the proper

totality of the circumstances test. Instead, he erroneously relied on the outdated and misapplied ‘safe haven’ doctrine to conclude that Ms. F does not warrant the favorable exercise of discretion. The record compels the contrary conclusion that a favorable exercise of discretion is warranted in light of the fact that Ms. F was not safe in France, the severity of the harm Ms. F has suffered and fears, her lack of any criminal history, her well founded fear of persecution, and the presence of her maternal family members in the United States, as well as other substantial equities.

Ms. F also meets the requirements for a grant of humanitarian asylum where she has experienced past persecution and fears other serious harm in the form of beatings, a forced marriage, rape, and domestic violence. She additionally and alternatively qualifies for withholding of removal under both the Immigration and Nationality Act (INA) and the Convention Against Torture (CAT).

ARGUMENT

I. The IJ’s Credibility Finding is Clearly Erroneous

A. Ms. F’s Claim was Detailed, Consistent, Plausible and Candid

Ms. F’s testimony was detailed, internally consistent, plausible and candid. She provided substantial corroborating evidence, including affidavits from individuals with personal knowledge of the facts supporting her claim, expert testimony and country conditions articles. Contrary to the IJ’s finding Ms. F’s testimony was therefore credible.

B. Summary of the Board’s Standards when Reviewing an IJ’s Credibility Finding

When reviewing the decision of an Immigration Judge (IJ), the Board of Immigration Appeals (Board) conducts a *de novo* review of questions of law, discretion, judgment, and mixed questions of law and fact. *See e.g.*, 8 C.F.R. § 1003.1(d)(3)(ii)8 C.F.R. § 1003.1(d)(3)(ii). The Board reviews an IJ’s *factual* finding, however, under a “clearly erroneous” standard. *Matter of A-S-*, 21 I. & N. Dec. 1106 (BIA 1998)*Matter of A-S-*, 21 I. & N. Dec. 1106, 1009 (BIA 1998). All credibility findings are reviewed by the federal courts for substantial evidence. *See e.g.*, *Matter of*

A-H-, 23 I. & N. Dec. 774 (A.G. 2005) *Matter of A-H-*, 23 I. & N. Dec. 774, 786-87 (A.G. 2005). This deference is greatest where the determination is based on demeanor. *Id.* Credibility determinations that are based on the IJ's analysis of testimony, as opposed to demeanor, are granted less deference. *See Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003) *Arulampalam v. Ashcroft*, 353 F.3d 679, 685-86 (9th Cir. 2003); *see also*

1. The IJ's Credibility Findings

The IJ stated that Ms. F was not credible because of: (1) “her *demeanor* while testifying,” (2) the “*plausibility*” of her account, and (3) the “*consistency* of her account.” *See* Decision of the IJ (Dec.) at 16 [emphasis added]. Remarkably, however, the IJ failed to cite a single example of problematic demeanor or inconsistent testimony. Rather, the entirety of his adverse credibility finding in fact rests on purported “implausibilities” in Ms. F’s testimony. However, even the plausibility-basis of the IJ’s adverse credibility finding is fatally flawed.

Every instance of implausibility cited by the IJ is rooted in unfounded personal speculation. Every instance of purportedly improbable behavior is reasonably explained by country conditions reports, fact witnesses, and the expert testimony. The IJ’s credibility analysis involves no mention of these reasonable and glaring explanations. Nor does the analysis provide a rationale for why his baseless conjecture outweighs these reliable, informed accounts.

2. The IJ's Demeanor Finding Has No Explicit or Implicit Basis

After leading his adverse credibility finding with the statement that Ms. F’s “demeanor while testifying” impaired her credibility with the court, the IJ neglected to cite a single instance of Ms. F’s supposedly flawed demeanor. This wholly unexplained characterization is therefore

unsustainable. See *Plausibility findings must be made in light of country conditions under the Board's precedent*

Plausibility does not exist in a vacuum. The Board has long recognized the dependent relationship between general country conditions and plausibility. *Tewabe v. Gonzales*, 446 F.3d 533 (4th Cir. 2006) *Tewabe v. Gonzales*, 446 F.3d 533, 538 (4th Cir. 2006). “If the IJ's adverse credibility conclusion is not based on a specific, cogent reason, but, instead is based on speculation, conjecture, or an otherwise unsupported personal opinion, it cannot be upheld because it will not have been supported by substantial evidence”) [internal quotations omitted]. *Id.*

Two Fourth Circuit cases clarify the highly fact-sensitive distinction between speculation-based implausibility findings and substantial evidence-based implausibility findings. In *Tewabe*, the following unexplained implausibility findings were *not* supported by substantial evidence but were instead based on the IJ's personal speculation:

- (1) the asylum applicant's decision to speak out at a town-hall meeting despite the dangerous political climate in Ethiopia and the prior persecution of her family members,
- (2) the applicant's sudden decision to depart Ethiopia the very morning after speaking out,
- (3) the applicant's application for asylum within days of arriving in the United States.

Lian-Jiang v. Gonzales, 489 F.3d 182 (4th Cir. 2007) 489 F.3d 182, 189 (4th Cir. 2007). The Court of Appeals agreed with the petitioner that “this particular basis for rejecting Lin's testimony rests upon an unsupported implicit assumption that airport officials are equipped to identify citizens sought by family planning cadre.” *Id.*

Like the plausibility decisions in *Tewabe* and *Lin-Jian*, each of the IJ's implausibility-grounds in this case are speculation-based and not determined in light of country conditions evidence as required under *is baseless speculation*

The IJ decided that it is "dubious" that Ms. F's father, "an educated diplomat who has lived abroad" would force Ms. F to marry a poor, uneducated fisherman. Dec. at 17. This characterization of the evidence is flawed, in addition to being baseless. Even if M S was himself poor, his family is not. The S family was wealthy enough to provide a bride-price of real property upon which Ms. F's father built apartments and relied for rental income. M S may not be as educated as Ms. F, but he also was not without education – having completed middle school. Furthermore, the IJ cited nothing in the record to support his idea of what "makes sense" for a powerful Senegalese diplomat from a small village who has already received an impressive bride price.

The IJ ignored the testimony of experts, as well as of witnesses with personal knowledge of the family situation, when he concluded that it was far-fetched for a father to finance nine years of his daughter's university education "and then marry her to a husband who he knows is conservative, poor, abusive and likely to keep her confined to his home." Dec. at 17.

First, the expert witness, Dr. N'Diaye, as well as lay witnesses testified regarding the pressures Mr. F would experience to return to tradition – which would be consistent with his choice of a conservative spouse for his daughter. Dr. N'Diaye testified that Senegalese individuals of Mr. F's generation who have spent many years abroad living in other cultures tend to become re-traditionalized upon return out of a desire to prove that one is just as "Senegalese and as

traditional as anybody who stayed there.” TR 108-109. Many Senegalese men, similarly situated to Mr. F, harbor conflicting desires for modernity and tradition at the same time:

I think [Ms. F’s father] is a man caught in the cross hairs between modernity and tradition, that he wants an educated, it’s a prize to have an educated offspring, I think she is also the *Tauw* and I think that was one thing, part of the privileges of the *Tauw* is to be the one to have the first shot at being educated. So I do think that here you see something that you see very often in Senegal which is the conflict between tradition and modernity going on in the same person.

TR 114: 9-16.

Ms. F’s uncle L S who is from the same Lebou ethnic group as Ms. F’s father, also testified as to the conflict between tradition and modernity. Affidavit of L S, Exh. 4, Tab A at 1. He explained that Mr. F’s education and residence abroad actually make it all the more necessary for him to succeed in forcing the marriage because he “does not want to be seen as somebody Westernized after many years in Europe and other countries as a diplomat.” *Id.* at 2.²

Furthermore, Mr. F’s motives are also explained by his interest in becoming a tribal chief. Ms. F’s mother and uncle both explained that Mr. F cares deeply about the community’s

²“Her father is completely subjected to such strong influence from the tribal chief that his future is on the line as far as this forced marriage is concerned. I believe that the decisions he is making are beyond his control . . .[because] . . .he does not want to be seen as somebody Westernized after many years in Europe and other countries as a diplomat. He [also cannot give back the bride-price land, he could be blackmailed by the tribal chief, his pension hangs in the balance, and his future potential as a tribal chief is as stake].”

perception of his ability to control his family because of his goal of becoming a chief. Thus, despite Mr. F's occupation and travels, he must appear loyal to tradition and custom.

As attested to by the expert, Dr. N'Diaye, there is nothing implausible about the fact that Mr. F allowed his daughter to continue her university education, even though he was marrying her to a man who would keep her confined to the home. Educated women are highly prized for their decorative refinement and their ability to raise educated children, not necessarily their ability to have a career outside the home. TR: 4 (“a wife who has an education is sort of a trophy wife”). It must be assumed that such education would increase Ms. F's value, and her father's reputation. Finally, the IJ's comment that Mr. F would not marry his daughter to a man who is “abusive” has not basis in fact. As demonstrated by the record, Mr. F himself was abusive to his own daughter – hitting and beating her upon numerous occasions.

Dr. N'Diaye's testimony, as well as the testimony of family witnesses explains exactly why Mr. F would forced his daughter into a marriage against her will to M S. Because the IJ ignores relevant lay and expert testimony, his implausibility finding contravenes the statute's mandate that all relevant factors be considered in determining credibility. *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii)

The IJ held that it is “implausible” that Ms. F's father will immediately force her into marriage now because he allowed her to live in France for the last nine years. In so finding, the IJ ignores the specific circumstances that made the delay permissible for nine years. Ms. F pretended to have submitted to the marriage in order to be allowed to study abroad, but no longer is protected by that pretense. Ms. F's study abroad was contingent on her submission to the presentation

ceremony, among other factors. Ms. F's mother was able to delicately negotiate Ms. F's reprieve abroad, but by November of 2005, was no longer able to stem her husband's impatience. Ms. F's family consented to delay the wedding to allow Ms. F to obtain an education out of "goodwill" but no longer harbors such amity. Ms. F's education abroad was also contingent on her submitting to her paternal uncles' careful surveillance, which she subsequently resisted by hiding and fleeing to the United States. Ms. F's education was an acceptable delay because it served to increase her value as a "trophy wife." By hiding, fleeing and seeking asylum in the United States, Ms. F has made it very clear that she will never accept the marriage and will have to be physically forced into it. The IJ's improbability finding is not supported by substantial evidence in light of the internally and externally consistent testimony about the specific facts of this case.

f. The IJ's conclusion that it is implausible that Mr. F would force his oldest daughter to marry when he had not forced his youngest daughters to marry is baseless speculation

The IJ calls it "inconsistent" that Ms. F's father would force her into an unwanted marriage and not pressure her younger sisters into similar circumstances. The Judge uses the word "inconsistent" but points to no discrepancy within the evidence itself. The only discrepancy that exists lies between a fact of record (three unmarried daughters, one forced marriage) and the IJ's own life experience in the United States. The IJ couches his disbelief in the term "inconsistent," but in actuality, this is another plausibility finding.

The requirement that the eldest daughter marry before the other daughters in a family is both plausible and normal in the societal context, as confirmed by the expert witness and the country conditions reports. *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

g. *The IJ's conclusion that Ms. F's insecurity in France is implausible is baseless speculation*

The IJ found it implausible that Ms. F cannot find safety in France and that she made no effort to obtain legal protection there. Dec. at 17.³ The IJ based his incredulity on the contents of one U.S. State Department country report, which does not address the point at issue, but states vaguely that French domestic violence laws are “generally enforced.” Exh. 4, Tab C. The IJ relied on this general report to rebut consistent factual and expert testimony about Ms. F’s particular circumstances. Dec. at 17.

The Department of State report on conditions in France does not apply to Ms. F’s particular circumstances for several reasons.⁴ Ms. F is not a French citizen or resident. Dr. N’Diaye testified

³ It is not part of Ms. F’s burden to demonstrate that she sought assistance in France and did not receive it. Rather, if an asylum applicant “was firmly resettled in another country prior to arriving in the United States,” she would not be eligible for asylum. 8 C.F.R. § 1208.158 C.F.R. § 1208.15. This is clearly not the case here, where Ms. F never received an offer of permanent resident status or citizenship in France. The outdated doctrine of “save haven” is likewise irrelevant here because the safe-haven regulations were repealed on January 5, 2001. *Asylum Procedures*, 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000) *Asylum Procedures*, 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000).

⁴The federal courts have expressed great concern about “the immigration service’s chronic over reliance on [Department of State] reports.” *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004). In more than one circuit, “the determination of whether or not a particular applicant’s fear is rebutted by general country conditions information requires an *individualized analysis* that focuses on the specific harm suffered and the relationship to it of the *particular information* contained in the

that there is great pressure within the Senegalese community not to involve the French police in family problems. TR 97. The French authorities, in turn, ignore violence within the African community. TR 112:13-16.

[among French police] there was a feeling that, [domestic violence] is something that Senegalese or Africans do. There was, especially in the current climate in France, which I witnessed in December when I was there, there was already a reluctance even to give the kind of social services to the Senegalese community, much less adjudicate and misuse domestic violence . . .

TR 116:3-7.

More important, however, is the fact that Ms. F's father has served as a diplomat in France, and had extensive contacts in the French government which created great insecurity for Ms. F. He even warned Ms. F that the French authorities would not help her. TR 50:2-3; 49: 14-15, 18-23. This insecurity was heightened by the presence in France of her paternal uncles, Ms. F was kept under surveillance by her paternal uncles, one of whom beat her on at least five occasions. TR 31:6-9. Ms. F suffered from the physical and psychological effects of her past and ongoing trauma while she was living in France.

The vast weight of the evidence establishes that Ms. F was unable to find effective protection in France. Like Ms. F, Ndeye Astou Mane also felt unsafe in France did not seek

relevant country reports." *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000) *Chand v. INS*, 222 F.3d 1066, 1079 (9th Cir. 2000) (emphasis added); *see also Krastev v. INS*, 292 F.3d 1268, 1277 (10th Cir. 2002) *Krastev v. INS*, 292 F.3d 1268, 1277 (10th Cir. 2002) (stating that reliance on a country report "does not substitute for an analysis of the facts of each applicant's individual circumstances."

asylum there. Affidavit of Ndeye Astou Mane, Exh. 4, Tab A. Rather, she was forced to flee to Italy for protection from her Senegalese family who forced her into an undesired marriage. *Id.*

h. The IJ's conclusion that Ms. F's urgency in seeking asylum is implausible is baseless speculation

The IJ found Ms. F's urgency in seeking asylum in December of 2005, "inconsistent" with her behavior in the summer of 2005 when she visited the United States. Once again there is nothing "inconsistent" within or between the evidence presented. Rather, the IJ merely finds the applicant's account improbable. In so concluding, the IJ again ignores the totality of the circumstances which explain why Ms. F did not apply for asylum until December 2005.

The IJ's own statement of facts mentions the very reasons behind Ms. F's sudden urgency in December 2005. "On November 19, 2005, Respondent received a phone call from her mother stating that her father was coming to France in January to take her back to Senegal, five months earlier than planned. Respondent said that the news surprised and panicked her." Dec. at 7.

His analysis section wholly overlooks these important factors. It overlooks the imminent and unexpected arrival of Ms. F's father in January 2006. It omits any consideration of Ms. F's testimony that she thought she could change her father's mind by the time she was done with her studies, and for that reason has not sought asylum earlier. Affidavit of Carine, Exh. 4, Tab A at 2. It disregards the difficulty of the decision to finally and permanently break with her family, upon whom she had always been financially dependent, and rely on the mercy of a foreign government.

According to the United Kingdom's Home Office, even after a woman has been forced into marriage, the decision to break with tradition and family is difficult and may take many years.⁵

If anything, Ms. F's urgency upon entry to the United States in December of 2005 is additional evidence of her application's veracity. She had already qualified for entry at the airport immigration inspection but rather than slip quietly into the United States, she requested an application for asylum on the spot, subjecting herself to detention.⁶ Because none of the IJ's implausibility findings are supported by substantial evidence under the totality of relevant circumstances, and because the entirety of the IJ's adverse credibility determination rests on unsupported implausibility suppositions, this aspect of the decision must also be reversed.

5. The IJ Ignored the Substantial Corroboration of Record and Failed to Identify Any Missing Corroboration

The Real ID Act of 2005 applies to asylum applications which are, like Ms. F's, filed on

⁵“Many women forced into a marriage suffer for many years from domestic abuse. They feel unable to leave because of the lack of family support, economic pressures and other social circumstances. They may live within a forced marriage for many years before they feel able to challenge the situation.” U.K. Home Office, Dealing with cases of Forced Marriage - Guidelines for Police, (available at http://www.lbp.police.uk/publications/dealing_with.htm, last visited September 3, 2007)U.K. Home Office, Dealing with cases of Forced Marriage - Guidelines for Police, (available at http://www.lbp.police.uk/publications/dealing_with.htm, last visited September 3, 2007).

⁶ Ms. F also passed the credible fear interview while in detention. TR 6:21-22.

or after May 11, 2005. Under the Real ID Act, where the applicant's testimony alone does not sustain her burden of proof, the trier of fact may require corroboration unless not reasonably obtainable. *See*

After determining that Ms. F was not credible for the reasons discussed above, the IJ erred as a matter of law when he ruled that affidavits from family and friends could *never* constitute independent evidence to support an asylum claim where a trier of fact has found the applicant not

credible: “[t]he Fourth Circuit has clarified that affidavits from friends and family are not the independent evidence that *Camara* contemplates.” Dec. at 12 (*citing*

The testimony of Senegalese cultural expert, Dr. N’Diaye supports Ms. F’s claim. The IJ dismissed the expert’s testimony out of hand because of her lack of personal knowledge of Ms. F. Personal knowledge of the individual

⁷ The only witness who did not submit an affidavit is Mr. F. Persecutors are not “likely to provide their victims with affidavits attesting to their acts of persecution.” *Matter of J-E-*, 23 I. & N. Dec. 291 (BIA 2002) *Matter of J-E-*, 23 I. & N. Dec. 291 (BIA 2002) (*citing Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985) *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985)).

⁸ *Camara* also does not apply. 378 F.3d at 370. Under *Camara*, an applicant may still establish eligibility for asylum, despite a legitimate adverse credibility finding, where she provides independent evidence of past persecution on account of a protected ground. *Id.* (“[q]uite apart from *Camara*’s somewhat discredited testimony, [she] presented independent evidence, which the IJ did not discredit, demonstrating that [she] suffered past persecution for her political beliefs”); *see also Lin-Jian*, 489 F.3d at 191 (“[a] determination that [an asylum applicant’s] testimony that he feared [persecution] was not believable does not defeat an asylum claim where there is also evidence of past persecution. *Camara* is inapposite because the adverse credibility finding at bar is not supported by substantial evidence. To the extent that it does apply, it stands for the proposition that independent evidence may establish eligibility for asylum even assuming *arguendo* that Ms. F was not credible.

applicant is, however, not a prerequisite for an expert witness' opinion however. See e.g., *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993) *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 592 (1993). The expert's opinion will have a reliable basis in the knowledge and experience of her discipline, rather than the circumstances of the case being tried. *Id.* “[T]he spirit of” *Daubert’s* rules for qualifying an expert witness in federal trials, “does apply to administrative proceedings.” *United States v. Farah*, where the Court upheld a conviction for using false statements to procure naturalization in violation of 18 U.S.C. § 1425(a). Slip op., No. 06-4712 (Aug. 14, 2007). In *Farah*, the government presented the testimony of Dr. Lee Casinelli, a researcher of Somali culture. *Id.* Dr. Casinelli testified that Somalian clan membership is passed through the father. This testimony established that the defendant had lied about her clan membership. *Id.* The defendant objected to Dr. Cassinelli’s testimony as unreliable because he had not interviewed the defendant, her family or her friends, and therefore lacked the requisite personal knowledge. *Id.* The Fourth Circuit dismissed these contentions, finding that, under *Daubert*, Dr. Cassinelli “did

⁹The Federal Rules of Evidence (FRE) are not binding on the Board but do provide guidance where no statute or regulation specifically governs. *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004). The FRE limit a lay witness’s testimony to those facts, opinions and inferences which are “rationally based on the perception of the witness.” FRE 701 (a). The expert witness provisions contain *no such*

not need personal knowledge of Farah's clan identity or a personal interview with Farah to opine about her clan identity.” *Id.* at 23. His testimony was relevant and subject to cross examination and therefore properly admitted. *Id.*

The IJ’s rejection of D. N’Diaye’s testimony contravenes the holding of *Daubert* and *Farah*. The IJ accepted Dr. N’Diaye’s expertise.¹⁰ DHS did not challenge Dr. N’Diaye’s expertise. TR 20: 4, 10-12.¹¹ The IJ noted that Dr. N’Diaye’s testimony addressed both of his main concerns: (1) “the contradictions between Respondent’s freedom to live in France for nine years and her alleged treatment at home in Senegal,” and (2) the fact that “Respondent’s sisters do not receive the same pressure to marry as Respondent because Respondent is the *Tauw*.” Despite acknowledging her expertise and the relevancy of her testimony, the IJ rejected the substance of Dr. N’Diaye’s testimony because she “has met Respondent on only two occasions” and has “limited knowledge of Respondent’s specific situation.” *Id.*

On the contrary, Dr. N’Diaye did not need to meet Ms. F at all for her testimony to be relevant and reliable and thereby admissible and meriting of full and fair consideration. Rather, an

requirement. See FRE 702. An expert witness’ testimony is permitted where the “testimony is based upon sufficient facts or data . . .” Id.

¹⁰He acknowledged that Dr. N’Diaye’s “credentials indicate cultural knowledge of the Senegalese community.” Dec. at 19. The IJ stated at the hearing that “[i]f she is going to testify with respect to the culture in Senegal concerning the women, I will accept her as an expert in that area.” TR 82:12-14. Moments later he also recognized her expertise in the role of women in Senegalese religious practices as well as in Senegalese immigrant communities in France. TR 82-83.

¹¹Counsel for DHS stated: “I’m happy to agree that she is an expert in the area of Senegalese women. . . “ TR 81:22-23.

expert's opinion is reliable because it is based in the knowledge and expertise of her discipline. Slip op., No. 06-4712 (Aug. 14, 2007) at 23.

Expert testimony must be credited and considered where reliable and probative. Where disregard for an expert's opinions results in the potential *refoulement* of a *bona fide* refugee, careful review is warranted. *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) *vetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000) (“it is particularly troubling to find Dr. Papzian’s opinions, which were the most current and particularized in the record and hence the most salient evidence as to Avetova’s potential future in Russia, discounted in that fashion”).

I. Ms. F Has Carried Her Burden of Providing Detailed, Persuasive and Consistent Testimony

Every piece of evidence in the record recounts the consistent story of a young woman who was subjected to severe violence and will be physically abused and forced into a marriage she opposes if she returns to Senegal. The Real ID requires the adjudicator to apply a totality of the circumstances test, and sets forth factors that he must consider. The IJ recited these rules but failed to actually apply them. He blamed the applicant’s demeanor but could not point to a single flaw in her courtroom presence. He faulted her for inconsistency but identified no discrepancy between any of her statements. Finally, he called the testimony implausible but every single item that he found improbable is fully plausible in the context the record provides. The IJ’s opinion does not effectively discount any of the evidence and contravenes the statute by failing to consider all of the relevant factors. His opinion also overlooks Ms. F’s demeanor, candor, accuracy and responsiveness.

Because Ms. F carried her burden of providing detailed, persuasive and consistent testimony, and because the IJ’s adverse credibility determination is clearly erroneous, Ms. F has

met her burden under the Real ID Act. Ms. F also provided corroborating evidence which is internally and externally consistent and was entered into the record at full weight, with no objection from opposing counsel. Ms. F has therefore met every standard of credibility outlined in

A. Severe, Repeated Physical Abuse Constitutes Persecution

The IJ's finding that Ms. F has not experienced past persecution is independent from his adverse credibility finding. "If some appellate body should redress this Court's credibility finding, it still finds no past persecution or fear of future persecution." Dec. at 19.

Ms. F endured repeated severe beatings. Serious physical harm is the prototypical example of harm rising to the level of persecution. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); *Matter of Acosta*, 19 I. & N. Dec. 211, 222-23 (BIA 1985). It is well-established that the persecutor's subjective intent is irrelevant for asylum purposes, as long as she is motivated by the protected ground. *See e.g., In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) ("subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution"); *see also* 8 C.F.R. § 1208.13(b)(1); 8 C.F.R. § 1208.13(b)(1). The burden of proof then shifts to DHS to rebut the presumption by demonstrating, by a preponderance of the evidence, that there has been a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution." Because Ms. F has demonstrated past persecution (*supra* section II), she is entitled to a presumption of a well-founded fear of persecution.

Because she has established past persecution, it is the DHS' burden to demonstrate that Ms. F can obtain safety from persecution by relocating within Senegal, and that it would be reasonable under all the circumstances for her to do so.

A. The IJ Wholly Failed to Consider Ms. F's Political Opinion Claim

Ms. F advanced her asylum application under three legal theories: political opinion, membership in a particular social group and religion. TR 136: 6-25, 137. The record is replete with evidence supporting each of these three theories. Despite this, and although the IJ noted that INA § 208 contemplates asylum for an individual who is persecuted on account of her race, religion, nationality, membership in a particular social group or political opinion, the IJ completely omitted any analysis of Ms. F's political opinion and religion-based claims. This failure to adjudicate was clear legal error and cannot withstand review.

B. Ms. F Possesses a Political Opinion and Expressed it Frequently

^{12c} . . . Senegal is a relatively small country and works by means of social networks and so it would be very, very difficult for someone within Senegal to run away and to get lost because there are extended families and there are also extended pseudo-families. Because there is a very strong system of patronage, so that as a man of, as a person of influence. A person of influence has a lot of ties by virtue of his standing and by virtue of the money that he has to circumvent the law, and also to find out where people are. And it's a poor country, so there is, you know, there's a lot of incentive for people to follow the wishes of a rich and powerful man." *Id.*

Ms. F's opinion that a woman should have the right to make her own decisions about marriage and sexual relations is political. Had the IJ considered this basis for asylum, he would have been compelled to find that she has a political opinion and was persecuted on account of it.

Political opinion is broader than electoral politics. *See e.g., Fatin v. INS*, the Third Circuit recognized that what it termed "feminism" or opposition to "the government's gender-specific laws and social norms" in Iran was clearly a political opinion. 12 F.3d 1233 at 1241 (3rd Cir. 1993) ("we have no doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes").¹³ Here, Ms. F possesses and expressed a deeply held political opinion that a woman should have the right to make her own decisions about marriage and sex, as well as the right to express her opinion about these issues.¹⁴ Such views about gender roles are recognized as political opinions. *See e.g., Fatin* 12 F.3d at 1241. That Ms. F's opposition to forced marriage is within the political realm in Senegal is made clear by the fact that the Senegalese constitution prohibits forced marriage, although this ban is not enforced, or even widely known. TR 85:18-19. What issues may be called political, if not those that are the subject of the highest laws? Dr.

¹³The *Fatin* Court ultimately found that the petitioner did not have a well-founded fear of persecution, but this in no way detracted from the recognition that opinions about the role of women in a society constitute political opinions in the asylum-law context.

¹⁴Ms. F testified that she "would like to get married some day but it's not my first occupation right now and I would take my time and make my own decision. I will choose the person with whom I would like to be married and I would choose also the moment." TR 65-66.

N'Diaye stated in her affidavit to the Court that, not only is the issue of forced marriage a political topic in Senegal, it is a topic at the *forefront* of political discourse.

The issue of forced marriage is one that, in Senegal, is the subject of ongoing and quite animated debate and struggles, with some affirming it as a legitimate traditional practice that still holds much value in the life of women, while others label it a harmful traditional practice that is oppressive of women and a major barrier to individual freedom of choice and self-fulfillment.

“Testimonial on Forced Marriage,” Diana Baird N'Diaye, PhD, Exh. 4, Tab D at 1.

Ms. F expressed her political opinion on many occasions. She testified that she had discussed her beliefs with her father before 1996 and that he had responded, even then, that Senegalese women should respect their parents' decisions on the subject. TR 67. This rift exploded in violence when the theoretical became actual. In January of 1996, Ms. F's father told her about the marriage he had planned for her. TR 34. Ms. F told her father that she did not want to be married at that time, did not want to be married to someone that she did not know, and asserted that her consent was required. *Id.* She kept repeating her objection to the marriage and her father, enraged, began to beat her viciously, telling her that her consent was not needed. *Id.*; TR 34. Between January and October of 1996, Ms. F tried to change her father's mind with speech on numerous occasions. TR 42.

In the years that followed in France, Ms. F and her uncles also argued frequently. TR 42, 45: 1-6. Her uncles were very controlling and kept her under tight surveillance. *Id.* From France, on the telephone with her father, Ms. F “begged him to give up the idea” of forcing her to marry. *See* Affidavit of M Top F, Exh. 4, Tab A at 2. Ms. F confided in her friend, N M,¹⁵ that she

¹⁵Ms. M also hid Ms. F in France in her first days in flight. *Id.*

opposed forced marriage as a violation of “the fundamental principal of a person’s having individual liberties.” Affidavit of NICM, Exh. 4, Tab A at 2. In the summer of 2001, Ms. F returned to Senegal:

I wanted to have maybe the chance to make my father change his mind so I was trying to do so but he got very, very angry because I told him that I would come back to Senegal after my studies but I told him that I would never get married to my cousin. So he told me that it wasn’t my decision but his, and that he didn’t need my consent to do so.

TR 47:12-18.

Ms. F’s mother appears to hold a somewhat related opinion, but chooses not to express it and thereby avoids the severe repercussions of such expression:

Faced with this situation, I could not express opposition to this marriage. In our traditional Muslim culture, to do so would be to go against the will of my husband and also demonstrate a lack of respect towards him. I am completely distressed by the situation, but through loyalty and respect I am condemned to remain powerless.

Affidavit of KS F, Exh 4, Tab A, at 2.

The record thus establishes that Ms. F possesses and expresses a political opinion.

C. Mr. F Harmed His Daughter on Account of Her Political Opinion

An asylum seeker must establish that a reasonable person would understand the persecution to be "on account of" one of the five statutory grounds. *See* INA § 208 (b)(1)(B)(I), 8 U.S.C. § 1158(b)(1)(B)(I).

Ms. F has met her burden of providing “some evidence” direct, or circumstantial of the persecutor’s motivation. *Elias-Zacarias*, 502 U.S. at 483-84. Ms. F’s views about women, gender roles and marriage are diametrically opposed to her father’s. Ms. F believes that she has an

inalienable right to make her own decision in marriage and has a right to express her views on gender roles. Her father believes that the decision of whether, when and whom Ms. F will marry is “his decision and also a family decision,” that she has “nothing to say about it,” that he does not need her consent and has the right to force her to marry. TR 34:1-5, 17-21.

The IJ’s own factual summary reveals the unmistakable connection between Ms. F’s political opinion and the violent thrashing she received on each occasion that she expressed that opinion to her father. “Respondent notes that she objected to the plan [of marriage], and her father beat her in the stomach and on the face.” Dec. at 3. “Respondent notes that when she objected to [being presented to M S and his family], her father slapped, punched and slammed her into a wall.” Dec. at 3. “According to Respondent, she visited Senegal in July 2001 and tried to talk her father into changing his mind about the marriage to her cousin. She notes that her father became violent when she objected to the marriage, and he beat her.” Dec. at 3-4. The IJ himself mentions the telling fact that Ms. F’s “mother suggested that she tell her father she accepted the marriage so he would stop beating her and not force an immediate marriage.” Dec. at 4. As soon as Ms. F acquiesced and pretended to agree with her father, he “allowed her to return to France [temporarily].” *Id.*¹⁶ No reasonable fact finder could fail to see the obvious nexus between Ms. F’s political opinion and her father’s blows.

¹⁶If a communist dictator mercilessly beat a dissident until he wrote a letter disavowing his earlier opposition and pledging allegiance to a communist agenda, at which point the beatings stopped, an Immigration Judge would be compelled to find that the beatings were motivated by the dissident’s political opinion. The same is true here.

Ms. F's mother explains her husband's motivation:

Upon seeing her stubbornness in refusing the marriage, my husband became agitated and began to beat my daughter violently, *repeating to her again and again that her opinion did not matter* and that it was not she who made decisions in the house. I tried to intervene and reason with my husband, but he took me out of the room and continued to beat her. . . . Each time that we broached the subject of marriage, my daughter continued to oppose my husband, which did not nothing but intensify his anger and violence.

Affidavit of K S F, Exh 4, Tab A, at 2 [emphasis added].

Ms. F explains that in the summer of 2001, when she returned home and again voiced her opposition, her father beat her after she again "tried to change his mind" and they "got into an argument." TR 47:12-22. Thereafter, during that visit, he beat her "whenever [she] disagree[d] with him . . . [b]ecause he wanted [her] to agree with all his decisions while [she] was there." TR 48:9-11. In 2001, once again, Mrs. F convinced her daughter to pretend to agree with her father in order to gain the limited freedom to return to France to finish her studies. TR 51-52.

The "on account of" or so-called "nexus" requirement can also be established by showing broader societal reasons for the persecution. *Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996). This explains both the motivation of the individual in the societal context, and the failure of the state to intervene. If the state is unwilling to intervene then the agent of persecution is emboldened to act with impunity. Here, despite the fact that Article 18 of the Senegalese Constitution prohibits forced marriage, "marriage rights [are] not enforced because of socio-cultural pressures, judicial reluctance to enforce the law, and a lack of information on marriage laws." U.S. Dept. of State Report, Exh. 4, Tab C. Spousal abuse is widespread and laws to protect victims are not enforced.

Id. Police in Senegal do not intervene in domestic disputes. *Id.* Spousal rape is not considered a crime. *See* Exh. 4, Tab D at 6.

According to Dr. N'Diaye, “[w]hen women [in Senegal] gain access to modern education and intellectual and professional freedom, they are viewed as threats to religious and patriarchal power structures.” TR 89. When Ms. F’s father grew up, the patriarchal view of Islam was even stronger in Senegal. TR 93. To men of his generation, especially those that have been abroad and fear being seen as westernized, there is a need to be seen as traditional, African, Muslim, and in control of his household. TR 105. If a woman refuses to give her consent to an arranged marriage she will be viewed as a threat to the patriarchal family order. TR 89.¹⁷ In light of this evidence, a reasonable fact finder can only conclude that Mr. F was motivated to beat his daughter because of her expression of opposition to the forced marriage.

VI. Ms. F was Persecuted on Account of Her Membership in the Particular Social Group of Young, Single Daughters from the Lebou Ethnic Group in Senegal Who Oppose Forced Marriage

A. Ms. F’s Particular Social Group is Legally Cognizable

Ms. F’s father persecuted her on account of her membership in the particular social group of young, single daughters from the Lebou ethnic group in Senegal who oppose forced marriage. For the purposes of asylum law, a ‘particular social group’ is one united by a common innate characteristic that its members either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. *See Fatin*, the Third Circuit determined

¹⁷“ . . .by disagreeing, she is not only disagreeing with one person, she is disagreeing with basically what the society has as a role for her.”

¹⁸*Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005); *Gao v. Gonzales*, 440 F.3d 62, 67 (2nd Cir. 2006) *vacated, remanded on other grounds by Keisler v. Gao*, 2007 U.S. LEXIS 10267 (Oct. 1, 2007); *Fatin v. INS*, 12 F.3d 1233, 1239- 40 (3d Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d

that the applicant, as a woman, was a member of a particular social group under the INA. 12 F.3d at 1240-41.²¹ In 440 F.3d at 68, *vacated, remanded by Keisler v. Gao*, 2007 U.S. LEXIS 10267 (Oct. 1, 2007). The Supreme Court recently vacated and remanded this case to the Second Circuit for “further consideration in light of [the Supreme Court’s decision in] *Gonzales v. Thomas*, 547 U.S. 183 (2006).” *Id.* In *Thomas*, the Supreme Court vacated the Ninth Circuit’s decision for failure to apply the proper deference to the Board to determine factual issues under *INS v. Ventura*, 537 U.S. 12 (2002). *Id.* The Supreme Court held that the agency had not yet had the opportunity to consider whether the particular family at issue constituted a particular social group. *Id.* Importantly, the Supreme Court’s decisions in both *Gao* and *Thomas* do not address the appellate courts’ substantive social group analyses, and instead deal solely with the appropriate scope of the factual review. As such, the Supreme Court did not upset (and implicitly recognized) the Second Circuit’s holding that such a social group is cognizable in certain instances.

533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir. 1998); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005).

¹⁹See e.g., *Islam (A.P.) V. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A 11 E.R. 545 (H.L. 1990); *Canada (Att’y Gen’l) v. Ward*, [1993] 2 S.C.R. 689.

²⁰See DHS’s Position on Respondent’s Eligibility for Relief, Feb. 19, 2004, at 27-28, available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf [visited September 6, 2007] (arguing that “married women in Guatemala who are unable to leave the relationship” are a particular social group under the law).

²¹The Court did not overrule the denial of her asylum application for other reasons. *Id.*

Ms. F's particular social group is analogous to the groups defined in *Kasinga* and *Gao*. Here too, the group is defined by the following immutable and fundamental characteristics: gender, marital status, familial status, ethnicity and nationality. Ms. F is powerless to change her gender, ethnicity, familial status and nationality. She should not be required to change her marital status or her opposition to forced marriage as these characteristics are fundamental to her individual identity and conscience.²²

The size of a particular social group is not the proper basis for an asylum denial. According to the United Nations High Commissioner for Refugees:

²²*See supra* section C.2, (Ms. F's opinion that she should be free from forced marriage is fundamental).

The size of the group has sometimes been used as a basis for refusing to recognise women generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate or that every member of the group is at risk of persecution.²³

The Second Circuit reasoned that:

[*Fatin* may be read to state that] the proper balance is to interpret ‘particular social group’ broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting ‘on account of’ strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution) . . .the focus with respect to [gender-related] claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.

Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005)*Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005).

Not every young, single daughter from the Lebou ethnic group in Senegal who opposes forced marriage will qualify for asylum of course. Not every member of a given race, religion or political organization will do so either. Other criteria in the refugee definition limit asylum grants to those young, single daughters from the Lebou ethnic group in Senegal who oppose forced marriage: (1) who actually want to leave their families and homes, (2) who manage to escape, (3) who have a well-founded fear of persecution or have already experienced persecution, and (4) whose persecutors are motivated to harm them by the protected characteristics.

²³United Nations High Commissioner for Refugees Guidelines on International Protection: Gender-Related Persecution (HCR/GIP/02/01, 7 May 2002), ¶ 31 (“UNHCR Gender Guidelines), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

The Board recently stated that a particular social group will “generally be recognizable by others in the community,” have “social visibility” and be “perceived as a group by society.” *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006) *In re C-A-*, 23 I. & N. Dec. 951, 959-60 (BIA 2006). The IJ himself acknowledges that “being young, female, and Senegalese may be highly visible.” Dec. at 20. Country conditions reports and expert testimony demonstrate the social visibility of Ms. F’s group within Senegalese society. “On a regular basis, girls as young as 13 years old and women across a broad age and class range face the prospect and reality of [being forced into marriage]” Testimonial on Forced Marriage, Diana Baird N’Diaye, PhD, Exh. 4, Tab D at 2. Various Senegalese directors, artists and musicians use their art to draw attention to the plight of single young girls and women in Senegal. *Id.* The group of young, single, daughters in Senegal who *oppose* forced marriage is growing. *Id.* (“More and more young women, such as Ms. Binata F, who are in danger of being obliged to submit to this practice, are opting for life away from their home communities and countries”).

C. Ms. F’s Father Harmed Ms. F on Account of Her Membership in the Particular Social Group of Young, Single Daughters from the Lebou Ethnic Group in Senegal Who Oppose Forced Marriage

The IJ determined that Mr. F did not beat his daughter on account of her membership in a particular social group. “Respondent’s claim of past persecution, however, ultimately fails because she has not shown that her father beat her to overcome her membership in the particular social group she describes.” Dec. at 19.

Mr. F’s actions demonstrate that he was motivated by Ms. F’s status as a young, single, daughter from the Lebou ethnic group in Senegal who oppose forced marriage when he beat her severely on numerous occasions. The “on account of” requirement is satisfied where an applicant demonstrates that the persecution occurs *because of* the protected ground. *See e.g., Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (“there is little question that genital mutilation occurs to a particular individual because she is a female . . . possession of the immutable trait of being female is a motivating factor -- if not a but-for cause -- of the persecution”); *see also Hassan v. Gonzales*, 484 F.3d 513, 518 (9th Cir. 2007). Here, Mr. F believes that, as the father and head of household, it is up to him, and him alone, to make decisions about Ms. F’s marital status. He told

Ms. F that Senegalese daughters²⁴ should respect their parents' decisions when it comes to marriage. Were it not for Ms. F's gender, age, ethnic group, nationality, status as a daughter, and opposition to forced marriage, she would not have been beaten by her father.

VII. The Harm Ms. F Feels Rises to the Level of Persecution

A. Forced Marriage Constitutes Persecution

1. The IJ Erred in Law and Fact when He Concluded that Forced Marriage is Not Persecution

The IJ held that “[i]t is the opinion of the Court that forced marriage does not constitute persecution.” Dec. at 19. The IJ's legal conclusion that forced marriage is not persecution contravenes international and domestic refugee law.

The Board's recent decision in *In re A-T-* for denying asylum to a woman from Mali who had experienced female genital cutting and who feared an arranged marriage to her cousin, is distinguishable from Ms. F's circumstances for several reasons. 24 I. & N. Dec. 296 (BIA 2007). First, the marriage at issue in *A-T-* was an arranged marriage, not a forced marriage. *Id.* at 302-03. The Board determined as a factual matter that the marriage in *A-T-* involved the “reluctant acceptance of family tradition over personal preference.” *Id.* at 303. This contrasts sharply with Ms. F's absolute and uncompromising rejection of the marriage her father wishes to force her into. Second, the applicant in *A-T-* does not appear to have explicitly rejected the marriage nor to have experienced any verbal or physical abuse for her opposition. Again Ms. F's circumstances are vastly different. Third, the applicant in *A-T-* presented no evidence about any consequences for her refusal to submit to the marriage. *Id.* at 303 (“[A-T-] gives little indication of what [her father]

²⁴Ms. F explained: “[i]f I were a boy everything would have been different.” Aff. S.F at 1.

might do if she disobeys him.”) Ms. F will clearly be seriously physical injured for refusing. Fourth, while “it appears that the respondent [in *A-T*] and her intended fiancé are of similar ages and backgrounds,” Ms. F and M S differ in age, religion, political views, current marital status and education. *Id.* at 302. Fifth, the applicant’s uncle in *A-T* testified that the applicant could relocate within Mali to avoid the marriage. The same is not true for Ms. F (*see infra* section XIII.A).

Ms. F does not face an *arranged* marriage, but a *forced* one. Many of the world’s marriages are arranged, based on a mutual consensus between the spouses and/or their parents. A forced marriage is distinguished by the overt coercion involved.²⁵ Dr. N’Diaye testified that forced marriage is “a marriage made by coercion in which the prospective wife does not agree with the marriage that has been arranged for her and coercion can be either physical or verbal through threats.” TR 84-85. The Board recently held that an abortion is not forced “unless the threatened harm for refusal would if carried out, be sufficiently severe that it amounts to persecution.” *In*

²⁵ U.K. Home Office, *Dealing with cases of Forced Marriage - Guidelines for Police*, U.K. Home Office, *Dealing with cases of Forced Marriage - Guidelines for Police*, (“a clear distinction must be made between a forced marriage and an arranged marriage. In arranged marriages the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals. In forced marriage at least one party does not consent to the marriage and some element of duress is involved.”) available at http://www.lbp.police.uk/publications/dealing_with.htm, [last visited September 3, 2007].

INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).²⁶ This provision does not apply to the instant application. However, the Board’s rationale as to when an activity is “forced” is applicable here because it provides an analytical framework for determining when a marriage is *arranged* and when it is *forced*. The union Ms. F fears is forced because it is coerced by threats of harm and beatings that a reasonable person would objectively view to be genuine and because the harm that is threatened, if carried out, would rise (and did rise) to the level of persecution.

The evidence of record conclusively establishes that Ms. F faces a forced marriage, not an arranged one. Neither Ms. F’s father, her future husband, nor her in-laws were willing to consider her consent or opposition. Quite the opposite, Ms. F was punished severely for expressing her opposition. Ms. F immediately voiced her opposition to the planned marriage when she first heard about it in January of 1996 and was battered and brow-beaten in response. TR 34. Her father told her that he did not need her consent to marry her off and that he would do anything necessary to force her to marry her cousin. *Id.* Ms. F repeated her staunch opposition on that occasion and on “many occasions” in the years that followed. TR 36:21. Ms. F expressed her opposition again on

²⁶ “. . . a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion . . .” *Id.*

the day before the presentation ceremony and was thrashed as a result. TR 39-40. She only attended the ceremony “in order to make [her] father stop the beatings.” TR 41:2-3.

In France, Ms. F’s paternal uncles closely monitored and controlled her life. TR 42-45. Her uncle M beat her when she did anything to threaten the successful performance of her father’s promise and the intact delivery of the goods that had been bartered (a chaste and unattached bride).²⁷ TR 42. Her uncle Mo. restricted and controlled her as well. TR 45.

On her next visit to Senegal, in 2001, Ms. F again attempted to plead with her father and change his mind. TR 47. She told him she would “never get married to [her] cousin.” TR 47:16. Mr. F told Ms. F that if she did not follow him back to Senegal in May of 2006, when he came to collect her, he “would beat [her] again until [she] accept[s].” TR 12-14. Upon learning of her father’s intent to come to France early, Ms. F knew her father would force her to return to Senegal and marry against her will. Ms. F’s flight from France to the United States was the final expression of her abhorrence for the marriage her father had sold her into. These facts necessitate the conclusion that Ms. F fears a forced marriage and not an arranged marriage. The IJ’s contrary conclusion must be reversed.

2. Forced Marriage Constitutes Persecution under Long-Established Asylum Jurisprudence

²⁷“I could not go to any party with my friends or have a boyfriend, as I was already promised to my cousin.” Aff. S. F at 2. “Whenever a friend called me at home, [my uncles] always questioned me to make sure that it was not a man. And when they did not believe me, they beat me, because they had been given this permission by my father.” *Id.*

Forced marriage constitutes persecution, whereas arranged marriage has been called “unfortunate.” *A-T-*, 24 I. & N. At 302. The Board has long defined persecution as “the infliction of suffering or harm upon those who differ in a way regarded as offensive.” *Matter of T-*, 20 I. & N. Dec. 571 (BIA Oct. 13, 1992)*Gao v. Gonzales*, the Second Circuit vacated the agency’s decision and held that an asylum applicant had established that the forced marriage she fears is persecution.³⁰ 440 F.3d 62 (2nd Cir. 2006), *vacated, remanded by Keisler v. Gao*, 2007 U.S. LEXIS 10267 (Oct. 1, 2007) (as addressed *supra* in section IV.A, the Supreme Court’s subsequent decision vacated *Gao* for conducting *de novo* review of a factual matter and did not upset the Second Circuit’s determination that forced marriage may constitute persecution in certain instances). In *Matter of [name redacted]*, A# redacted, (Atlanta, GA, Imm. Ct., July 3, 2002)*Matter of [name redacted]*, A# redacted, (Atlanta, GA, Imm. Ct., July 3, 2002), an IJ granted asylum to a woman facing forced polygamous marriage.

²⁸ The United States Supreme Court recognizes the UNHCR Handbook as guiding authority for interpreting asylum law. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 n. 22 (1987). *See also* U.S. Dept. Of Justice Proposed Asylum Rule, 65 Fed. Reg. 76588, 76590 (Dec. 7, 2000) (recognizing that the UNHCR Handbook provides guidance for defining persecution).

²⁹*See* Phyllis Coven, U.S. Dept. of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, at 9 (May 26, 1995) (U.S. Gender Guidelines).

³⁰The Court also recognized that the persecution is on account of her membership in the particular social group of women who have been “sold into marriage (whether or not that marriage has taken place) and who live in a part of China where forced marriages are considered valid and enforceable.

Other areas of American jurisprudence also recognize that marriage is a fundamental freedom. In *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) *Meyer v. Nebraska*, where it held that the Due Process clause protects the liberty “to marry, establish a home and bring up children.” 62 U.S. 390 (1923); *see also Theck v. Warden, I.N.S.*, 22 F. Supp. 2d 1117, 1122 (C.D. Cal. 1998) *Theck v. Warden, I.N.S.*, 22 F. Supp. 2d 1117, 1122 (C.D. Cal. 1998).

If Ms. F is removed to Senegal, she will be forced into a marriage against her core convictions, in violation of her fundamental freedom to marry of her own free will. Being forced to marry a person one does not wish to be married to is clearly suffering and harm amounting to persecution under long established asylum jurisprudence. This harm will be felt all the more intensely by Ms. F who explained that she will “never accept the marriage” and never “be a submissive wife.” Aff. S. F at 4. Because Ms. F does not want to be married to anyone at this time, forcing her into any marriage is serious harm. TR 65-66. Ms. F’s focus is her education and her profession. *Id.* Her goal is to obtain a Ph.D. in international studies. TR 65:11-13. Someday, Ms. F would like to marry and have children, but she wants to choose her spouse, and choose the timing of their union. TR 65-66. Instead of obtaining her dreams,³¹ Ms. F will be forced to actualize the marriage into which she has already been sold.³²

³¹Toward which she has already worked very hard and obtained numerous degrees.

³² The knowledge that her own father sold her for financial gain also harms Ms. F. Mr. F bartered his daughter’s body and lifetime capacity for labor, sexual relations, and childbearing in exchange for money, fabrics, jewelry and a parcel of land on which he built apartments to rent for profit. *See* Affidavit of Mrs. F, Exh. 4, Tab A at 2. There is no principled, substantive distinction between

The harm Ms. F will experience by being forced into *any* unwanted marriage will be exacerbated because her future husband is a brutal, religiously conservative polygamist who will punish her for her current disobedience as well as the unending resistance she will show in the future. Ms. F will be subjected to a lifetime of false imprisonment, domestic violence, rape and forced domestic servitude. Each of these harms cumulatively and individually constitutes persecution as explained in section V. B, C and D *infra*.

3. Forced Marriage Constitutes Persecution under International Human Rights Law

Courts look to international human rights instruments for guidance about whether a given harm constitutes persecution. *See* U.S. Gender Guidelines U.S. Convention on the Elimination of All Forms of Discrimination against Women Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³³ and the Universal Declaration of Human Rights Universal Declaration of Human Rights³⁵ and the

this transaction and the sale of a prized slave at auction, despite the decorative trappings of the former example. The for-profit sale of another human being against her will is clearly serious harm.

³³Annex to G. A. Res. 34/180, 34 U. N. GAOR Res. Supp (No. 46) 194, U. N. Doc. A/34/46, Art. 4(1) (1979) Dec. 18, 1979, art. 16(1)(b) (requiring state parties to “ensure on a basis of equality of men and women . . . the same right freely to choose a spouse and to enter into marriage only with their full and free consent). Senegal ratified the CEDAW on Feb. 5, 1985. *See also* Committee on the Elimination of All Forms of Discrimination against Women, Gen. Recommendation No. 21, ¶ 16, U.N. Doc HRI\GEN\1\ Rev 1 (1994) (a “woman’s right to choose a

Refugee tribunals from numerous countries have recognized forced marriage as a basis for asylum, including Canada,³⁸ Australia,³⁹ Belgium,⁴⁰ Switzerland,⁴¹ and France.⁴² Agency-issued gender guidelines in both Canada and the United Kingdom also recognize forced marriage as

spouse and enter freely into marriage is central to her life and her dignity and equality as a human being”).

³⁴Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Art. 2(a), U.N. Doc. A/48/629 (1993) (“Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”).

³⁵U.N. Universal Declaration of Human Rights, G. A. Res. 217A (III), U. N. Doc. A/810 (1948) (“Marriage shall be entered into only with the free and full consent of the intending spouses.”).

³⁶International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 23(3) (“No marriage shall be entered into without the free and full consent of the intending spouses.”)

³⁷UNHCR, Elimination of Violence Against Women, Commission on Human Rights Resolution 2001/449, ¶ 3 (2001) (“Affirm[ing] that the term ‘violence against women’ means any act of gender-based violence including . . . forced marriages.”)

³⁸*See e.g., Vidhani v. Canada*, [1995] 3 F.C. 60 *Vidhani v. Canada*, [1995] 3 F.C. 60 (“women who are forced into marriages against their will have had a basic human right violated . . . the right to enter freely into marriage is a basic human right”), *available at*

<http://reports.fja.gc.ca/en/1995/1995fca0157.html/1995fca0157.html.html> [last visited, Sept. 3, 2007]; T99-07761, [Sept. 27, 2000] Convention Refugee Determination Division (CRDD) (applicant’s forced ‘marriage’ amounted to statutory rape without her consent”), *available at*

http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/151c/crdd/T9907761S_e.rtf); CRDD T99-14088T99-14088, [June 2, 2000] CRDD (reasons signed July 17, 2000) (applicant faced persecution based on her membership in a particular social group: women in forced marriages), *available at* http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/147c/crdd/T9914088S_e.rtf [last visited, Sept. 3, 2007]; CRDD 99-098877, May 17, 2000 99-098877, [May 17, 2000] CRDD (reasons signed June 5, 2000) (applicant facing forced marriage had established a “serious probability of persecution”), *available at* http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/145c/crdd/T99098877S_e.rtf [last visited, Sept. 3, 2007]; *See also* Refugee Prot. Div (RPD) TA2-00417, Nov. 13, 2002 TA2-00417, [Nov. 13, 2002] Refugee Protection Division (RPD) (women subject to forced levirate marriage (compulsory marriage of a widow to a brother of her deceased husband) constituted a valid particular social group), *available at* http://www.irb.cisr.gc.ca/rtfreflex/fulltext/204c/rpd/TA200417S_e.rtf [last visited, Sept. 3, 2007]; RPD MA1-8227, Aug. 19, 2002

MA1-8227, [Aug. 19, 2002] RPD (a fundamental human right of women is violated when they are forced to enter into marriage against their will”), *available at* http://www.irb.cisr.gc.ca/rtfreflex/fulltext/197c/rpd/MA108227S_e.rtf [last visited, Sept. 3, 2007]; RPD TA1-21612, Sept. 9, 2002 TA1-21612, [Sept. 9, 2002] RPD (recognizing that forced levirate marriage and domestic violence in Zimbabwe is persecution), *available at* http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=article.view&id=10106 [last visited, Sept. 3, 2007].

³⁹V 96/04445 (July 23, 1996), Refugee Review Tribunal (granting asylum to a woman facing forced marriage, and concluding that it violated article 16(2) of the UDHR and article 23 of the ICCPR), *available at* <http://www.worldlii.org/au/cases/cth/rrt/V9604445.html> [last visited, Sept. 3, 2007].

persecution.⁴³ These cases reflect a growing international consensus that forced marriage constitutes persecution.

⁴⁰Decision 01-0668/F1356/cd, Commission Permanente de Recours de Réfugiés, Mar. 8, 2002 (granting asylum to a 15 or 16 year-old girl from Cameroon who feared polygamous marriage to an older man), in Heaven Crawley and Trine Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, at 36 (2004), available at www.unhcr.org [last visited, Sept. 3, 2007].

⁴¹Entscheidungen und Mitteilungen der ARK [EMARK] [Swiss Asylum Appeal Commission] 93/9, EMARK 96/16, in Crawley & Lester, *supra*, at 95-96.

⁴²Mlle Ayten Tas., Commission des Recours des Réfugiés (CRR), March 4, 2005, 489014. (Fr.), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42c5317e4> [last visited, Sept. 3, 2007] (granting asylum to a Kurdish woman refusing a forced marriage who belongs to a particular social group of women who refuse forced marriage in Kurdistan in Turkey); CRR, SR, 29 juillet 2005, 519803, Mlle T.Mlle T., CRR, SR, July 29, 2005, 519803, Appartenance a un certain groupe social, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43abfa5c4> [last visited, Sept. 3, 2007]; (recognizing that forced marriage can constitute persecution but denying the applicant's claim for other reasons); CRR, SR, 15 octobre 2004, 444000, Mlle Noreen NiazMlle Noreen Niaz, CRR, SR, Oct. 15, 2004, 444000 (Fr.) (granting asylum to a Pakistani woman who feared honor killing for refusing a forced marriage), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=418894274> [last visited, Sept. 3, 2007].

⁴³Canadian Gender Guidelines , Immigration Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* § B (1996) Canadian Gender Guidelines , Immigration Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* § B (1996) (available at <http://www.irb->

B. Rape Constitutes Persecution

Once Ms. F has been forced into the marriage she will be subject to numerous additional forms of persecution such as rape, domestic violence, false imprisonment and forced domestic servitude. It is well-established that rape constitutes persecution. *See e.g., Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir. 2007); *Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir. 2007); *Matter of DV*, Interim Dec. 3252 (BIA 1993); *Matter of DV*, Interim Dec. 3252 (BIA 1993). If Ms. F is forced to marry M S, she will be subject to rape for the remaining years of her life. United States courts recognize that forced marriage leads to rape. Warren Jeffs, leader of the Fundamentalist Church of Jesus Christ of Latter Day Saints, was recently convicted of two felony counts of being an accessory to rape for forcing a fourteen year old follower to marry her nineteen year-old cousin.⁴⁴ Senegalese laws do not recognize forced sex within a marriage as rape. *The Persecution of Women in Senegal*, Cecilia Royal, April 2006, Exh. 4, Tab D. at 5. Prevailing views are that wives are obligated to obey husbands in sexual relations. *Id.* at 6. According to Dr. N'Diaye “there is a saying in Senegal that the wife, in Islam . . . is the field of the husband.” TR 101:13-14.

cisr.gc.ca/en/references/policy/guidelines/women_e.htm); U.K. Gender Guidelines, Immigration Appellate Authority, *Asylum Gender Guidelines* at 3 (2000) available at <http://www.asylumsupport.info/publications/iaa/gender.pdf> [last visited, Sept. 3, 2007].

⁴⁴John Dougherty and Kirk Johnson, *Sect Leader Is Convicted as an Accomplice to Rape*, N.Y. Times, Sept. 26, 2007, available at http://www.nytimes.com/2007/09/26/us/26jeffs.html?_r=1&oref=slogin [last visited October 5, 2007].

Because the evidence thus demonstrates that Ms. F will have to submit to M S's demand for sex and will not have a right to refuse, her forced marriage to him will necessarily lead to rape.

Country conditions reports make clear that contraceptives are stigmatized in Senegalese society, that abortion is outlawed except in very limited situations, and that childbearing is commonly understood to be a wife's duty. *Id.* Dr. N'Diaye explains that reproductive choice will be the "husband's prerogative" and that birth control is discouraged in an Ibadu Rachman marriage. TR 101:21-25. Upon return to Senegal, Ms. F will have no control over whether and when she bears children. These choices will be M S's prerogative alone. Especially in light of M S's Ibadu Rachman faith, Ms. F will have no autonomy over her body's reproductive system.

C. Abduction and Involuntary Servitude Constitute Persecution

Ms. F fears that her father and uncles will kidnap her and that she will be falsely imprisoned, forced into domestic servitude and unable to leave the marriage with M S. Country conditions reports indicate that escape from the marriage will be close to impossible. Abduction and enslavement is harm that is severe enough to constitute persecution. *See e.g., Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) (*disapproved for other reasons by*

Physical abuse may constitute persecution where serious. *See supra* Section II.B. Ms. F fears repeated physical and emotional abuse by her father and by M S. Because of her increased resistance, Ms. F is likely to be beaten with even more vehemence than on the prior occasions when Mr. F punched her, slammed her head into the wall and slapped her in the face very hard. This unquestionably rises to the level of persecution. M S's domestic violence against Ms. F will also rise to the level of persecution.

VIII. Even Absent the Presumption, Ms. F’s Fear of Future Persecution in Senegal is Well-Founded

A. Ms. F’s Fear is Genuine

A fear is well-founded if it is subjectively genuine and objectively reasonable. *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005); *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005);

see also An applicant’s fear of persecution is objectively reasonable where there is a one in ten

chance of being persecuted. *C*

A. Ms. F’s Particular Social Group is Legally Cognizable

In *Gao*, the Court recognized the social group of “women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.” *In re A-M-E-*, 24 I. & N. Dec. at 74. Ms. F’ social group is not so defined. Rather, a very specific list of traits combine to form a small cross section of Senegalese society which is subject to persecution. The group is internally recognized within Senegal and the struggle of this social group “is dramatized in a few creative works that . . . mirror existential realities.” Testimonial on Forced Marriage, Diana Baird N’Diaye, PhD, Exh. 4, Tab D at 3.

The IJ’s analysis of Ms. F’s social group is flawed as a matter of law. The IJ states: “Respondent failed to show how Senegalese who do not know her will identify her as a person facing forced marriage.” Dec. at 20. The proper question is rather whether Ms. F is identifiable in her community or to her persecutors as a Senegalese woman from the Lebou ethnic group who has been sold into marriage. *See e.g.*,

Ms. F's father's family and M S's family will target Ms. F because Ms. F is female, Senegalese, Lebou, and has already been sold into the marriage. Each of these factors motivate her persecutors. Each of these factors permit her persecutors to act with impunity. Ms. F's friend, A M, was similarly situated to Ms. F. She too was a young, single daughter in Senegal.⁴⁵ She too was "given," without her consent, in marriage to a friend of her parents. Affidavit of Ndeye Astou Mane, Exh. 4, Tab A

D. Ms. F will be Subjected to a Forced Marriage on Account of her Membership in the Particular Social Group

Because Ms. F is female, Senegalese, Lebou, and has been sold into an enforceable marriage, she will be forced into the marriage if she returns to Senegal. Forcing Ms. F into a marriage that she does not consent to is a denial of a basic human liberty. *Supra* Section V.A. Mr. F will be motivated by the contract he entered into, by his daughter's gender, her ethnicity, nationality, and the fact that such marriages are enforceable amongst the Senegalese Lebou. M S will also be motivated to force Ms. F into marrying him because of her gender, ethnicity, nationality, and the fact that his family already rendered valuable consideration for her. "There is little question that genital mutilation occurs to a particular individual because she is a female . . . [t]hat is, possession of the immutable trait of being female is a motivating factor-if not a but-for cause-of the persecution." *Mohammed*, 400 F.3d at 797; *see also Gao* at 70, *vacated, remanded by Keisler v. Gao*, 2007 U.S. LEXIS 10267 (Oct. 1, 2007) (noting that the fact that only one person could claim the applicant as his property was irrelevant to the issue of nexus "[t]he law does not

⁴⁵(although it is unclear from the record what her ethnic group was)

distinguish between single persecutors and mobs, provided that the persecution is based on a specified ground and that the government is unable or unwilling to protect the victim.”)

E. Ms. F will be Subjected to Abduction, Enslavement, Rape and Physical Abuse on Account of Her Membership in the Particular Social Group

As a woman sold into marriage, Ms. F will also be subject to marital rape, enslavement, and domestic abuse. “[T]here is a saying in Senegal that the wife, in Islam . . . is the field of the husband. . . . if the wife refuses to be the field, that would be grounds for verbal abuse certainly and physical abuse if that didn’t work.” TR 101:13-16. Because M S will see Ms. F as his wife, he will feel entitled to treat her as he treats his other wife -- to physically abuse her. Because he will see her as his wife, he will feel entitled to have sexual relations with her despite her objections. He will see it as his choice whether to impregnate her, regardless of her consent. He will be free to establish rules about what she can wear, when, and if, she can leave the house, and whether she can undertake a profession.

The Senegalese constitution outlaws violence against women, but “the government [does] not enforce the law in practice” and “spousal abuse is a widespread problem” according the U.S. Department of State. The Persecution of Women in Senegal, Exh. 4, Tab D at 4. A Senegalese newspaper reported in May of 2003, that fifty-nine percent of the women it surveyed in the cities of Dakar and Kaolack had suffered from domestic violence. *Id.* The head of the African Assembly for Human Right’s Department for Women and Children on Gender Violence, estimated that two of every five Senegalese women are victims of violence. *Id.* He explained that violence against women is caused by deep-rooted socio-cultural beliefs and the influence conservative interpretations of Islam. *Id.* It is a husband’s right to “correct” disobedient wives with beatings

when verbal reprimands do not work. *Id.* According to legal scholars, marital rape is not criminalized in Senegal. *Id.* at 5-6. “Although rape is a punishable crime in every Muslim society, nowhere is the criminal sanction extended to rape within marriage, because sexual access is deemed elemental to the marriage contract.” *Id.* at 6. The official acceptance of domestic violence naturally bolsters the abusive spouse’s feelings of entitlement.

XI. The Harm Ms. F Fears will be on Account of Her Political Opinion

Ms. F’s uncle L S explains that the abuse will escalate if Ms. F is sent back to France or Senegal because Ms. F’s father, uncles and future husband are all “furious” about her opposition. *See* Affidavit of L S, Exh. 4, Tab A at 3. The verbal and physical abuse that Ms. F already suffered due to her opposition to the marriage indicates that the harm she fears will also be so motivated. *See* section III.B.C *supra*.

M T believes that Mr. F will have to punish Ms. F for her self determination in order to maintain his status in the society:

Upon my sister’s return, in order to have a clean slate of honor, he would have to severely beat her as punishment. In this way, the rest of the family and his peers will continue to respect him, to know him as someone who knows how to make himself heard, someone who directs his children and their lives.

Affidavit of M T F, Exh. , Tab A at 4.

M T also believes that M S will beat Ms. F for having run away:

I am certain that if Binata returns to Senegal, he will put her through hell and will *make her pay for her initial refusal to marry him*. He is already finds any reason to be violent toward his wife, and now he’d have a concrete one. Binata disrespected him, and my father and her entire future family in-law agree with him.

Id.

This assessment is corroborated by cultural expert Dr. N'Diaye who explained that M S will “basically feel that he has paid for her and . . . he’s been waiting a while. He will want to show his dominance over her and punish her, in effect, for having even tried to resist or tried to run away from the situation.” TR 103:12-17.

XII. The Harm Ms. Ffears Will Be on Account of Her Religion

In *Matter of S-A-*, the Board determined that a young woman with liberal Muslim beliefs had established past persecution and a well-founded fear of future persecution at the hands of her father on account of her religious beliefs.

XIV.

For asylum purposes, the persecutor must either be the state or an agent that the state is unwilling or unable to control.

The IJ failed to apply the correct legal standard when he considered whether Ms. Fwarranted a discretionary grant of asylum. Adjudicators apply a “totality of the circumstances” test to discretionary determinations in asylum. *Pula*, at 473-74.

⁴⁶[MR. BIKOFF TO DR. N’DIAYE]

Q “So on both sides of the debate in Senegal between those in favor of arranged [marriages] and using coercion and those who are opposed to it, can both sides find some support in Islam for their respective positions?”

A Yes, Islam has, on one hand –

JUDGE TO MR. [BI]KOFF

Q I don’t need to hear about that.

Ms. F applied for asylum affirmatively and immediately upon entering the country. Her uncle, L S, describes Ms. F as a “very talented young woman,” “open-minded, caring and reliable,” a woman who displays “kindness, honesty, generosity and truthfulness.” Exh. 4, Tab A at 1. She received her MBA “with distinction.” Exh. 6, Tab I. She has experienced severe harm in Senegal and fears more of the same and worse. Under the totality of the circumstances test, Ms. F clearly merits a favorable exercise of discretion. The IJ’s conclusion otherwise was an abuse of discretion.

XVII. Ms. Fis Eligible for a Humanitarian Grant of Asylum

In cases of severe past persecution, an applicant may obtain asylum regardless of whether or not she has a well-founded fear of persecution in the future, provided that she has “compelling reasons” for being unwilling to return because of either: the severity of the past persecution or a reasonable possibility that she may suffer other serious harm upon returning to that country. *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989) *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989). Ms. F meets the requirements for a humanitarian grant based on the other serious harm she may suffer upon returning to Senegal. Because Ms. F has demonstrated past persecution and because she fears the serious harm⁴⁷ of a forced marriage, beatings and rape, she has demonstrated eligibility for asylum under

⁴⁷Forced marriage, beatings and rape constitute persecution, *see supra* section II. If the Board were to determine that these harms do not rise to the level of persecution, they constitute serious harm.

A. Because Ms. Fhas Established Past Persecution, a Presumption Arises that it is More Likely than Not that Her Life or Freedom Will be Threatened in the Future

The IJ erred when he denied Ms. F’s application for withholding of removal. Dec. at 22. In order to qualify for withholding of removal, an applicant must show that her “life or freedom would be threatened” if she is returned to her homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. *Cardoza-Fonseca*, 480 U.S. at 430. Unlike asylum, withholding is a mandatory form of relief. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

Past persecution generates a presumptive eligibility for withholding.

For the reasons articulated *supra*, in section VI.B.2, it is more likely than not that Ms. F will be forced into marriage against her will, with a man who is more likely than not to beat her, rape her, forbid her to fulfill her professional and personal goals and subject her to forced domestic servitude and imprisonment. Ms. F therefore qualifies for withholding of removal.

XX. Ms. Fis Entitled to Withholding of Removal under the CAT
XXI.

A. The IJ Applied an Incorrect Legal Standard to the Issue of Official Acquiescence

An applicant for protection under the Convention Against Torture (CAT) must demonstrate that it is more likely than not that she will be torture “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Ms. F's father, who has already battered her severely on numerous occasions, is a prominent Senegalese government official. He is also well-connected and has a cousin in the Ministry of the Interior who works closely with the police. The U.S. Department of State reports that the Senegalese police do not enforce laws against domestic violence, that marital rape is not criminalized, and that women's rights to choose when and whom they marry are restricted in Senegal. Exh. 4, Tab D. Because the country conditions evidence of record establishes that the Senegalese government turns a "blind eye" to force marriage, domestic violence and marital rape, it is more likely than not that the Senegalese government will acquiesce to Ms. F's torture. *See e.g., In re Y-L-*, 23 I. & N. Dec. 270, 281 (BIA 2002) (dismissing a CAT claim because the Board determined that Haiti did not turn a "blind eye" to torture). Ms. F has made the requisite showing of official involvement and, alternatively, acquiescence.

D. The IJ's Determination that the Severe Beatings Ms. F Endured Were Not Torture is Clearly Erroneous

The IJ's determination that the beatings Ms. F experienced did not rise to the level of torture is unsupported by the evidence. Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 1208.16(c)(3). Evidence of the kind of flagrant human rights violations that occur in Senegal are also relevant to the determination. Ms. F has met her burden for CAT relief.

E. The IJ Wholly Failed to Consider whether Forced Marriage, Rape and Domestic Violence Constitute Torture

The IJ did not mention Ms. F's fear that she will be subjected to severe physical and mental suffering if she is forced to marry the abusive M S. His failure to even address this likely future harm is also reversible error. For all the reasons discussed in sections V, and VI, *supra*, there is no question that Ms. F would suffer severe physical and mental harm based on the numerous violations of her fundamental rights.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision below denying Ms. F asylum, rule that she has experienced past persecution, has a well-founded fear of persecution on account of her political opinion, membership in a particular social group and religion, and merits the favorable exercise of discretion, and remand for the entry of a grant of asylum. Alternatively, *amicus* submits that Ms. F qualifies for withholding of removal under both the INA and the CAT.

Respectfully submitted this October ____, 2007, by

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