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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia 22041

IN THE MATTER OF:	
Binata F,	File No.: A #
Respondent	BRIEF FOR RESPONDENT
In Removal Proceedings	

RESPONDENTS' APPEAL FROM A DECISION BY

THE UNITED STATES IMMIGRATION JUDGE

Dated this 12th day of September, 2007

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(i) Statement of Facts and Procedural History

On May 3, 2006, Respondent filed her application with the Immigration Court in Arlington, Virginia, for asylum, withholding of removal, and relief under the U.N. Convention against Torture in response to the government's effort to remove her. On August 28, 2006, the Immigration Judge (Hon. Wayne Iskra) held a hearing in which Respondent testified, as did her maternal uncle, L- S, and an expert witness, Dr. Diana N'Diaye from the Smithsonian Institution. On December 18, 2006, the Immigration Judge issued a written opinion (hereinafter "IJ") denying Respondent all relief and ordering her removal.

Ms. Binata F, the Respondent, is the French-educated daughter of a senior diplomat named B- F- from Senegal, West Africa, and his wife, K- F, née S-, who fled to the U.S. to escape domestic violence and being forced into a polygamous marriage she strongly opposes. In January 1996, when she turned 18 years-old and was anticipating graduation from high school that year, Ms. F's father informed her that she would be married to Moussa S-, a cousin, 14 years older than her, whom she had met only once before [Note: despite having the same surname, the prospective husband is not related to Ms. F's mother or uncle]. Although Ms. F did not know it at the time, her father bartered her into marriage in exchange for land he received from Moussa's family, on which the father built his own family's house (IJ at 8; Transcript of Hearing, hereinafter "TR," at 120; Affidavit of L- S, Group Exh. 4, A-6, p. 2; K- S- F affidavit, Group Exh. 4, A-2, p. 3). When she objected her father beat her, and while fleeing from him, her right hand

was burned in hot embers from a heating device when she slipped and fell. (TR at 33-35; Binata F affidavit, Group Exh. 4, A-1, p.1; K- S- F affidavit, Group Exh. 4, A-2, p. 1)[1]

In July 2006, Ms. F, a Muslim, graduated from a Catholic high school in Dakar, Senegal. She and her mother persuaded Ms. F's father to permit her to attend a university in France, if she met his three conditions: That she attend a university in a city where one of her father's brothers lives; that she be presented to the cousin's family in Senegal and receive their permission to study in France; and that at the end of her studies there in five or six years she return to Senegal (TR at 37-39). That same month, the day before visiting the cousin's family, Ms. F told her father she did not want to go. Her father became angry and beat her again "very hard," punching her in the stomach, slapping her face, and slamming her into a wall, where she hit her head. The right side of her face swelled and she bled on her mouth (TR at 39-40). Following her mother's advice on how to stop her father's beatings, Ms. F agreed to visit the family and she received their permission to study in France (TR at 41, 70-74).

At the meeting, Ms. F realized that she would become the second wife in a polygamous union. The first (current) wife later told Ms. F's sister M- T- F that she herself is opposed to the marriage, but she fears her husband's "anger and violence against her" and "knows that if she told her husband she disagreed, he would beat her." (M- T- F affidavit, Group Exh. 4, A-3, p. 3) During this visit, Ms. F also saw that the women in his household were wearing scarves to cover their hair and that she would be required to wear one.

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[1] These two affidavits and four others are identified as the Immigration Court's Group Exhibit 4, A-1 through A-6, in the order in which they are introduced and cited.

In October 1996, after many appeals by Ms. F and her mother, her father sent Ms. F to France to begin her university studies, but ensured that she would be supervised by his brothers living there and that she would be required to marry her cousin following her studies. One brother, Mar F, with whom she lived in Bordeaux, France, from her arrival until 1998, beat her at least five times— slapping her face and punching her body— to control her and to enforce a strict social isolation upon her (TR at 41-42, 79). During 1998 she received money from another of her uncles, L- S, her mother's brother, who lived in the U.S., so she could move to a dormitory (TR at 43). Ms. F later studied in Lyon and Paris, living with her paternal uncles and their families in both cities (TR at 52-55). All the uncles prevented her from having male friends, would not allow her to leave the house without their permission, and questioned her to ensure that her telephone callers were not males (Binata F affidavit, Group Exh. 4, A-1, p. 2). The uncles were her guardians while she lived in France, and they, characteristically for the Senegalese community there, restricted her activities to an even greater extent than her father would himself had he been in France. (Dr. N'Diaye, TR at 97-98)

While living and studying in Bordeaux, Ms. F met and became friends with a young woman from the Republic of Congo, C- M-, who witnessed the restrictions that Ms. F's uncle placed upon her. (TR at 78-79; C- M- affidavit, Group Exh. 4, A-4, p. 1-2)[2] Ms. F also befriended another young woman from Senegal, N- A- M, who herself

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[2] Her full name is N- I- C- M-, née S B. She learned in Bordeaux that Ms. F was in fear of her life from the forced marriage. Ms. F told her that her beliefs in "the fundamental principle of a person's having individual liberties" were violated by her father imposing a husband upon her in the name of religion and tradition. In December 2005 M helped Ms. F leave France. (TR at 43; M affidavit, Group Exh. 4, A-4, p. 1-2)

became the victim of a forced marriage. (A- M affidavit, Group Exh. 4, A-5, p. 2-4)[3] Ms. F discussed with them and others, including her father, her beliefs in a modern version of Islam and women's rights, in which women are endowed with liberty, autonomy, and individuality, and have the right to decide if, when, and whom to marry. (TR at 59-60; Binata F affidavit, Group Exh. 4, A-1, p. 4-6)

The attitude of Ms. F's father to the marriage never changed and he never relented, despite appeals from Ms. F and her mother during the years Ms. F studied in France. B F, the father, is influenced by many different forces, as well as his own beliefs and values, to ensure that his daughter in placed into this marriage. There is the force of cultural tradition and the desire that he and his family not be viewed by his kin and countrymen as "westernized" by his diplomatic career. (Binata F affidavit, Group Exh. 4, A-1, p. 5). It is also common for someone like B to be ultra-traditionalist to prove that he is as much a Senegalese as those who never left for the West. (Dr. N'Diaye, TR at 108-09)

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[3] In 2004 N- A- M, living in France, was lured back to Senegal by her family and placed into a forced marriage. She pretended to accept the marriage and within one month, using a cover story that she needed medical care, she escaped from Senegal to France. When her father and husband searched for her in Paris, she concluded that France was too dangerous and within 6 months she moved to Italy and lost all contact with her family. Ms. A- M offers her story both "to prevent other young Senegalese women such as Binata from suffering what I have suffered," and to warn that Ms. F will not be able to escape from Senegal, because Ms. F's father knows the subterfuge that Ms. M employed. She also warns that France is not safe for Ms. F. (A M affidavit, Group Exh. 4, A-5, p. 3-4)

B received land from the presumptive husband's family, as part of the bride-price, on which he built his family's house, as well as apartments that he rents out. (*See* IJ at 8; Affidavits of Binata F, Group Exh. 4, A-1, p. 5; K- S F, Group Exh. 4, A-2, p. 2-3; and L-S, Group Exh. 4, A-6, p. 2-3 and testimony) As he approaches retirement from the government, he is thinking about becoming a tribal elder or chief, which will be possible only if he enforces the promise he made to observe the custom of forced marriage for Ms. F. *Id.* Finally, as a future retiree who will receive a pension from the government of Senegal, the father well knows that the tribal chiefs and government officials can pressure him to implement this forced marriage arrangement by threatening or actually withholding his pension. *Id.*

On Ms. F's last visit to Senegal, in July 2001, her father beat her once again throughout her visit and subjected her to extreme verbal and emotional abuse over her refusal to accept the marriage. The beatings were in her face and on her back. On one occasion, during a beating, Ms. F lost her balance and smashed her head into the wall of a room, almost losing consciousness and becoming disoriented. She developed an extreme fear of her father. (TR at 47-48; Binata F affidavit, Group Exh. 4, A-1, p. 3) During this visit, her father beat her many times and she was not allowed out of the house for her entire stay. Ms. F told her mother that she would never again set foot in Senegal because she could not bear the violence caused by her opposition to the forced marriage. (TR at 51-52; K- S F affidavit, Group Exh. 4, A-2, p. 2)

Ms. F continued her studies in France, eventually moving to Paris for additional degrees and living with another paternal uncle. Her father told Ms. F that she was expected to return from France to Senegal in May 2006 and be married to the cousin the following month, on June 10, 2006. Ms. F concluded that it would be unsafe for her to remain in France, both because of her uncles, who would force her to comply with her

father's demands by sending her back to Senegal against her will, and because her father had made friends, when he himself studied and worked as a Senegalese diplomat in France in the 1970's, who were now officials in the French Foreign Ministry and Ministry of the Interior. (TR at 48-49; Binata F affidavit, Group Exh. 4, A-1, p. 3-4)

In December 2005, several weeks after she learned that her father and uncles planned to force her from France back to Senegal in January 2006, rather than May, she fled to the United States. (TR at 27-28; Binata F affidavit, Group Exh. 4, A-1, p. 6) Upon arriving in the United States, Ms. F declared her intention to seek protection and was immediately placed in detention. She was released on parole after spending three weeks in detention. While living in France, Ms. F developed stomach pain that has no clear medical cause and is likely the result of stress from her fears. (K- S F affidavit, Group Exh. 4, A-2, p. 3)

Upon being returned to Senegal, either directly or via France, Ms. Fs faces the certainty of resumed beatings by her father for her disobedience in seeking refuge in the United States and bringing "shame" upon the family by preventing him, as master of his household, from keeping his promise to deliver her as a bride to the cousin (*See* IJ at 4, 9, 10). She fears her father and fears returning to France, where she believes she would be abducted and placed on a flight to Senegal (TR at 61). According to Ms. F's sister M- T-, their father "promised that [Ms. F] would pay dearly for her insolence, how she had slighted him and the dishonor she'd placed upon the family." M- T- indicates that their father becomes "quite violent," and "in order to have a clean slate of honor, he would have to severely beat her as punishment." (M- T- F affidavit, Group Exh. 4, A-3, p. 4) If returned to Senegal, Ms. F would be placed in the marriage forcibly without further delay. (Affidavit of L- S, Group Exh. 4, A-6, p. 3; Dr. N'Diaye, TR at 102)

For his part, the cousin (the presumptive husband) Moussa S— described by Ms. F's mother as "a very violent man"— enraged, embittered, and humiliated by being kept waiting for over a decade, will use whatever violent means he determines to enforce Ms. F's strict compliance with his demands for household and sexual services. He is a member of a strict Islamic group, Ibadu Rahman. (*See* TR at 62-63; IJ at 8-9; Binata F affidavit, Group Exh. 4, A-1, p. 4; K- S F affidavit, Group Exh. 4, A-2, p. 3.) He believes he has the right to beat her to force her to accept his opinions, while she insists on the right to her own views about traditions. She would "never accept his views of Islam and women's role" in Senegal (TR at 63). M- T- describes the presumptive husband as "mad with rage," and "now more than ever he wants to marry her. . . . He wants to save face and prove before everyone that he succeeded in marrying her so that he won't be mocked." He promises that the day Ms. F becomes his wife she must "submit herself completely." According to Ms. F's sister, "He will not deprive himself of beating her since his honor is at stake." M- T- cannot "even imagine the hell he will put her through." (M- T- F affidavit, Group Exh. 4, A-3, p. 4-5)

According to Ms. F's maternal uncle, L- S— who lives in the Washington, D.C. area— the abuse from the father, uncles, and future husband will "escalate" if she is returned to France or Senegal, because all "are furious" about her challenging her role and status as a woman in the family and resisting her father's demands by fleeing to the U.S. (L- S affidavit, Group Exh. 4, A-6, p. 3) Indeed, if Ms. F were to return to France, her uncles in that country would "immediately make sure to forcefully return her to Senegal." (M- T- F affidavit, Group Exh. 4, A-3, p. 4)

The government of Senegal has a record of being unable and unwilling to protect Ms. F, and others in this position, in the face of these customs and social mores. There is nowhere in that country to which she may safely flee. (Dr. N'Diaye, TR at 88, 110-11;

Department of State Country report on Senegal, Group Exh. 4, C at 2) Ms. F could not seek help from the police. Not only do they not interfere in family matters, but they would have phoned her father's cousin, who is an official in the Ministry of the Interior. (TR at 50-51; Binata F affidavit, Group Exh. 4, A-1, p. 2) Ms. F cannot return to France, since she was allowed there on a temporary student visa only while she was enrolled in a university and while she was supported by her father (TR at 30).

Within this marriage, Ms. F faces the certainty of a life of subordination, eradication of her identity and individuality, and virtual bondage. Without full submission to his will and to the antiquated social conventions among strict Moslems in Senegal, beatings will become her daily fate in married life. (K- S F affidavit, Group Exh. 4, A-2, p. 3) Intimate marital relations will be coerced, unwanted, and most likely violent— in short, Ms. F faces a lifetime of marital rape. (Dr. N'Diaye, TR at 100-02; IJ at 4)

Respondent timely filed her notice of appeal to the Board on January 16, 2007.

(ii) Summary Dismissal Is Not Appropriate

Summary dismissal pursuant to 8 C.F.R. § 1003.1(d)(2)(i) is not appropriate because: (1) Respondent has specified the reasons for the appeal; (2) the appeal does not rely on facts or conclusions of law that were previously conceded; (3) the order below did not grant Respondent the relief that she requested; (4) the appeal is not filed for an improper purpose and it is not frivolous; (5) the appeal lies within the jurisdiction of the Board of Immigration Appeals ("BIA"); (6) it is timely filed and it is not barred by any waiver of the right of appeal; and (7) the appeal meets essential statutory or regulatory requirements and is not expressly excluded by statute or regulation.

(iii) A Three Member Panel Is Appropriate

This appeal is appropriate for a three-judge panel pursuant to 8 C.F.R. §1003.1(e)(6). First, pursuant to 8 C.F.R. §1003.1(e)(6)(iii), panel review is appropriate because the decision of the IJ is not in conformity with the law. Additionally, the failure of the IJ to follow legal precedent demonstrates the need to establish precedent construing the meaning of laws, regulation, or procedures. This lack of precedent is itself a proper ground for panel review under 8 C.F.R. §1003.1(e)(6)(ii). Second, panel review is also appropriate under 8 C.F.R. §1003.1(e)(6)(v) as the IJ committed clearly erroneous factual determinations. Third, 8 C.F.R. §1003.1(e)(6)(vi) allows for panel review where there is a need to reverse the decision of an IJ. Because the IJ's decision is not in conformity with the law and contains factual errors, it must be reversed. Thus, a three-member panel review is appropriate.

(iv) Statement of Issues

1. Where the Respondent's uncontradicted testimony about her forced marriage was detailed and believable, should the Immigration Judge's labeling of Respondent's testimony as "implausible," without specific and cogent reasons to support his conclusions, be set aside as a flawed finding on credibility unsupported by substantial evidence?

2. Should the Immigration Judge's finding that the independent evidence of Respondent's family, friends, and a Smithsonian Institution cultural anthropologist could not overcome his adverse credibility finding against Respondent also be set aside as unsupported by substantial evidence, where the Immigration Judge (a) failed to provide specific, cogent reasons for disregarding this evidence, (b) committed errors of law by misapplying two Fourth Circuit cases, *Camara v. Ashcroft* and *Gandziami-Michhou v. Gonzales,* and (c) used an incorrect legal standard for considering the testimony of the expert?

3. Did the Immigration Judge commit legal error when he ruled that Respondent did not suffer past persecution "on account of" her political opinion and religion, and her membership in a particular social group, where Respondent established that her father attempted to force her into a marriage he had bartered her into for his material benefit, despite her belief in her right to choose her own marriage partner and her group membership within the Wolof-Lebou people in Senegal of young, single, woman who oppose forced marriage?

4. Did the Immigration Judge commit legal error when he ruled that Respondent failed to establish a "well-founded fear" of future persecution, where Respondent showed that she both suffered past persecution— and thereby should have benefited from the presumption of future persecution— and, apart from the presumption, reasonably fears that if she is returned to her father and her prospective husband, she faces future persecution on account of her political opinion, religion, and membership in a social group of young single women in a region of Senegal where forced marriage is practiced?

5. Did the Immigration Judge commit legal error when he denied Respondent asylum based upon the notion that Respondent had enjoyed a "safe haven" in France, even though Immigration Judges no longer have a discretionary power to invoke safe haven as a bar to asylum and have lacked that power ever since the regulation concerning "safe third country" was repealed in January 2001? Under the current regulation, did the IJ abuse his discretion in denying asylum to Respondent, when she had met all the legal requirements for asylum and was not subject to any bars?

6. Did the Immigration Judge err in denying Respondent Withholding of Removal and relief under the U.N. Convention against Torture, where Respondent's evidence meets the higher standards for these two forms of relief?

(v) Standard of Review

"Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous." 8 C.F.R. §1003.1(d)(3)(i). However, the "Board may not accord deference to an Immigration Judge's credibility finding where that finding is not supported by the record." *Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998). The scope of review of questions of law, discretion, and judgment and all other issues is *de novo.* 8 C.F.R. §1003(d)(3)(i-ii).

(vi) Argument

I. <u>The Immigration Judge's Rejection Of Respondent's Uncontradicted Testimony About Her Forced Marriage, Based Upon His Characterization Of It As "Implausible," Should Be Set Aside.</u>

At the hearing before the IJ, Respondent bore the burden of proving that she was a refugee and that she merited a grant of asylum if her evidence met the standards specified for meeting her burden and establishing her credibility. *See* 8 U.S.C. §1158(b)(1)(B). Under the REAL ID Act of 2005, credible testimony by an asylum applicant by itself "may be sufficient to sustain the applicant's burden without corroboration," where that testimony "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." [4] The Board established long ago that an applicant's own

[4] Section 101(a)(3), Title I, of the REAL ID Act of 2005, Pub.L.No. 109-13, Div. B, 119 Stat. 231 (2005), codified at INA §208(b)(2)(B)(ii); s*ee also* 8 C.F.R. §208.13(a).

testimony may suffice to establish her claim "where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the alien's alleged fear." *Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997); *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). Respondent was a credible witness— and the IJ's finding to the contrary was clearly erroneous and must be reversed, as argued below.

The IJ found that Respondent was not credible, basing his finding "not only on her demeanor while testifying, but also the plausibility and consistency of her account," without regard to whether those flaws went "to the heart" of her claim.[5] (IJ at 16) The IJ's opinion explains this conclusion without any further reference to demeanor and with only scant reference to "consistency." His opinion provides six ostensible reasons why Respondent is not credible, nearly all of which relate to the IJ's belief that Respondent's evidence was not plausible. None of these alleged grounds of implausibility, either alone or in combination, is sufficient to sustain the IJ's credibility finding.

Both the Board and the U.S. Court of Appeals for the Fourth Circuit have set out similar standards for reviewing an IJ's credibility findings where an alien asserts a claim of persecution and seeks asylum. An IJ's adverse credibility determinations "are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony; and where these circumstances exist in view of the background evidence on country conditions, it is appropriate for an Immigration Judge to make an adverse credibility determination[.]" *Matter of S-M-J-, supra,* at 729. This same case, however, cautions that IJ's "have not demonstrated consistently an ability to reasonably judge individual events occurring outside our own society" and counsels that "in

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[5] *See* INA §208 (b)(1)(B)(iii).

considering claims of persecution it is 'highly advisable to avoid assumptions about how other societies operate.'" *Id.* at 742 (concurring opinion of L. Rosenberg).[6] *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1999), which pre-dates the REAL ID Act, instructs that although deference is due the credibility findings of the IJ, because of that judge's opportunity to observe the alien testify, this deference is not absolute: "Under some circumstances, the Board may not accord deference to an Immigration Judge's credibility finding where that finding is not supported by the record." *Matter of A-S-, supra,* at 1109. The REAL ID Act did not change the Board's standards, but merely reflects these

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[6] Similar, though more pointed, observations have been made by Circuit Judge Richard Posner about the causes and consequences of Immigration Judges' failures to make reasoned findings when they assert that aliens' testimony is not credible. Where a cultural issue is involved, he writes, "If immigration judges want to base their findings on insights into the political or military or social culture of the asylum seeker's country, that is fine, but they must indicate a knowledge of the culture." *Kantoni v. Gonzales,* 461 F.3d 894, 897 (7th Cir. 2006). The same judge has also written, "An IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are no substitute for evidence— a point that we have made repeatedly, but which has yet to sink in." *Banks v. Gonzales,* 453 F.3d 449, 453 (7th Cir. 2006). He recommends that IJ's rely on experts on a foreign culture, "someone who knows local conditions at a level of detail that would permit [the expert] to opine on the question whether a given alien's assertions are plausible" and the level of risk if the alien were sent home. *Id.* at 454. *See generally Zhen Li Iao v. Gonzales,* 400 F.3d 530, 533-35 (7th Cir. 2005) (Posner, J.).

cases and restates truisms known to every judge, lawyer, and juror who has heard a legal case and made judgments about the credibility of witnesses.

In the Fourth Circuit, as with the Board, deference is similarly broad but not absolute. An IJ who rejects a witness's testimony because it lacks credibility must offer a "specific, cogent reason for his disbelief." Where the IJ's adverse credibility conclusion is instead based on "speculation, conjecture, or an otherwise unsupported personal opinion" it cannot be upheld because it is not supported by substantial evidence. *See Tawabe v. Gonzales,* 446 F.3d 533, 538 (4th Cir. 2006) (quoting *Dia v. Ashcroft*, 353 F.3d 228, 250 (3rd Cir. 2003) (*en banc)*); *see also Camara v. Ashcroft,* 378 F.3d 361, 367 (4th Cir. 2004), and *Figueroa v. INS*, 886 F.2d 76, 78-79 (4th Cir. 1989). Although *Tawabe* did not address the REAL ID Act— which though enacted, did not apply to that case since the alien's asylum application had been filed before its enactment— it appears that the Fourth Circuit's requirement that the IJ provide "specific and cogent reasons" for his credibility finding was not changed by that statute. Other recent cases from that court (unpublished), also decided without reference to the REAL ID Act, analyzed IJ findings on credibility and found them lacking for their absence of "specific and cogent reasons" for disbelieving the asylum applicant. *See Itoe v. Gonzales,* 2005 U.S. App. Lexis 24637, 2005 WL 3086588 (4th Cir. 2005); *Curumi v. Ashcroft*, 2005 U.S. App. LEXIS 429, 2005 WL 44939 (4th Cir. 2005).

In *Tewabe* the Fourth Circuit rejected as "speculative" the IJ's finding that the alien's account of her persecution was implausible. Instead, the court concluded that there was nothing "inherently implausible" about her testimony (of why she attended a particular political meeting and spoke out against the government of her country), and it remanded the case to the Board to consider it anew. *See Tewabe, supra,* 446 F.3d at 538-39. In *Camara* the Fourth Circuit considered the six justifications that the IJ presented

for discrediting the testimony of the asylum applicant. Reviewing one of the justifications, where the IJ had declared it to be "improbable" that the applicant would enter a courthouse in her country (Guinea) from which she had just escaped from prison, in an effort to obtain evidence of her persecution, the Fourth Circuit said that the IJ was engaged in speculation and that there was nothing implausible about that account (the court sustained the IJ's credibility finding for other reasons). *See Camara, supra,* 378 F.3d at 368-69.

With these principles in mind, we turn to an examination of the six reasons the IJ gives for rejecting Respondent's testimony. We will show that the IJ's reasons for finding her not credible are each inadequate, for being speculative or based on the IJ's conjecture or unsupported personal opinion, and, taken as a whole, do not deserve broad deference nor amount to sufficient evidence to sustain his finding. None of the IJ's reasons for rejecting Respondent's testimony contains the specific, cogent reasons that are required to be sustained on review:

1. The IJ found implausible Respondent's testimony that her father will immediately force her into an unwanted marriage if she is removed from the U.S. The reason given is that her father permitted Respondent to study in France for nine years, and when she visited Senegal in 2001 for 6 weeks and continued to express her opposition to the marriage, he allowed her to return to France to continue her education there.

To the contrary, there is nothing implausible in Respondent's account that her father will force her into marriage if she returns to Senegal now. The IJ is not an expert in country conditions or the customs of Respondent's Wolof-Lebou ethnic group and extended family. The evidence he cites as "casting doubt" on Respondent's account of

the threat of the forced marriage does not do that. The IJ seems to reason that because the father did not bring about the marriage over Respondent's stated opposition when he controlled her in 1996 (before he allowed her travel to France) and on her visit home in 2001, and instead allowed her to study in France for 9 years, that he will once again postpone the marriage if she is returned to him now. But Respondent's testimony and the affidavits of witnesses explain the reasons for the earlier delays in the marriage, and why these reasons have changed so that no further postponement will occur. The conditions facing Respondent abruptly changed in November 2005, when Respondent learned that her father decided to bring her back from France about four months early, before she finished the master's degree program in which she was enrolled, so she could be married in June 2006. The evidence shows that the prospective husband was getting more and more angry, indeed enraged by the long delay. Finally, the evidence details the father's motivations for safeguarding his pension, obtaining a tribal office, and securing his rental properties on the groom's family's former land— suggesting that these factors had erupted and forced his hand. Given the overwhelming evidence that the father was about to force the issue by surprising his daughter with her early retrieval back to Senegal in January 2006, the IJ engaged in improper speculation, with no support in the record, that Respondent was not threatened by an immediate forced marriage.

2. The IJ noted that as the first-born, or "Tauw," in a Senegalese family, Respondent had special access to education and career opportunities, and also an obligation to be married before her younger sisters, ages 26 and 15 at the time. The IJ nevertheless found it "inconsistent" that Respondent's 26 year-old sister was free to live in France and pursue her education without facing pressure from their father to enter into a marriage. That her sister evidently has more freedom than

Respondent to pursue her education and career somehow "casts doubts" on Respondent's claims.

The problem is not the supposed inconsistency in Respondent's testimony, but the IJ's apparent belief that the father would not pressure Respondent without also pressuring one or both of her younger sisters into a forced marriage. The IJ evidently assumes that in Respondent's culture, when a father practices forced marriage for his oldest daughter, he must also practice it for the younger daughters and attempt to bring about all the marriages simultaneously. But the unchallenged expert's testimony, and the affidavit of her 26 year-old sister, clearly explain why Respondent is facing the forced marriage, but not her younger sisters: The oldest daughter, as the Tauw, must marry first (Dr. N'Diaye, TR at 96; Affidavit of M- T- F, Group Exh. 4, A-3 at p. 3). She has not only greater privileges, but also greater responsibilities and is a role model for her younger siblings. The fact that her 26 year-old sister, of marriageable age, is free to study in France without the present threat of a forced marriage does not, either logically or culturally, undercut Respondent's testimony that she is in imminent threat of a forced marriage.

3. The IJ found it "dubious" that Respondent's father, an educated Senegalese diplomat with extensive experience living outside of his country, would support Respondent's career goals and pay for nine years of higher education, and would be aware of her educated status and values she acquired, yet would force Respondent to marry a poor, uneducated man in a fishing village whom he knows to be conservative, poor, abusive, and likely to keep Respondent confined to the home.

The IJ should not substitute his views ("dubious," "makes little sense") for a culturally-based phenomenon about which he has no expertise. The evidence that the

father is doing precisely what the IJ describes is incontrovertible. Respondent's testimony, along with that of the expert on Senegal and Respondent's maternal uncle, described the father's motivations, his background, and his actions (Dr. N'Diaye, TR at 90-92, 114; L- S, IJ at 8; affidavit of L- S, Group Exh. 4, A-6, p. 1-3). The unquestioned testimony of the expert established that educated wives are prized in Senegal and that it is not uncommon for educated women to be forced into marriages with traditional, uneducated men. While his actions and thinking may not make sense to a U.S. immigration judge or an average citizen of the U.S., the father is carrying out his forced marriage plan for Respondent in a different culture, operating under different assumptions and rules. The IJ's own cultural preconceptions and his limitations in understanding the Senegalese culture do not render the Respondent's testimony implausible.

The marriage is designed to bring together the two families, not merely the new bride and groom. The groom's family had real estate that they transferred to Respondent's father at some point in the past, and in exchange for that land Respondent was intended to be given as a second wife in payment. As the expert testified (Dr.N'Diaye, TR at 113-14), the educational mismatch between Respondent and the intended husband (which grew wider during the years Respondent spent in France) is not unusual and did not cause either the father or the intended husband to revisit plans for the marriage.

4. The IJ found it "implausible" that Respondent could not find "relief from her situation" in France. Respondent's evidence showed that French authorities pay little attention to immigrant communities and that her father's connections to French government officials would obstruct their ability to help her. The IJ

> found this claim in conflict with a State Department human rights report that indicates that France generally enforces its laws regarding violence against women. The IJ noted that the French government sponsors and funds programs for women who are victims of violence, but that Respondent made no efforts to seek help from any of these organizations.

This other asserted ground of implausibility and the IJ's observations about conditions in France for threatened women have nothing to do with Respondent's credibility. Respondent had to establish that she was a refugee from her country of nationality, Senegal (*see* INA § 101(a)(42)(A)). Thus, it was not an element of Respondent's asylum claim that she show either persecution in France or that she tried and failed to gain relief from her situation from authorities or NGOs in France. She nonetheless showed past persecution in France from one uncle (who beat her at least five times), as well as the fear of future persecution from her father and three uncles should she be returned to France (TR at 49, 115-16). She also pointed to the Department of State's report on France that discusses the poor treatment immigrant women in France often face from authorities (*see* Exh. 8, p 7-8). Whether Respondent was actually able to get help in France, or faced danger in France, goes only to the issue of whether her stay as a student in France somehow barred her from eligibility for asylum under the outmoded doctrine of "safe haven" or the statutory bar of firm resettlement (*see* Point V, *infra*), but not to her credibility. Indeed, the IJ does not say that Respondent is lying about being unable to get protection in France, only that he disagrees and believes that

she can get protection. The IJ erred completely in basing a decision about Respondent's credibility on this issue.[7]

5. The IJ also found it implausible that Respondent never took advantage of her opportunities to seek help from the police or other authorities in France, even though in Bordeaux she lived for a while in a dormitory, away from her uncle, and had some independence from his control and that of the Senegalese community during that time.

This similar point by the IJ is not really about Respondent's credibility but about the IJ's disagreement with Respondent's testimony that she was not safe in France. Once again, since Respondent was applying for asylum from Senegal, not France, it was not part of Respondent's burden to show that she sought help from the French police. In demonstrating why Respondent's student years in France cannot be viewed as a statutory bar to receiving asylum (*see* Point V, *infra*), Respondent and her expert also explained why Respondent did not receive help in France. The expert described the cultural practices and family structures within the Senegalese immigrant community in France

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[7] It is, incidentally, not entirely accurate for the IJ to write that Respondent never sought help from an NGO in France. Perhaps as the result of a small lapse of memory or preparation, Respondent testified in August 2006 that she had not approached an NGO in France; however, the record of her credible fear interview on December 13, 2005, (Exh. 3) shows that she actually sought the assistance of the Association of African Women in France against Forced Marriage. She was told they could not help her, since she was a foreign student and not a citizen of France. *See* letter of Respondent's Counsel to the IJ, dated September 25, 2006, pages 4-5.

that permitted paternal control over Respondent— and the threat that her paternal uncles could kidnap her in France and return her to Senegal. She also explained how French police would find it "quite difficult" to assist an immigrant woman from Africa, especially one who has no legal residency other than temporary status as a foreign student (Dr. N'Diaye, TR at 96-98, 112, 115-16). The IJ, however, gave no specific and cogent reasons for rejecting either one's testimony about the absence of protection for Respondent in France, nor could he explain how this issue related to the credibility of Respondent, because it does not.

6. The IJ concluded that Respondent's application for amnesty in the U.S. was "inconsistent" with her behavior the previous summer of 2005, when she visited the U.S. for five weeks and received advice from her Uncle L- to seek help from the U.S. Embassy in Paris. Upon her return to France, rather than do this, Respondent re-enrolled in classes and then hurriedly fled Paris for the U.S. in December 2005 when she learned her father was coming from Senegal to retrieve her earlier than she thought.

This alleged "inconsistency" represents another spurious issue, one that also leads the IJ to engage in speculation on a point of limited relevance to the case. Respondent was under no legal obligation to seek assistance at the U.S. Embassy in Paris, which in any event is not authorized or equipped to make grants of asylum or otherwise provide assistance to a foreign national being persecuted in France by family members.[8] Indeed,

[8] The Foreign Affairs Manual (FAM) of the Department of State declares, "The Department considers a forced marriage to be a violation of basic human rights." Consular officials at U.S. embassies and consulates are instructed to take "appropriate

requesting asylum at a U.S. Embassy is about the most foolish action a desperate refugee can take: It is a fast track to revocation of the refugee's U.S. non-immigrant visa, if one had already been granted, or a long-term bar to getting such a visa.

Also, there was nothing inconsistent in Respondent's testimony or her behavior—it is once again a matter of the IJ simply not understanding why she would not apply for asylum sooner. (This point is directly in conflict with the IJ's earlier doubt that Respondent faced an imminent threat of forced marriage.) Were Respondent fabricating her evidence about why she fled France when she did and had she been motivated only to get to the U.S. at the earliest possible moment, as the IJ seems to believe, she could have easily done so when she visited the U.S. in the summer of 2005.

Respondent's testimony explains both her trip to the U.S. in the summer of 2005 and her conduct after returning to France to resume her studies, marked by her rush to enroll in classes and renew her French visa, followed by her flight to the U.S. in December 2005 and application for asylum (TR at 29-31; Affidavit of Binata F, Group Exhibit 4, A-1, p. 6). The well-meaning but incorrect advice from her uncle to contact the U.S. Embassy during her three months back in France—advice she was wise to not implement—does not create an "inconsistency" about her reasons for seeking asylum. Once she learned that her father was coming four months earlier than she expected, her situation became even more urgent. There is nothing inherently implausible about Respondent's actions either during her summer 2005 visit to the U.S., or her flight from France and her urgency in seeking asylum as soon as she arrived in the U.S.

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action on these cases <u>when U.S. citizen/ nationals are involved</u>." 7 FAM 1459 (c). (emphasis added) The FAM does not contain authorization for U.S. foreign diplomatic posts to take any action when, as in Respondent's case, a non-U.S. national is involved.

The Board should overturn the IJ's unsupported credibility findings and conclude that Respondent's testimony was credible and established her eligibility for asylum.

II. The IJ Committed Legal Error By Failing To Find That The Affidavits Of Respondent's Family And Friends, The Testimony Of Her Uncle, And The Testimony Of A Cultural Anthropologist From The Smithsonian Institution With Expertise In Senegalese Culture Provided Sufficient Independent Corroboration Of Respondent's Testimony; Moreover, The IJ Misapplied Two Fourth Circuit Cases To Improperly Dismiss The Corroborating Evidence.

Respondent was a credible witness, as shown above, and was thus not required to provide corroboration of her personal experience of her persecution at the hands of her father. Nonetheless, she did provide overwhelming corroboration of those experiences, which the IJ then improperly and illogically dismissed. This was legal error that the Board should reverse. The reasons the IJ gives for rejecting the independent evidence are neither specific nor cogent, and do not amount to sufficient evidence to support his credibility finding. His reliance on two Fourth Circuit cases, moreover, is misplaced, resulting from an egregious misreading of those cases.

The Board requires only that an alien present "general background information about a country" to support his or her claim. *See Matter of S-M-J-, supra,* 21 I&N Dec. at 724. When the record contains this information "and an applicant's claim relies primarily on personal experiences not reasonably subject to verification," the Board makes clear that "*corroborating documentary evidence of the asylum applicant's particular experience is not required*." *Id.* at 725 (emphasis added). "Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate

particular experiences (e.g. corroboration from the persecutor)." *Id.* *Matter of S-M-J-* requires that only certain kinds of facts should be corroborated, such as place of birth, and concludes that corroborating an applicant's "particular experiences" is only required when "the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers." *Id.* at 726.

Respondent fully complied with the Board's requirements by providing background information about gender persecution and forced marriage in Senegal (in a paper digesting academic studies of Senegal, prepared by a student volunteer assisting Respondent's attorney, Group Exh. 4-D); the State Department Country human rights report (Group Exh. 4-C); and records documenting her birth and nationality, educational degrees in Senegal and France, and internships in France (Group Exh. 5, F-H and Group Exh. 6, I-P). Then, even though she was not required to do so, Respondent also submitted affidavits corroborating her "particular experiences" from her mother, one sister, maternal uncle, and two friends (Group Exh. 4, A-2 to A-6), and she also called that uncle as a witness at the hearing. She also submitted an affidavit (Group Exh. 4, A-7) and testimony of Dr. Diana N'Diaye, a cultural anthropologist, whom the judge qualified as an expert on Senegalese culture. All of this evidence overwhelmingly corroborates Respondent's testimony about her father's past persecution of her and her fears of future persecution by the husband, if she is forced into a marriage that she rejects.

None of this evidence impressed the IJ. Having improperly found Respondent not credible, the IJ recognized that he was required to examine the entire record for independent corroborating evidence that would establish Respondent's satisfaction of the asylum requirements. The IJ dismissed all this evidence for reasons similar to those he had given for dismissing Respondent's testimony: That it failed to explain why

Respondent did not seek help from authorities or non-profit organizations in France; why her father would fund her graduate education, but then try to marry her to a poor, uneducated man who will not allow her to work; and why her father would permit her to study for nine years in France in the face of her rejection of his marriage plan and despite her act of independence in moving out of her uncle's home in Bordeaux, France.

These reasons given by the IJ for rejecting the independent evidence of Respondent's uncle, mother, sister, and friends are equally unpersuasive. While the IJ had little empathy for or understanding of Respondent's culture, that is not a proper basis for rejecting all of this evidence on credibility grounds (*see* fn. 6 and accompanying text, *supra*). It is immaterial that Respondent did not seek or obtain help from police or an NGO in France (except insofar as Respondent had to show that France was not a "safe haven," *see* Point V, *infra*), and any efforts by Respondent to get that help were likely to be futile, in view of the documented reluctance of French authorities to assist African women, whether immigrants or, like Respondent, non-immigrants. The IJ's bafflement by Respondent's father's actions in allowing her to study in France despite her opposition to the forced marriage, and his insistence on making such an unequal marriage, again represents the IJ's own improper substitution of his views of what is culturally appropriate for the evidence. These are not the specific and cogent reasons needed before the IJ may dismiss the evidence of Respondent's family and friends.

Relying upon two cases from the Fourth Circuit, *Camara v. Ashcroft, supra*, and *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006), the IJ declared that "the letters and testimony from Respondent's uncle, mother, sister, and friends have limited value in the Fourth Circuit . . . . Affidavits from friends and family often do not provide independent evidence of persecution under *Camara*." (IJ at 12) The IJ seriously misreads both cases. In *Camara* the Fourth Circuit reversed and remanded to the

immigration court an asylum case because the IJ had "completely ignored" the independent evidence of the applicant's persecution for political party activities in her home country, Guinea. That evidence consisted of court documents from that country, which showed the applicant's conviction, imprisonment, and escape, a letter from a leader of the political party in which she had been active, and State Department reports on civil protests in which the applicant had likely been involved. *Camara* at 370.

In *Gandziami-Mickhou* the Fourth Circuit considered a case from the Republic of Congo in which the applicant also sought asylum based on persecution for her political party activity, including a claim that her father was a founder of that party and had been killed as a result, and that she herself was an active member and had been arrested for her party activities. On appeal, she claimed that the IJ had failed to consider corroborating evidence, which included articles and country reports describing political repression by the government and affidavits from her friends and family that confirmed her involvement with the party, her father's death, and her persecution. Unlike in *Camara,* however, the *Gandziami-Mickhou* court sustained the IJ's rejection of the applicant's asylum request, finding that the IJ had considered that evidence and in fact identified other pieces of documentation that might have assisted the applicant but were not offered into evidence. The court contrasted the documents offered in *Camara* and said, "[T]he only documents that [the applicant] alleges the IJ overlooked that specifically connect her to the persecution of [the political party] are affidavits from friends and family—hardly the independent evidence that *Camara* contemplates." *Gandziami-Mickhou* at 358-59.

Quite clearly, *Gandziami-Mickhou* does not, and cannot possibly, mean that the Fourth Circuit expects IJ's and this Board to dismiss as independent evidence of persecution affidavits from friends and family members as a matter of course. Rather, the case appears to instruct that where an applicant for asylum claims he or she is persecuted

for her political party activity, then the independent evidence should specifically connect her to the persecution of that party. Such evidence as police or court records may do that, as may letters or affidavits from officials in the party suffering government oppression. But where an applicant for asylum claims, as Respondent has, that she is persecuted by *her own father and her prospective husband to a forced marriage*, it defies logic to require police or court records or statements from political party officials. In a case such as this, indeed, the affidavits of family and friends are the best—if not the only—independent evidence corroborating Respondent's testimony. Moreover, *Gandziami-Mickhou* and *Camara* stand for the proposition that an IJ cannot merely reject corroborating evidence without a thorough review of it first. It is legal error for the IJ in Respondent's case to dismiss them out of hand and is tantamount to the error displayed by the IJ in *Camara* who completely ignored the independent evidence.

Finally, the IJ discarded the testimony of the expert witness, Dr. N'Daiye, on the grounds that she met Respondent only twice and "admitted limited knowledge of Respondent's specific situation." IJ at 19. This reflects a serious legal error, since the IJ misconstrues the role of an expert witness, and it requires the reversal of the IJ's credibility findings. *See Dia v. Ashcroft, supra,* 353 F.3d at 258 (IJ's "outright rejection" of asylum applicant's handwriting expert, a U.S. government employee with unchallenged expertise, was "unfounded"). The expert was not solely testifying about the Respondent's factual experiences, although she was permitted to comment on them and did. Experts testify in order to provide explanations, based on their professional expertise, that help a trier of fact to understand the case or decide a fact in issue, and are allowed the leeway to express opinions, which ordinary witnesses are not. *See Federal Rules of Evidence,* Rule 702. Their opinions include "<u>those that are not based on firsthand knowledge or observation</u>." *Daubert v. Merrell Dow Pharmaceuticals*, 509

U.S. 579, 592 (1993) (emphasis added); *see Federal Rules of Evidence*, Rules 702 and 703, and Advisory Committee Notes. The Notes to Rule 703 make clear that in federal court, and presumably more so before immigration judges, the expert may base her opinion on facts and data that were not admitted into evidence, but come from out of court and include material that the expert did not gather through her own perceptions.

Dr. N'Diaye was called as a witness to give the cultural background to forced marriage in Senegal and to give her opinions about the behavior of the parties to this family dispute, including Respondent, her father, and her prospective husband, *in light of her expertise on Senegalese culture and forced marriage practices*. Thus, whether she met with Respondent once, twice, or not at all is completely immaterial to the weight the IJ should have accorded to her testimony. These are not specific and cogent reasons, and the IJ committed legal error in dismissing Dr. N'Diaye's testimony, especially when that testimony provided the explanations to the culturally based conduct that the IJ found so perplexing in Respondent's testimony, *as the IJ himself indicates* (IJ at 19).

According to the IJ, Dr. N'Diaye "addressed the contradictions between Respondent's freedom to live in France for nine years and her alleged treatment at home in Senegal." The expert testified that "forced marriage and domestic violence is widespread in Senegal, and it is common for Senegalese women to return home from abroad and face expectations that they remain at home as mothers and wives." *Id.* Further, according to the IJ, the expert explained why Respondent's younger sisters "do not receive the same pressure to marry as Respondent[,] because Respondent is the Tauw [eldest sibling], and her community experts her to marry first." *Id.* Despite having what the IJ recognized as "cultural knowledge of the Senegalese community," the IJ essentially "completely ignored" Dr. N'Diaye's testimony, which had he viewed it properly would

have established independent corroboration of Respondent's persecution. *See Camara, supra.*

III. The Immigration Judge Committed Legal Error When He Ruled That Respondent Did Not Suffer Past Persecution "On Account Of" Her Political Opinion, Her Religion, Or Her Membership In The Particular Social Group Of Young Unmarried Women Of The Wolof-Lebou Ethnic Group In Senegal Who Oppose Forced Marriage, Where Respondent Established That Her Father Bartered Her Into A Marriage Arrangement And Systematically Beat And Threatened Her To Force Her To Accept It.

The record shows that Respondent's father persecuted her "on account of" her political opinion (feminism) and her religion (a tolerant, modern practice of Islam that recognizes women's free marital choice). The IJ's opinion unaccountably fails to address these two crucial bases of Respondent's past persecution, addressing only the question of whether Respondent faced persecution on account of her membership in a particular social group. In fact, Respondent suffered past persecution from her father (and his brothers) "on account of" three different protected grounds, each of which is addressed below in turn. Respondent also established that the government of Senegal was unable or unwilling to protect her from this persecution, a point the IJ and government evidently accepted given the silence in the IJ's opinion.[9]

[9] The Board has long-recognized that persecution can be inflicted by a government or by private parties that "a government is unwilling or unable to control." *See, e.g.*, *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *Matter of S-A-*, 22 I&N

1. Respondent suffered past persecution:

Section 101(a) (42) (A) of the INA defines a refugee as a person who is unable or unwilling to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." While the term "persecution" is not defined in the statute, the Board describes it broadly as comprising "harm or suffering" that is "inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor

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Dec. 1328, 1335 (BIA 2000). In the past, the Board relied upon the 1999 and 2000 State Department reports for Senegal in finding that a woman's fears of her treatment at the hands of her Moslem relatives amounted to persecution. *See Matter of Anon., A72-867-100* (BIA, September 24, 2002) (this opinion is in the record as Group Exh. 4-E). Those reports indicate that "domestic violence is widespread in Senegal, that the police usually do not interfere in family matters, and that most people are reluctant to approach the police for help in such situations." The 2005 State Department report for Senegal submitted by Respondent (Group Exh. 4-C) states that despite laws against domestic and spousal violence, such practices are widespread and the government does not enforce the law. This report reiterates the earlier reports about the failures of the police to intervene in domestic disputes. In Respondent's case, the government of Senegal is unable and unwilling to do anything about the domestic violence to which she has been subjected and which she fears in the future. Her father's high-ranking government position and his contacts with the national police, moreover, make it even less likely that the government would be of any use in protecting Respondent from his or the presumptive husband's violence.

seeks to overcome." *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985), *overruled in part by INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) . The Supreme Court indicates that "persecution," as used in Article 33.1 of the 1951 U.N. Convention on the Status of Refugees, "is a seemingly broader concept than threats to life and freedom." *INS v. Stevic*, 467 U.S. 407, 428 n. 22 (1984). The "concept of persecution is broad enough to include . . . measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

The IJ's Opinion appears to accept *arguendo* that Respondent did suffer past persecution, based on the beatings she received, but he takes pains to assert that forced marriage does not constitute persecution.[10] Having recognized the beatings, the IJ then erred by not considering the mental anguish Respondent suffered from the threat of

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[10] Should the Board wish to rule that forced marriage, a significant violation of human rights, is a form of persecution, Respondent's case is a suitable one, given that the record includes the comparative practices of other leading nations and a plethora of policy judgments and academic and scholarly material to support this view. (*See* Brief submitted by Amicus in this case, the Center for Gender and Refugee Studies, University of California, Hastings College of Law.) Should the Board, alternatively, wish to fashion a case-by-case approach to finding when forced marriages amount to persecution, Respondent's case also provides a suitable opportunity. This record shows a scale of abuse, starting from maltreatment in the past when Respondent expressed her opposition to this arrangement to the prospect of horrific abuse and torment in the future at the hands of her presumptive husband, if she is actually forced to enter into this marriage.

forced marriage. Respondent's father generated severe anguish by treating her as chattel and trading her life and liberty, including her most intimate matters of sexuality and childbearing, for land and other consideration. This, like the beatings, was a form of persecution that flowed from the fact that Respondent was threatened by a forced marriage.

Respondent's beatings by her father were administered by him periodically from 1996, during her senior year in high school in Dakar, Senegal, to 2001, on her last visit from France to Senegal. These beatings caused Respondent physical injuries from burns to her hands and bruises and abrasions to her body and head, possibly including concussions; they also caused her extreme anguish and emotional distress, as evidenced in part by an undiagnosed stomach disorder (Group Exh. 4, A-2, K- S F affidavit at p. 3). From 1996 to 1998, Respondent's paternal uncle, in whose household she lived while studying in Bordeaux, France, on behalf of Respondent's father inflicted at least five beatings on her to enforce a program of social isolation while she studied there.

2. Respondent's persecution was on account of her political opinion:

The IJ failed to address whether Respondent's persecution was on account of her political opinion; had he done so, he would have been compelled to find that it was. To establish persecution on account of political opinion, in the Immigration Court Respondent was required to and did: 1) specify the political opinion on which she relies; 2) show that she holds that opinion; and 3) show that she was persecuted or has a well-founded fear of persecution based on that opinion. *Fatin v. INS, supra,* 12 F. 3d at 1242. The Supreme Court instructs, "The ordinary meaning of the phrase 'persecution on account of . . . political opinion' in [INA] §101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's." *INS v. Elias-Zacarias,* 502 U.S. 478, 482

(1992). Circuit courts have held that "the plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution solely on account of the victim's political opinion." *Osorio v. INS*, 18 F. 3d 1017, 1028 (2d Cir. 1994). "An imputed political opinion, whether correctly or incorrectly attributed, may constitute a reason for political persecution within the meaning of the Act." *Ravindran v. INS*, 976 F. 2d 754 (1st Cir. 1992). Even where a victim has no political opinion and has no reflections on the government or culture of her country, it is the "imputation of political opinion" that counts under both the asylum and withholding statutes. *See Lazo-Majano v. INS*, 813 F. 3d 1432, 1435 (9th Cir. 1987). In *Lazo-Majano*, the victim's belief comprised a political opinion, even though she was apolitical and her opinion was "camouflaged." The fact that she believed that her persecutor was not restrained or punished by anyone in authority made her a "subversive" in the eyes of her persecutor. Since political opinion is seen through the eyes of the persecutor, this removed her treatment from a purely personal conflict and made it into persecution for her political beliefs. *Id.* at 1435.

"[F]eminism qualifies as a political opinion" for purposes of U.S. asylum law. *Fatin, supra*, 12 F. 3d at 1242. S*ee also Lazo-Majano, supra*; *Guidelines on International Protection: Gender Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UNHCR (the concept of a political opinion "may include an opinion as to gender roles. It would also include non-conformist behavior which leads the persecutor to impute a political opinion to [the applicant]."); Asylum Officer Basic Training Manual, *Female Applicants and Gender- Related Claims* ("a political opinion may be attributed to a woman who refuses to comply with social norms[.]")

Respondent met these tests before the IJ, because she specified her political opinion, showed that it was one she herself had, and proved that her persecution followed from it. In a manner similar to the women in *Fatin* and *Lazo-Majano*, Respondent believes that the Senegalese custom and tradition of fathers selecting spouses for their daughters, especially in barter arrangements that materially benefit themselves, is outmoded and represents an obstacle to modern notions of proper gender roles and women's rights. Her beliefs, as in these other cases, may be labeled "feminism," or may be viewed as a mainstream, classically liberal (and Western) expression of fundamental human and civil rights. Respondent's affidavit and testimony showed (Group Exh. 4, A-1 at p. 6; TR at 59-60, 65-66), simply, that she believes that women should choose their marital partner and the timing of their marriage. Her views, as Respondent and the expert witness explained (Dr. N'Diaye, TR at 89-90, 92-93), were in conflict with her father's traditional views and customary practices in Senegal, where marriage is a pact between families and the views of the daughter being married are unimportant. Respondent expressed these opinions to her father and she lived according to her opinions, as her conduct demonstrated. Often telling her she was "too modern and Westernized (TR at 60)," her father imputed a political opinion to her—one which she held herself—and as a result he inflicted punishment on her, amounting to persecution.

Nexus:

The "nexus" of the persecution was to Respondent's political beliefs, not merely out of personal disagreement over the marriage plans and her disobedience of her father's wishes. The requirement that an asylum applicant's persecution be "on account of" that person's race, religion, nationality, membership in a particular social group, or political opinion means that Respondent must provide some evidence, direct or circumstantial, of

the persecutor's motive. *INS v. Elias-Zacarias, supra,* 502 U.S. at 483-84. The Fourth Circuit indicates that "under the INA's 'mixed motive' standard, an asylum applicant need only show that the alleged perpetrator is motivated *in part* to persecute him on account of a protected trait." *Menghesha v. Gonzales,* 440 F. 3d 201, 206 (4th Cir. 2006). Since persecutors "often have multiple motives for punishing an asylum applicant, the INA requires only that an applicant prove that one of those motives is prohibited under the INA." *Menghesha* at 206. Respondent does not have to prove that the persecution she suffered and fears suffering is motivated solely by her political opinion, religion, or social group membership. A persecutor may have multiple motives for doing harm, some of which may not be impermissible under asylum law, but a Respondent need not conclusively prove that the persecutor has one clear motivation. *See Matter of S-P-,* 21 I&N Dec. 486, 489 (BIA 1996) (requiring an applicant to conclusively prove the persecutor's motivation "would be inconsistent with the 'well-founded fear' standard embodied in the 'refugee' definition.") *See also Matter of S-A-,* 22 I&N Dec. 1328, 1336 (BIA 2000).

The Department of Homeland Security indicates that the "on account of" requirement does not mean that a persecutor must be shown to also harm other people based on the same "targeted characteristic" of the asylum applicant he has persecuted. *DHS Brief at 34,* filed in *Matter of R-A-.* [11] The brief observes, "In the domestic violence

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[11] The Homeland Security brief, dated February 19, 2004, is available on the website of the Center for Gender and Refugee Studies ("CGRS"), at the University of California, Hastings School of Law, at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf. The brief was filed with the BIA following the remand of *Matter of R-A-,* 22 I&N Dec.

context, evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that the applicant has within the family relationship is highly relevant to determining the persecutor's motive." The brief advises, "This includes any direct evidence about the abuser's own actions and motives, as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society[.]" The DHS lawyers conclude that "Such circumstantial evidence, in addition to direct evidence regarding the abuser's statements or actions, may support a determination that the abuser believes he has the authority to abuse and control the victim 'on account of' the victim's status in the relationship." Brief at 35-36.

The REAL ID Act amended Section 208 of the INA to require that applicants show that a protected trait is "at least one central reason" for their past or feared future persecution.[12] This statute recognizes that several reasons could give rise to the persecution, including reasons that have nothing to do with a protected trait, and that a person could be eligible for asylum (or withholding of removal) as long as just one central reason is related to a protected trait. Also, by focusing on the "reason" for the persecution, rather than the "motive," the new statutory language might place more of an

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906 (decided by the BIA, June 11, 1999; decided by the Attorney General, January 19, 2001).

[12] 8 U.S.C. §1158(b)(1)(B)(i)

objective standard on the causes of the persecution, instead of a focus on the subjective motivation of the persecutor.[13]

Respondent easily met the standards for demonstrating a nexus between her political opinions and the persecution she suffered. Among her father's multiple motives, he was motivated in part to punish Respondent for a protected category, her opinion (and her religious views, *see infra*.) The evidence is overwhelming that one central reason for her persecution was her political opinion. The fact that her father began to beat her immediately following her refusal to submit to the marriage is also a clear indication of nexus. The objective causes of his conduct were, among them, to protect traditional mores and values; demonstrate his control over his family, so as not to "lose face;" and reject conduct by his daughter that was too "modern and Western." Finally, reflecting the DHS analysis, Dr. N'Diaye's expert testimony gave extensive circumstantial evidence showing that the father's pattern of violence was supported by the legal system and social norms of Senegal and its prevalent beliefs. This includes the traditionally subordinate position that women have in relation to men in Senegal in their family roles and within society at large. Taken together with the direct evidence, the circumstantial evidence supports a finding that the father believes he has "the authority to abuse and control [Respondent] 'on account of' the victim's status in the relationship."

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[13] *See* Guidance issued on June 10, 2005, by Human Rights First: "Overview of Changes to Eligibility for Asylum and Other Forms of Relief from Removal Under the REAL ID Act." For related comments and guidance on this Act, *see* http://www.humanrightsfirst.org/index.asp.

3. Respondent's persecution was also on account of her religion:

The IJ also failed to address whether persecution was on account of religion. In *Matter of S-A-* the Board considered a young woman, not unlike Respondent, who had suffered severe abuse and injury at the hands of her father, a strict Moslem, in Morocco. The Board found that the woman had a well-founded fear that if she returned home her father would kill her. The father's persecution of his daughter, the Board found, was based upon his daughter's religious beliefs "as they differed from those of her father concerning the proper role of women in Moroccan society." Because of the "daughter's refusal to share or submit to his religion-inspired restrictions and demands," the father mistreated her. *Matter of S-A-, supra,* 22 I&N Dec. at 1336.

Similarly, Respondent's view of Islam is that it provides for equality between men and women, accommodates women's desires for freedom, dignity, and autonomy, and respects a woman's right— established also in international law— to decide whom she wishes to marry. Her presumptive husband, a member of a strict Moslem sect, and her father, who is motivated in part by his own desires to please the tribal chiefs—who serve as religious as well as ethnic authority figures— hold diametrically opposed views to hers about what Islam instructs on the role of women and marital relations between men and women (Dr. N'Diaye, TR at 93, 99-100). Her father's violent rejection of Respondent's religious identity and beliefs is a part of his motivation and "one central reason" for his persecution of her. As with her political opinion, Respondent's religion meets the standards for connection to her persecution.

4. Respondent's persecution was also on account of her membership in a particular social group:

The IJ found that Respondent failed to demonstrate a nexus between "any alleged past persecution" by members of her family or her prospective husband and her membership in the social group of "young women in Senegal facing forced marriage." (IJ at 19-20) The IJ reasoned that: A) this social group "did not exist independently of and before the persecution began," and was not sufficiently "socially visible," and B) Respondent failed to show that "her father beat her to overcome her membership in the particular social group that she describes," since he "did not allegedly abuse her because of her gender, age, and nationality." (IJ at 20) To the contrary, Respondent showed a "nexus" between her father's beatings (and mental torments) and her membership in a particular social group.

A. The social group of young, single women of the Wolof-Lebou ethnic group in Senegal who oppose forced marriage is cognizable, because it exists independently of the persecution, is socially visible, and is defined with particularity:

Although not defined in the INA, the Board has interpreted "particular social group" to generally mean "a group of persons all of whom share a common, immutable characteristic. . . such as sex, color, or kinship ties." The characteristic "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta, supra*, at 233. The Second Circuit indicates that "a particular social group is comprised of individuals who possess some fundamental characteristic in common which serve to distinguish them in the eyes of a persecutor or in the eyes of the outside world in

general." The "attributes of a particular social group must be recognizable and discrete." *Gomez v. INS*, 947 F. 2d 660, 664 (2d Cir. 1991). In *Fatin v. INS* the Third Circuit set out three requirements for an applicant to meet: 1) Identify a group that constitutes a "particular social group;" 2) establish that she is a member of that group; and 3) show that she would be persecuted or has a well-founded fear of persecution based on that membership. *Fatin, supra*, 12 F. 3d at 1240. In that case, the court found that the applicant had persuasively defined a narrow group based on gender and ideology or political thought: "Iranian women who *refuse to conform* to the government's gender-specific laws and social norms." *Fatin* at 1241 (emphasis in original).

In a series of gender-related cases, which mostly involve female genital mutilation ("FGM"), the Board has recognized that "women" and "young women" are characteristics that define, either wholly or partially, a social group. *Kasinga* established that young women of the "Tchamba-Kunsuntu tribe" in Togo who have not had FGM at the hands of the tribe and who oppose the practice are such a group. *See Kasinga, supra*, 21 I&N Dec. at 365.[14] The Board wrote in an oft-cited passage:

> In accordance with *Acosta*, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

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[14] Notably, many of the FGM cases also involve forced marriages: Often, within the ethnic groups in question, especially in Africa and the Middle East, the FGM procedure is a pre-condition, usually part of a "cleansing ritual," for the husband to accept the woman as his wife. *See, e.g., Kasinga* (Rosenberg opinion at 374).

Kasinga, supra, at 366. Following Board precedent, the courts of appeals on many occasions in FGM cases have defined social groups based on female gender, or gender in combination with ethnic or national identity. *See, e.g., Mohammed v. Gonzales,* 400 F. 3d 785, 797 (9th Cir. 2005) (social group of Somalian females or narrower group of young girls in the Benadiri clan); *Niang v. Gonzales*, 422 F.3d 1187, 1198 (10th Cir. 2005) (women in the Tukulor Fulani tribe are a cognizable social group); *Hassan v. Gonzales,* 484 F.3d 513, 518 (8th Cir. 2007) (Somali females constitute a particular social group). Moreover, the Fourth Circuit and other circuits have ruled that a family may constitute a particular social group. *See, e.g., Lopez-Soto v. Ashcroft,* 383 F. 3d 228, 235 (4th Cir. 2005). In forced marriage cases specifically, the circuit courts are now beginning to recognize the social groups that applicants belong to and how their persecution is on account of it. *See, e.g., Gao v. Gonzales*, 440 F. 3d 62 (2d Cir. 2006), discussed in further detail *infra.* In other cases involving neither gender persecution nor FGM the Board has relied upon ethnic or national identity to define a social group. *See, e.g., Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996) (Marehan subclan of Somalia can be characterized as a particular social group); *Matter of V-T-S,* 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry are a social group).

The Board recently elaborated on the *Acosta* definition by indicating that one "important element in identifying the existence of a particular social group" is the "recognizability" and "social visibility of the group in question." *See Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006). That is, a particular social group should have a distinct and visible social identity within the country "recognizable by others in the community," and that identity "cannot be defined exclusively by the fact that its members have been subjected to harm." *Matter of A-M-E-*, 24 I&N Dec. 69, 74 (BIA 2007); *see also Matter of C-A-, supra,* at 960. Nevertheless, subjection to harm "may be a relevant factor in

considering the group's visibility in society." *Matter of A-M-E-, supra,* at 74. Regarding the requirement of particularity, a social group does "not generally require a 'voluntary associational relationship,' 'cohesiveness,' or strict 'homogeneity among group members.'" *Matter of A-M-E-, supra*; at 74; *see also Matter of C-A-, supra,* at 956-57.

In terms of defining a social group, Respondent's case of forced marriage is similar to those involving FGM, drawing upon the characteristics of gender and ethnicity. In this case young, single, women in the Wolof-Lebou ethnic group in Senegal who oppose forced marriage are the social group (Group Exh. 4, A-1 at p.1; Dr. N'Diaye, TR at 94. This group is socially visible, particular, and possesses a distinct social identity, sharing common, immutable characteristics. Common sense and experience in our own society show that young, single women form a group; indeed, special magazines, advertisers, and media exist to cater exclusively to the comings and goings of their celebrities, their needs in clothing fashions and cosmetics, sports and diets, and their interests in dating and relationships.

The IJ appeared to misunderstand the particular social group Respondent belongs to, and erroneously interpreted the Board's recent "social visibility" cases to require that Respondent show that Senegalese who do not know her personally, complete strangers, should be able to identify her as a person merely "facing" forced marriage (IJ at 20). In Senegal, the evidence shows, those young women who actually "resist" (as Respondent did) and are coercively placed into forced marriages do possess real social visibility, especially as prominent and numerous victims of family violence. (*See* State Department report on Senegal, excerpts, Exhibit 4-C at 2; academic paper on women in Senegal and supporting materials, *passim,* Exhibit 4-D.) Nor is visibility the same as immutability, as the IJ erroneously indicates in writing, "Although Respondent is identifiable as a young, Senegalese woman, she failed to demonstrate that . . . this circumstance that she faces is

immutable." (IJ at 21) It is basic that the social group characteristics, not the circumstances of her persecution, must be fundamental or immutable. *See Matter of Acosta, supra,* at 233.

The IJ, citing *Lukwago v. Ashcroft,* 329 F.3d 157, 172 (3d Cir. 2003), and *Castellano-Chacon v. INS,* 341 F.3d 533, 548 (6th Cir. 2003), found that Respondent's social group of young, unmarried women in Senegal opposing forced marriage did not exist independently of the persecution and before the persecution began. Neither of these cases, however, involved situations where immutable characteristics of gender, ethnicity, and opposition to forced marriage define the group and gender-based violence— FGM or forced marriage— defines the harm. The IJ also reasons that the "fact that Respondent's family is forcing her into marriage is a critical element of the definition." IJ at 20. To the contrary, Respondent's social group exists prior to, and independent of, any harm that is directed toward it (*see* discussion by Dr. N'Diaye, TR at 84-88). Surely, the IJ committed the classic *post hoc ergo propter hoc* logical Facy: The violence and persecution that Respondent was subjected to by her family after she resisted the marriage does not mean that the violence and persecution led to, created, or caused the formation of the social group to which she belongs.

Respondent and other young, single, women of the Wolof-Lebou who oppose forced marriage are, collectively, a *de facto* group in Senegalese society. While the exposure of this group to violence and sexual violence for opposing forced marriage does not exclusively define the group, their persecution is "a relevant factor in considering the group's visibility in society." *See Matter of A-M-E-, supra,* at 74. This harm is distinct, but flows, from their opposition to forced marriage. This social group is neither defined nor created by the harm; it is socially visible; and it meets "particularity" standards.

Therefore, these young women including Respondent are cognizable, legally, as a particular social group.

B. Respondent proved a clear nexus between her social group and the persecution she suffered:

The same standards apply for showing the connection between the protected trait and persecution that were described above: Given her father's mixed motives, Respondent need only show that "the alleged perpetrator is motivated *in part* to persecute [her] on account of a protected trait." *Menghesha v. Gonzales*, *supra,* 440 F. 3d at 206. She should also show, under the REAL ID Act, that her protected traits are "one central reason" for her persecution. Finally, in the domestic-violence context under the DHS position, Respondent is not required to show that her father also harms others (her sisters) based on the same "targeted characteristic" as her, and she may rely on direct and circumstantial evidence to show that her father "believes he has the authority to abuse and control the victim 'on account of' the victim's status in the relationship."

Respondent met each of these standards. Although her father's motivations were many and complex, they were *in part* to punish Respondent for her protected traits as a member of this social group of young, single women of the Wolof-Lebou who oppose forced marriage. Through his persecution of her, her father attempted to overcome the crucial characteristics of that group, which was its gender, age, single status, nationality, and ethnicity, and its insistence on its internationally-recognized human right to marital choice. The IJ's observation that "the fact that Respondent is female, young, and Senegalese did not generate the alleged physical abuse by her father" (*Id.* at 20) is flatly misplaced. Respondent did not accidentally become a victim of forced marriage. Indeed, these attributes represented the core reasons for her father to persecute her and they

provided the motivation for her persecution. Had Respondent been appreciably older (once-married or beyond her child-bearing years), or had she been a son, or had the family come from a country where ethnic groups do not practice forced marriage, it is impossible to imagine that her father and his family would have abused Respondent in the course of concocting this marriage plan. Further, had Respondent not asserted her rights, her father might not have used force to try to coerce her into accepting his plan. In short, Respondent was persecuted "on account of" her membership in a cognizable group.

The father's support for Respondent's educational goals, noted by the IJ (*IJ* at 20), does not diminish either the fact of or the reasons behind his physical abuse of her. His treatment of Respondent's younger sisters—not threatening the 26 year-old with a forced marriage, at least not yet— noted by the IJ, *Id.,* is unrelated to his repression of Respondent, since not all members of the class need to be treated the same by the persecutor.

IV. The Immigration Judge Erred In Ruling That Respondent Failed To Establish A "Well-Founded Fear" Of Future Persecution.

Having shown above that the IJ erred in finding that Respondent did not suffer past persecution, Respondent is entitled to the benefit of the presumption of 8 C.F.R. §208.13 (b)(1) that she has a well-founded fear of persecution "on the basis of the original claim" concerning the threat of her future forced marriage. Nothing in the record helps the government to meet its burden to rebut this presumption, which it has not even attempted to do. Independently of the presumption, Respondent has a well-founded fear of future persecution at the hands of her father and presumptive husband if she is returned to France or Senegal. The IJ erred in finding that she lacked an objectively reasonable

fear, and he also committed error in concluding that she failed to show "a subjectively reasonable fear (*sic*)." (IJ at 21) Respondent also met her burden of showing that, as with her past persecution, the future persecution is on account of her political opinion, religion, and membership in a particular social group.

The four-part test for establishing a well-founded fear of persecution requires that:

- The applicant "possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;"
- The persecutor is aware or could become aware that the applicant possesses this belief or characteristic;
- The persecutor has the capability of punishing the applicant;
- The persecutor has the inclination to punish the applicant.

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); *Matter of Acosta, supra*. The Supreme Court indicates that "so long as an objective situation is established by the evidence. . . it is enough that persecution is a reasonable possibility." *Cardoza-Fonseca, supra,* 480 U.S. at 440 (internal quotes omitted). "The term 'well-founded fear' refers to a subjective state of mind. . . . [It] requires that 1) the alien have a subjective fear, and 2) that this fear have enough of a basis that it can be considered well-founded." *Cardoza-Fonseca v. INS*, 767 F. 2d 1448, 1452-53 (9th Cir. 1985). The Second Circuit provides additional guidance to the meaning of this phrase:

> The term "well-founded fear" implies both a subjective and an objective element. The applicant must first establish the subjective element, that he does have a fear of persecution. To make that fear well-founded and thereby qualify for asylum, however, the alien must also demonstrate that there are objective facts supporting that fear.

Carcamo-Flores v. INS, 805 F. 2d 60 (2d Cir. 1986). "[O]nce subjective fear is demonstrated, the applicant need only show that such fear is grounded in reality to meet

the objective element of the test." *Melendez v. INS*, 926 F. 2d 211, 215 (2d Cir. 1991). An applicant establishes a well-founded fear "if he shows that a reasonable person in his circumstances would fear persecution." *Id.* at 215.

Respondent's evidence shows her actual, or subjective, fear and that her fear was objectively reasonable or grounded in facts. She was already sold into marriage through a barter transaction her father undertook with the prospective husband's family in a part of Senegal and within an ethnic group where these transactions are legitimate and are enforced, through social custom and customary law, if not in the formal legal system. If she is returned to Senegal or France, she will be placed into this marriage against her will, which by itself will be a source of persecution of indefinite duration. Upon her return to her father's custody, there is no question but that Respondent will suffer a resumption of the beatings, this time motivated by the father's rage at her disobedience and anger at his impotence while she was in the U.S. pursuing her asylum claim. In the custody of her new husband, beatings are also certain since he has equally suffered humiliation and frustration in his long-deferred project to make Respondent his wife. Once placed into the marital relationship, Respondent will suffer other forms of persecution, among them: marital rape on a regular basis, since she will not consent to sexual relations with the husband; beatings to enforce compliance and eradicate any hope of escape; rigid control and social isolation; stark prohibitions on her dress and movement outside the home; the end of her career hopes and desire for her own financial resources; loss of control over the timing and frequency of her child-bearing; and enforced subservience to the senior wife and her husband's mother. For all these reasons, Respondent possesses a subjective fear that is objectively reasonable.

In his contrary view, the IJ points to the fact that Respondent lived alone in a dormitory for a few years and that she never sought help from French authorities or

NGO's as evidence that she lacked actual fear. (IJ at 21) Apart from its lack of relevance, it is hard to see how these facts demonstrate a lack of fear. As the expert explained, the French authorities are not likely to assist African visitors— Respondent was not an immigrant to France, merely a foreign student— when they face problems within their families (Dr. N'Diaye, TR at 115-16). Senegalese cultural and social patterns within immigrant communities in France, moreover, reinforce the view that young women like Respondent should not seek intercession from authorities and their attempts at doing so are doomed and might even make their situation worse. Rather than take useless and possibly counter-productive actions, Respondent fled to the U.S. when she learned that her father was planning to take her from France sooner than expected and back to the marriage to her cousin. Knowing of his bad character, his religious fundamentalism and penchant for violence, his anger and frustration with her, and his belief in his prerogatives as her master and her subordination to him, Respondent concluded that flight was less risky a course than remaining in France or returning to Senegal. Given her knowledge of the situation that awaited her and her experiences of persecution by her father and uncle, Respondent's flight to the U.S. indicated her state of fear. The evidence of Respondent's well-founded fear is overwhelming and undeniable.

For the reasons discussed above, relating to past persecution, the well-founded fear of future persecution Respondent faces from her father and prospective husband are "on account of" her political opinion and her religion, both reflecting her modern, Western, and liberal Moslem beliefs in the autonomy and dignity of women and their right to marital choice. Respondent meets the four-part test of *Matter of Mogharrabi, supra,* since she possesses political and religious views about women's marital rights that her persecutors are trying to overcome, and the persecutors are fully aware of her views and have both the capacity and inclination to punish Respondent for them.

Her future persecution is also on account of her membership in a particular social group, one whose definition is somewhat different from those relating to her past persecution. The social group here, similar to that in *Gao v. Gonzales, supra,* 440 F. 3d 62, is composed of young, single women from the Wolof-Lebou ethnic group in a part of Senegal where forced marriage is practiced and marital contracts and arrangements are considered valid and enforceable.

Respondent's social group is cognizable, particular, and socially visible, as detailed in the earlier discussion. In *Gao* the Second Circuit determined that women subject to forced marriages in a specific region of China are a cognizable social group. The *Gao* court defined the group as "women who have been sold into marriage and who live in a feudal community in China where forced marriage is condoned." The court found that the term "particular social group" is "broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental." *Id. at 63.* The court concluded that the alien belonged to a social group that shares more than a common gender: "Gao's social group consists of women who have been sold into marriage . . . and who live in a part of China where forced marriages are considered valid and enforceable." *Id. at 70.* The *Gao* case, on appeal to the U.S. Supreme Court, suggests that Respondent's case is an excellent opportunity for the Board to explicate how Respondent's persecution through forced marriage was because of her membership in a social group.[15] The nexus is particularly

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[15] In its appeal of *Gao* to the Supreme Court, the U.S. government argues in part that because this Board is "in the process of clarifying the *Acosta* definition of particular social group. . . . [t]he Board would have had the opportunity to apply its expertise in

clear in this case, moreover, since Respondent will be forced into the marriage, and her future persecution, on account of her membership in this social group.

The IJ distinguishes *Gao* on the ground that in the Fourth Circuit this issue is still open and because, in his view, Respondent was "not identifiable as a woman sold into marriage." IJ at 19. Respondent, however, like the woman in *Gao,* was "identifiable" to all who knew her within and without her family as someone who had herself been a form

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construing the INA and determining, for example, the proper role of United Nations interpretations in applying United States law in the course of addressing Gao's social group claim." *Petition for Writ of Certiorari, Solicitor General of the U.S. (No. 06-1264) at 18*. The government seeks a remand of *Gao* to the Board for it to decide whether the social group defined by the circuit court has "sufficient particularity," and so that the Board can bring its "substantial expertise to bear" on the law, foreign policy, and cultural questions of "whether and when prospective or completed arranged marriages become forced marriages, and whether and when persons in or facing forced marriages constitute a particular social group." *Id.* at 19. Respondent's case contains ample expert testimony, supported by a paper reviewing the social science literature and policies of international organizations, about how arranged marriages differ from forced marriages in Senegal and why Respondent was facing persecution from the latter. Thus, Respondent's case represents a important opportunity—regardless of what happens in *Gao*—for the Board to draw the critical distinctions and employ its expertise to define the type of social group to which Respondent belongs. The Board can take the initiative on this case, on an appeal from an immigration court, rather than, as the government seeks in *Gao*, on remand from a Circuit Court.

of payment in the marital transaction. The fact that Respondent's father stands to achieve a tribal chief's position and also secure his government pension if he completes the forced marriage is further indication of how visible Respondent and her family are in their community. Crucially, the IJ mistakenly held that Respondent must be visible to others who do not know her, even though the Board's recent cases indicate that it is the social group that should have a distinct and visible social identity within the country through characteristics "recognizable by others in the community." *See Matter of A-M-E-, supra,* 24 I&N Dec. at 74; *Matter of C-A-, supra,* 23 I&N Dec. at 960.

V. The Immigration Judge Erred When He Denied Respondent Asylum Based Upon The Notion That Respondent Had Enjoyed A "Safe Haven" In France, Because Immigration Judges Have Lacked The Discretionary Power To Invoke Safe Haven As A Bar To Asylum Ever Since The Regulation Concerning "Safe Third Country" Was Repealed In January 2001. Respondent Was Neither Safe In France, Nor Was She Ever "Firmly Resettled" There Under The Current Regulation That Governs Eligibility For Asylum. Moreover, The IJ Abused His Discretion In Denying Asylum To Respondent.

The IJ purported to rule in his discretion that Respondent was not entitled to asylum, citing *Matter of Pula,* 19 I&N Dec. 467, 473 (BIA 1987), because she lived in France for nine years, orderly refugee procedures are available there, and Respondent lived there safely with the potential for long-term employment (IJ at 21). The doctrine of "safe haven," used as a basis for a discretionary denial, however, no longer has a grounding in the immigration regulations, since those prior regulations— found in 8 C.F.R. §208.13(d)— were repealed on January 5, 2001. *Asylum Procedures,* 65 Fed.

Reg. 76121, 76126 (Dec. 6, 2000); s*ee Tandia v. Gonzales*, 437 F. 3d 245 (2d Cir. 2006) and *Mamaouzian v. Ashcroft*, 390 F. 3d 1129 (9th Cir. 2004). The *Tandia* court held that a stay in a "safe third country" or "safe haven" must be evaluated by determining whether the applicant was "firmly resettled" in the third country, under the current regulation, before arriving in the U.S., and that absent such a finding, time spent in a safe haven cannot support a discretionary denial of asylum. *See Tandia* at 248-49 & n.8; *see also* 8 C.F.R. §208.15 (2007). It is reversible error to base a discretionary denial of asylum on the presumed doctrine of safe haven.[16] *Id.*

Even if the "safe haven" doctrine were still the law, which is not the case, the IJ erred in concluding that Respondent would be safe if returned to France because of that country's "orderly refugee procedures," obligations for *non-refoulement*, and temporary protection of those who may not qualify as refugees. (IJ at 22) The Record establishes that France was not a safe place for Respondent once her father decided to bring her home to Senegal and she decided to adhere to her longstanding opposition to the forced marriage. Not only were her uncles in France assigned to watch over her, but her father

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[16] The IJ also mischaracterized the evidence, when he concluded that Respondent's two internships—one at a nominal salary, the other with an honorarium at its conclusion—and her maternal uncle's rental payments for her in Bordeaux showed that she could "support herself through employment" in France (IJ at 22), both when she studied there and today. In fact, the record demonstrates that Respondent received the bulk of her support from her father and she has no basis on which to support herself in France if returned there. Nor, in contrast to the IJ's suggestion, does she have the right to reside in France or obtain a job in that country. Without current enrollment in a university, Respondent also lacks the right to return to France as a foreign student.

also was and is on good terms with French officials, receives their assistance when needed, and is able to enter and leave France at will (TR at 49; Group Exh. 4, A-1 at p. 4). Indeed, Respondent's father told her explicitly that French authorities would not help her if she tried to stay in France, given his friendships with them (TR at 49). The expert witness, also qualified to discuss Senegalese communities in France, confirmed that French police would not be responsive to Respondent's needs for protection (TR at 115-16).

Like her Senegalese friend, A- M-, who also fled a forced marriage in Senegal for France initially before seeking greater safety in Italy, Respondent was not secure in France— because her father and uncles would find her and, the French legal system notwithstanding, force her onto a plane to Senegal.[17] Indeed, the 2005 U.S. Department of State Report on France (Exhibit 8 at p. 7) cites the criticism of the French government by an NGO about the treatment of foreigners, especially asylum seekers, at French airports and notes "allegations of abuse against foreigners in waiting areas, particularly during attempts to re-embark them on aircraft."[18] It is wishful thinking to believe that the French government would assist Respondent then or now during an attempt by her father and uncles to place her on an airplane to Senegal.

It is also evident that Respondent was not "firmly resettled" in France. Section 208.15 of the regulations defines "firm resettlement" as the receipt by the alien from the

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[17] *See* affidavit of N- A- M-, Group Exh. 4, A-5, and note 3, *supra*.

[18] The report also mentions that a "repressive atmosphere" against women exists in some suburbs of Paris dominated by North African immigrants, where men "reportedly intimidated women whom they perceived as violating social norms. This abuse ranged from verbal abuse to physical assault and rape." (Exh. 8 at p. 8)

other country of "an offer of permanent resident status, citizenship, or some other type of permanent resettlement." The length of time spent in the third country is not dispositive; rather, the issue turns upon whether the applicant was offered some type of permanent resettlement in that country. INS, *Basic Law Manual* at 49. It is the government's burden to establish that an applicant for asylum was firmly resettled elsewhere. *Makadji v. Gonzales*, 470 F. 3d 450, 455 (2nd Cir. 2006). Some courts permit the government to meet this burden without the need to show a "formal or express 'offer,' if the circumstances of the person's existence in a country demonstrate that the person was effectively accepted by that nation as a permanent resident." *Id.* "[M]ore than mere duration of refuge [is required] to support the conclusion that permanent resettlement was established." *Id.* at 456.

Although Respondent studied in France for nine years, she was not offered and did not enjoy permanent resident status there, nor did the French government indicate in any way that she was accepted as a permanent resident in that country. She was permitted to stay in France on a temporary student visa, which had to be periodically renewed and was valid only while she was enrolled as a full-time student (TR at 30). She was not permitted to work in France, except for brief internships in connection with her courses at the university (TR at 54-55). Respondent's financial support for her living expenses came from her father (except for some rent from her maternal uncle in the U.S.), as did her tuition payments for university courses. During her years studying in France, she never received an offer of permanent legal status in that country, and, thus was not firmly resettled there.

Respondent met the requirements for showing her status as a refugee within the INA. No statutory or other bars apply. The IJ's refusal to grant her asylum amounted to an abuse of his discretion.

VI. The Immigration Judge Erred In Denying Respondent Withholding Of Removal And Relief Under The U.N. Convention Against Torture, Because Respondent Meets The Higher Standards For These Two Forms Of Relief.

The IJ found that Respondent did not meet her burden of proving it was "more likely than not" that she would be persecuted on a protected ground if returned to Senegal, and he therefore denied her the remedy of withholding under INA §241(b)(3). The IJ is incorrect. As discussed above, Respondent established through credible testimony that she was the victim of past persecution and has a well-founded fear of persecution, based on her political opinion, religion, and social group of young women facing forced marriage. The evidence is overwhelming that she faces a "clear probability" of persecution, *see INS v. Stevic, supra,* 467 U.S. 407, and is therefore entitled to withholding.

The IJ also found that Respondent is not entitled to relief under the U.N. Convention against Torture, because he found that officials of Senegal or those acting in an official capacity were not involved in beating her over the forced marriage, and that the treatment she suffered does not rise to the level of "extremely cruel, inhuman, or degrading treatment" under 8 C.F.R. §1208.18(a)(2). (IJ at 23) These findings, too, are incorrect. Respondent's father, himself a high-ranking Senegalese government official, has close contacts with the police and the Interior Ministry (TR at 49; IJ at 6). It is an easy matter for him to receive their assistance, even if they are to turn a blind eye, if he forcibly returns Respondent to Senegal and forces her into the marriage. Moreover, the U.S. Department of State recognizes that victims of domestic violence in Senegal do not receive assistance by seeking protection from the police; indeed, matters can get worse

for the woman who goes for help to the police.[19] Thus, officialdom in that country at a minimum acquiesces in the violence inflicted on Respondent and others facing forced marriages and in Respondent's case may even lend its helping hand to her oppressors.

Finally, it is difficult to accept the IJ's conclusion that entering into a forced marriage does not rise to the level qualifying for "torture." While Respondent's past beatings at the hands of her father and an uncle may not qualify, her prospective treatment in the home of her fundamentalist Islamist future husband—with its daily indignities and subservience— would meet any definition of torture when, as expected, Respondent becomes the victim of regular sexual violence and marital rape. Respondent's fate, to be sold or trafficked into virtual sexual slavery as the second— and unwilling— wife of an ignorant, intolerant, and violent man, amounts to torture, unless the U.S. courts intervene to protect her.

Conclusion and Relief Sought

Respondent Binata F is facing persecution from her father, his family, and her "husband" if she is returned to France or Senegal, because she was trafficked as a piece of property into a forced marriage. Her persecution is based on protected grounds, including political opinion and religion, and her membership in the class of young, single women in the Wolof-Lebou group in Senegal who are potential victims of forced marriage. Neither the government of France, where she was a visiting African student, nor the government of Senegal, her country of nationality, has the slightest inclination or ability to protect her. The Immigration Judge should have granted her application for

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[19] Group Exh. 4-C, U.S. Department of State, 2005 Country Reports on Human Rights Practices: Senegal (March 2006).

asylum, or for withholding, or relief under the Convention against Torture. The BIA should reverse the judgment of the IJ and grant asylum. In the alternative, the matter should be remanded for a new hearing before a different immigration judge.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 12, 2007, I served a copy of this Brief by first class mail, postage prepaid, upon the following:

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