

CENTER FOR
Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *S-F-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the Board of Immigration Appeals (BIA) in May 2008. In the matter of *S-F-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses forced marriage as a basis for asylum and persecution on account of political opinion and membership in a particular social group of “young, single daughters of an ethnic group in Senegal who oppose forced marriage.” The brief also argues against an adverse credibility finding by an immigration judge.

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

XXXXX

IN THE MATTER OF

XXXXX

Respondent

Not Detained

AMICUS CURIAE BRIEF

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U.S. STATUTORY MATERIAL

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INTERNATIONAL CASE LAW

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OTHER INTERNATIONAL MATERIALS

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United Nations High Commissioner for Refugees Guidelines on International Protection: Gender-Related Persecution (HCR/GIP/02/01, 7 May 2002), & 31 53

Universal Declaration of Human Rights, G. A. Res. 217A (III), U. N. Doc. A/810 (1948) 59

STATEMENT OF *AMICUS CURIAE*

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

STATEMENT OF FACTS

XXXXXXXXXXXXXXXXXXXX [SECTION REDACTED] XXXXXXXXXXXXXXXXXXXXXXX

SUMMARY OF ARGUMENT

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

The opinion below omits any consideration of Ms. XXXXX's claims that she was persecuted on account of her political opinion and her religion. Ms. XXXXX practices a modern, tolerant form of Islam and firmly believes that a woman should have the right to make her own decisions about marriage and sex, as well as the right to express her opinion about these issues. Ms. XXXXX did express this opinion on numerous occasions and was viciously and repeatedly attacked because of it.

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

Ms. XXXXX is entitled to a presumption that she has a well-founded fear of future persecution. Ms. XXXXX reasonably and genuinely fears future persecution in the form of forced

marriage, domestic violence and rape. The IJ's determination that the forced marriage under those circumstances does not constitute persecution contravenes long-established asylum jurisprudence, international human rights norms and international refugee jurisprudence.

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

The IJ concluded, against the vast weight of the evidence, that Ms. XXXXX was safe in [A EUROPEAN COUNTRY]. He further failed to consider the discretionary component of Ms. XXXXX's application under the proper totality of the circumstances test. Instead, he erroneously relied on the outdated and misapplied "safe haven" doctrine to conclude that Ms. XXXXX does not warrant the favorable exercise of discretion. The record compels the contrary conclusion that a favorable exercise of discretion is warranted in light of the fact that Ms. XXXXX was not safe in [A EUROPEAN COUNTRY], the severity of the harm Ms. XXXXX has suffered and fears, her lack of any criminal history, her well founded fear of persecution, and the presence of her maternal family members in the United States, as well as other substantial equities.

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

ARGUMENT

I. The IJ's Credibility Finding is Clearly Erroneous

A. Ms. XXXXX's Claim was Detailed, Consistent, Plausible and Candid

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

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

When reviewing the decision of an Immigration Judge (IJ), the Board of Immigration Appeals (Board) conducts a *de novo* review of questions of law, discretion, judgment, and mixed questions of law and fact. *See e.g., Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004); 8 C.F.R. ' 1003.1(d)(3)(ii). The Board reviews an IJ's *factual* finding, however, under a *clearly erroneous* standard. 8 C.F.R. ' 1003.1(d)(3)(i).

An IJ's credibility determination withstands review where it is: (1) based on discrepancies noted by the IJ that *actually* are present in the record, (2) these discrepancies provide specific and cogent reasons to determine that the applicant is incredible, and (3) the applicant has not provided a convincing explanation for the inconsistencies. *See e.g., Matter of A-S-*, 21 I. & N. Dec. 1106, 1009 (BIA 1998). All credibility findings are reviewed by the federal courts for substantial evidence. *See e.g., Camara*, 378 F.3d at 367. An IJ "who rejects a witness's positive testimony because in his or her judgment it lacks credibility should offer a specific, cogent reason for his disbelief." *Id.*

The Board defers to an IJ's credibility finding. *Matter of A-H-*, 23 I. & N. Dec. 774, 786-87 (A.G. 2005). This deference is greatest where the determination is based on demeanor. *Id.*

Credibility determinations that are based on the IJ's analysis of testimony, as opposed to demeanor, are granted less deference. *See Arulampalam v. Ashcroft*, 353 F.3d 679, 685-86 (9th Cir. 2003); *see also Cordejo-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994). The instant adverse credibility determination is not demeanor-based and is therefore due diminished deference. For reasons articulated below, this credibility finding is not supported by substantial, or reasonable evidence.

C. The IJ's Credibility Finding is Based on Personal Speculation and Conjecture, not Demeanor, Candor, Inconsistency, Inaccuracy or Falsehood

1. Summary of the IJ's Credibility Findings

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

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

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

After leading his adverse credibility finding with the statement that Ms. XXXXX's Ademeanor while testifying impaired her credibility with the court, the IJ neglected to cite a single instance of Ms. XXXXX's supposedly flawed demeanor. This wholly unexplained characterization is therefore unsustainable. *See Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989) (specific, cogent reason required for disbelief). The IJ did not provide a single specific, cogent reason for faulting Ms. XXXXX's demeanor or apparent sincerity. To the contrary, the record indicates that Ms. XXXXX testified without hesitation, in a responsive, candid and forthright manner.

3. The IJ's Plausibility Finding is Baseless

- a. Plausibility findings must be made in light of country conditions under the Board's precedent

Plausibility does not exist in a vacuum. The Board has long recognized the dependent relationship between general country conditions and plausibility. *In re S-M-J-*, 21 I. & N. Dec. 722, 728 (BIA 1997)(en banc). While inconsistent statements may support an adverse credibility finding independent of country conditions information, the same is not true for plausibility findings. Rather, Ageneral country condition information is essential to an IJ's evaluation of the plausibility of the applicant's account. *Id.* at 729. A proper adverse credibility finding based on plausibility exists only where an applicant presents A inherently improbable testimony, where these circumstances exist in view of the background evidence on country conditions. *Id.* If, however, as here, an IJ ignores country condition information and bases his finding on unsupported personal opinion, the finding is unsustainable. *Tewabe v. Gonzales*, 446 F.3d 533, 538 (4th Cir. 2006). AIf the IJ's adverse credibility

conclusion is not based on a specific, cogent reason, but, instead is based on speculation, conjecture, or an otherwise unsupported personal opinion, it cannot be upheld because it will not have been supported by substantial evidence⁶ [internal quotations omitted]. *Id.*

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

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

446 F.3d at 538.

Similarly, in *Lin-Jian v. Gonzales*, it was impermissible for the IJ to conclude that the applicant was incredible simply because he testified that he had presented his own identity card to government officials at an airport despite being in hiding from family planning officials. 489 F.3d 182, 189 (4th Cir. 2007). The Court of Appeals agreed with the petitioner that this particular basis for rejecting Lin's testimony rests upon an unsupported implicit assumption that airport officials are equipped to identify citizens sought by family planning cadre.⁶ *Id.*

Like the plausibility decisions in *Tewabe* and *Lin-Jian*, each of the IJ's implausibility grounds in this case are speculation-based and not determined in light of country conditions evidence as required under *S-M-J-*. 21 I. & N. Dec. 722, 729 (BIA 1997)(en banc) (A general

country condition information is essential^o). In fact, each of the findings contradicts the country conditions evidence of record. Each of the IJ's speculative findings also ignores the specific evidence presented that established why Ms. XXXXX's account was in fact plausible. These findings are therefore not supported by substantial evidence and must be reversed.

- b. The IJ's conclusion that an educated Senegalese [GOVERNMENT OFFICIAL] would not force his daughter into marriage against her will and would not choose an uneducated abusive man as her husband is baseless speculation

The IJ decided that it is Adubious^o that Ms. XXXXX's father, Aan educated [GOVERNMENT OFFICIAL] who has lived abroad^o would force Ms. XXXXX to marry a poor, uneducated fisherman.

Dec. at 17. This characterization of the evidence is flawed, in addition to being baseless. Even if XXXXX was himself poor, his family is not. The XXXXX family was wealthy enough to provide a bride-price of real property upon which Ms. XXXXX's father built apartments and relied for rental income. XXXXX may not be as educated as Ms. XXXXX, but he also was not without education B having completed middle school. Mr. XXXXX was an educated [GOVERNMENT OFFICIAL] but he himself has two wives and adheres to a more traditional interpretation of the Muslim religion. Mr. XXXXX's aim with the marriage appears to be consistent with tradition, that is to unite two families whose practical needs are suited, not to unite two spouses whose personalities are compatible. Furthermore, the IJ cited nothing in the record to support his idea of what Amakes sense^o for a powerful Senegalese [GOVERNMENT OFFICIAL] from a small village who dreams of being a future tribal chief and who has already received an impressive bride price.

The IJ ignored the testimony of the expert, as well as of witnesses with personal knowledge of the family situation, when he concluded that it was far-fetched for a father to finance nine years of his daughter's university education Aand then marry her to a husband

who he knows is conservative, poor, abusive and likely to keep her confined to his home.@
Dec. at 17.

First, the expert witness, Dr. N-Diaye, as well as family witnesses testified regarding the pressures Mr. XXXXX would experience to return to tradition B which would be consistent with his choice of a conservative spouse for his daughter. Dr. N-Diaye testified that Senegalese individuals of Mr. XXXXX-s generation who have spent many years abroad living in other cultures tend to become re-traditionalized upon return out of a desire to prove that one is just as ASenegalese and as traditional as anybody who stayed there.@ TR 184-85. Many Senegalese men, similarly situated to Mr. XXXXX, harbor conflicting desires for modernity and tradition at the same time:

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

TR 190: 9-16.

Ms. XXXXX-s uncle XXXXX who grew up in the same village as Mr. XXXXX and is from the same XXXXX ethnic group as him, also testified as to the conflict between tradition and modernity. Affidavit of XXXXX, Exh. 4, Tab A at 1. He explained that Mr. XXXXX-s education and residence abroad actually make it all the more necessary for him to succeed in forcing the marriage because he Adoes not want to be seen as somebody Westernized

after many years in Europe and other countries as a [GOVERNMENT OFFICIAL].[@] *Id.* at 2.¹

Furthermore, Mr. XXXXX's motives are also explained by his interest in becoming a tribal chief. Ms. XXXXX's mother and uncle both explained that Mr. XXXXX cares deeply about the community's perception of his ability to control his family because of his goal of becoming a chief. Thus, despite Mr. XXXXX's occupation and travels, he must appear loyal to tradition and custom.

As attested to by the expert, Dr. N-Diaye, there is nothing implausible about the fact that Mr. XXXXX allowed his daughter to continue her university education, even though he was marrying her to a man who would keep her confined to the home. Educated women are highly prized for their decorative refinement and their ability to raise educated children,

¹ AHer father is completely subjected to such strong influence from the tribal chief that his future is on the line as far as this forced marriage is concerned. I believe that the decisions he is making are beyond his control . . .[because] . . .he does not want to be seen as somebody Westernized after many years in Europe and other countries as a [GOVERNMENT OFFICIAL] . . . [h]e cannot give back the land that was given as a part of XXXXX's dowry by her future family-in-law . . . it is not unusual for somebody like XXXXX's father to be blackmailed by a tribal authority . . . [and] his pension could be taken away after all these years with the government.[@]

not necessarily their ability to have a career outside the home. TR 167: 4 (Aa wife who has an education is sort of a trophy wife@). It must be assumed that such education would increase Ms. XXXXX's value, and her father's reputation - and in fact did - as evidenced by XXXXX's agreement to postpone the marriage in order for Ms. XXXXX to pursue an education. Finally, the IJ's comment that Mr. XXXXX would not marry his daughter to a man who is abusive@ has no basis in fact. As demonstrated by the record, Mr. XXXXX himself was abusive to his own daughter B hitting and beating her on numerous occasions.

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

Judges are not required to leave common sense at the courtroom door. However, a credibility finding based *solely* on what is plausible within a different culture in the face of consistent, detailed and corroborated testimony warrants close scrutiny. This is especially true where, as here, fact-witnesses, an expert witness, and country conditions reports all effectively explain the cultural and political factors that influence the purportedly implausible behavior and explain why the behavior is both plausible and unexceptional.

- c. The IJ's conclusion that a man who would force his daughter into marriage would not allow her to delay it for nine years is baseless speculation

The IJ held that it is implausible@ that Ms. XXXXX's father will immediately force her into marriage now because he allowed her to live in [A EUROPEAN COUNTRY] for the last nine years. In so finding, the IJ ignores the specific circumstances that made the delay permissible for nine years. Ms. XXXXX pretended to have submitted to the marriage in order to be allowed

to study abroad, but no longer is protected by that pretense. Ms. XXXXX's study abroad was contingent on her submission to the presentation ceremony, among other factors. Ms. XXXXX's mother was able to delicately negotiate Ms. XXXXX's reprieve abroad, but by November of 2005, was no longer able to stem her husband's impatience. XXXXX's family consented to delay the wedding to allow Ms. XXXXX to obtain an education out of *Agoodwill* but no longer harbors such amity. Ms. XXXXX's education abroad was also contingent on her submitting to her paternal uncles' careful surveillance, which she subsequently resisted by hiding and fleeing to the United States. Ms. XXXXX's education was an acceptable delay because it served to increase her value as a *Atrophy wife*. Mr. XXXXX and XXXXX both valued education and wanted their children to be educated. Ms. XXXXX's teachers encouraged Ms. XXXXX to be educated in [A EUROPEAN COUNTRY] because of her high academic performance. By hiding, fleeing and seeking asylum in the United States, Ms. XXXXX has made it very clear that she is no longer delaying but, rather, that she will never accept the marriage and will have to be physically forced into it. Once again, the IJ's improbability finding contravenes the statute's mandate that all relevant factors be considered in determining credibility, and is not supported by substantial evidence in light of the internally and externally consistent testimony about the specific facts of this case.

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

The IJ calls it *inconsistent* that Ms. XXXXX's father would force her into an unwanted marriage and not pressure her younger sisters into similar circumstances. The Judge uses the word *inconsistent* but points to no discrepancy within the evidence itself. The only discrepancy that exists

lies between a fact of record (three unmarried daughters, one forced marriage) and the IJ's own life experience in the United States. The IJ couches his disbelief in the term 'inconsistent,' but in actuality, this is another plausibility finding.

The requirement that the eldest daughter marry before the other daughters in a family is both plausible and normal in the societal context, as confirmed by the expert witness, Ms. XXXXX's sister, and the country conditions reports. *See* INA ' 208(b)(1)(B)(iii), 8 U.S.C. ' 1158(b)(1)(B)(iii) (as amended by the Real ID Act, which states that a trier of fact must consider 'the totality of the circumstances and all the relevant factors . . .'). Dr. N-Diaye testified that it is of utmost importance for the *Tauw* (oldest child) to be married *before* her younger sisters. TR 172:1-4. XXXXX corroborates this and explains her own fear that a forced marriage lies in her future as well. Affidavit of XXXXX, Exh. 4, Tab A. If anything, the existence of Ms. XXXXX's younger sisters, increases the necessity for Ms. XXXXX to be married quickly from Mr. XXXXX's point of view. Also, according to Dr. N-Diaye, it is critical that Mr. XXXXX's oldest daughter be married because the *Tauw* sets the standard for the younger children to follow. TR 172:14-18. If her rebellion is successful, her younger sisters are also likely to refuse to comply with forced marriages. The IJ's implausibility finding does not discredit or even mention the testimony of Dr. N-Diaye or XXXXX. His implausibility finding thus fails to comply with the requirements of INA ' 208(b)(1)(B)(iii), 8 U.S.C. ' 1158(b)(1)(B)(iii).

- e. The IJ's conclusion that Ms. XXXXX's insecurity in [A EUROPEAN COUNTRY] is implausible is baseless speculation

The IJ found it implausible that Ms. XXXXX cannot find safety in [A EUROPEAN COUNTRY] and that she made no effort to obtain legal protection there. Dec. at 17.² The IJ based his incredulity on the contents of one U.S. State Department country report, which does not address the point at issue, but states vaguely that [THE EUROPEAN COUNTRY-S] domestic violence laws

² It is not part of Ms. XXXXX's burden to demonstrate that she sought assistance in [A EUROPEAN COUNTRY] and did not receive it. Rather, if an asylum applicant was firmly resettled in another country prior to arriving in the United States, she would not be eligible for asylum. 8 C.F.R. ' 1208.15. This is clearly not the case here, where Ms. XXXXX never received an offer of permanent resident status or citizenship in [A EUROPEAN COUNTRY]. The outdated doctrine of 'save haven' is likewise irrelevant here because the safe-haven regulations were repealed on January 5, 2001. *Asylum Procedures*, 65 Fed. Reg.

are generally enforced. Exh. 4, Tab C. The IJ relied on this general report to rebut consistent factual and expert testimony about Ms. XXXXX's particular circumstances. Dec. at 17.

The Department of State report on conditions in [A EUROPEAN COUNTRY] does not apply to Ms. XXXXX's particular circumstances for several reasons.³ Ms. XXXXX is not a [EUROPEAN COUNTRY] citizen or resident. Dr. N-Diaye testified that there is great pressure within the Senegalese community not to involve the [EUROPEAN COUNTRY] police in family problems. TR 173. The [EUROPEAN COUNTRY-S] authorities, in turn, ignore violence within the African community. TR 188:13-16.

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

TR 192:3-7.

76121, 76126 (Dec. 6, 2000).

³ The federal courts have expressed great concern about "the immigration service's chronic over reliance on [Department of State] reports." *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004). In more than one circuit, the determination of whether or not a particular applicant's fear is rebutted by general country conditions information requires an *individualized analysis* that focuses on the specific harm suffered and the relationship to it of the *particular information* contained in the relevant country reports." *Chand v. INS*, 222 F.3d 1066, 1079 (9th Cir. 2000) (emphasis added); *see also Krastev v. INS*, 292 F.3d 1268, 1277 (10th Cir. 2002) (stating that reliance on a country report "does not substitute for an analysis of the facts of each applicant's individual circumstances.")

More important, however, is the fact that Ms. XXXXX's father has served as a [GOVERNMENT OFFICIAL] in [A EUROPEAN COUNTRY], and had extensive contacts in the [EUROPEAN COUNTRY-S] government which created great insecurity for Ms. XXXXX. He even warned Ms. XXXXX that the [EUROPEAN COUNTRY-S] authorities would not help her. TR 50:2-3; 49: 14-15, 18-23. This insecurity was heightened by the presence in [A EUROPEAN COUNTRY] of her paternal uncles; Ms. XXXXX was kept under surveillance by her paternal uncles, one of whom beat her on at least five occasions. TR 31:6-9. Ms. XXXXX was permitted to go nowhere on her own and during the time living alone she had to spend every weekend with her uncles and had to report her whereabouts to her uncles. TR 87. Ms. XXXXX suffered from the physical and psychological effects of her past and ongoing trauma while she was living in [A EUROPEAN COUNTRY].

The vast weight of the evidence establishes that Ms. XXXXX was unable to find effective protection in [A EUROPEAN COUNTRY]. Like Ms. XXXXX, XXXXX also felt unsafe in [A EUROPEAN COUNTRY] and did not seek asylum there. Affidavit of XXXXX, Exh. 4, Tab A. Rather, she was forced to flee to Italy for protection from her Senegalese family who forced her into an undesired marriage. *Id.*

- f. The IJ's conclusion that Ms. XXXXX's urgency in seeking asylum is implausible is baseless speculation

The IJ found Ms. XXXXX's urgency in seeking asylum in December of 2005, *inconsistent* with her behavior in the summer of 2005 when she visited the United States. Once again there is nothing *inconsistent* within or between the evidence presented. Rather, the IJ merely finds the

applicant's account improbable. In so concluding, the IJ again ignores the totality of the circumstances which explain why Ms. XXXXX did not apply for asylum until December 2005.

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

The IJ's analysis section wholly overlooks these important factors. It overlooks the imminent and unexpected arrival of Ms. XXXXX's father in January 2006. It omits any consideration of Ms. XXXXX's testimony that she thought she could change her father's mind by the time she was done with her studies, and for that reason had not sought asylum earlier. Affidavit of XXXXX, Exh. 4, Tab A at 2. It disregards the difficulty of the decision to finally and permanently sever ties with her family, upon whom she had always been financially dependent, and rely on the mercy of a foreign government. According to the United Kingdom's Home Office, even after a woman has been forced into marriage, the decision to break with tradition and family is difficult and may take many years.⁴

If anything, Ms. XXXXX's urgency upon entry to the United States in December of 2005 is additional evidence of her application's veracity. She had already qualified for entry at the airport

⁴ Many women forced into a marriage suffer for many years from domestic abuse. They feel unable to leave because of the lack of family support, economic pressures and other social circumstances. They may live within a forced marriage for many years before they feel able to challenge the situation.@ U.K. Home Office, Dealing with cases of Forced Marriage - Guidelines for Police, (available at http://www.lbp.police.uk/publications/dealing_with.htm, last visited September 3, 2007).

immigration inspection but rather than slip quietly into the United States, she requested an application for asylum on the spot, subjecting herself to detention.⁵ Because none of the IJ's implausibility findings are supported by substantial evidence under the totality of relevant circumstances, and because the entirety of the IJ's adverse credibility determination rests on unsupported implausibility suppositions, this aspect of the decision must also be reversed.

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

The Real ID Act of 2005 applies to asylum applications which are, like Ms. XXXXX's, filed on or after May 11, 2005. Under the Real ID Act, where the applicant's testimony alone does not sustain her burden of proof, the trier of fact may require corroboration unless not reasonably obtainable. *See* INA ' 101(a)(b)(iii), 8 U.S.C. ' 1158(b)(1)(B)(ii). Although the Real ID Act allows IJs to require corroboration of otherwise credible testimony unless it is reasonably unavailable, the ruling at bar is erroneous because: (1) although the IJ mentioned Real ID's totality of the circumstances,⁶ he failed to apply it; (2) he ignored the corroboration that was provided; and (3) he neglected to point to a single item of evidence that Ms. XXXXX failed to present, reasonably obtainable or otherwise.

D. The IJ Erred when He *Per Se* Rejected Corroborating Affidavits from Ms. XXXXX's Family and Friends as Independent Evidence of Past Persecution

After determining that Ms. XXXXX was not credible for the reasons discussed above, the IJ erred as a matter of law when he ruled that affidavits from family and friends could *never* constitute

⁵ Ms. XXXXX also passed the credible fear interview while in detention. TR 6:21-22.

independent evidence to support an asylum claim where a trier of fact has found the applicant not credible: A[t]he Fourth Circuit has clarified that affidavits from friends and family are not the independent evidence that *Camara* contemplates.® Dec. at 12 (*citing Gandziami-Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006)). This both overstates and misapplies the holding of *Gandziamai-Mickhou*.

First, *Gandziami-Mickhous* is distinguishable because it involved a valid adverse credibility finding based on inconsistencies. *Id.* Here, the adverse credibility finding is improper. Second, the IJ in *Gandziami-Mickhou* determined that affidavits from family and friends were insufficient objective evidence of the applicant's *membership in a political party*. 445 F.3d at 358. Here, the affidavits of friends and family with first hand knowledge are the best evidence because all key incidents occurred within the XXXXX family. In *Dankam v. Gonzales*, issued after *Gandziami-Mickhou*, the Fourth Circuit rejected letters from an applicant's husband because the letters contained material inconsistencies but *not* because they were letters from a family member. 495 F.3d 113 (4th Cir. 2007) (holding that the IJ did not err in rejecting letters from the applicant's husband that contained inconsistent dates for the applicant's politically- motivated arrest which coincided with an election period). Third, in *Gandzaiami-Mickhou*, the reviewing Court was satisfied in part because the IJ identified particular pieces of missing, relevant documentation that would have assisted *Gandziami-Mickhou* in satisfying her burden of persuasion and explained why it was not unreasonable for her to attempt to obtain them.® *Id.* at 358. The IJ in the *Gandzaiami-Mickhou* case questioned why the applicant made no effort to obtain corroboration from her political party, which appeared to be reasonably available to her. *Id.* Here, it is impossible to imagine what evidence Ms. XXXXX could have produced beyond the affidavits of family members and the testimony of a cultural expert. Unlike

the case of *Gandziama-Mickhou*, the IJ here failed to point to any additional unprovided evidence and rejected the best obtainable evidence, affidavits from every person who witnessed the past persecution.⁶

- E. The IJ's Rejection of Respondent's Expert Witness Testimony is Impermissible under Controlling Authority

⁶ The only witness who did not submit an affidavit is Mr. XXXXX. Persecutors are not likely to provide their victims with affidavits attesting to their acts of persecution. *Matter of J-E-*, 23 I. & N. Dec. 291 (BIA 2002) (citing *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985)).

The testimony of Senegalese cultural expert, Dr. N=Diaye supports Ms. XXXXX=s claim. The

IJ dismissed the expert=s testimony out of hand because of her lack of personal knowledge of Ms. XXXXX. Personal knowledge of the individual applicant is, however, not a prerequisite for an expert witness=opinion. *See e.g.*, Federal Rules of Evidence 701-702.⁷

The Supreme Court acknowledges that A[u]nlike an ordinary witness, an expert is permitted wide latitude to offer opinions, *including those that are not based on firsthand knowledge or observation.*@ *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 592 (1993). The expert's opinion will have a reliable basis in the knowledge and experience of her discipline, rather than the circumstances

⁷ The Federal Rules of Evidence (FRE) are not binding on the Board but do provide guidance where no statute or regulation specifically governs. *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004). The FRE limit a lay witness=s testimony to those facts, opinions and inferences which are Arationally based on the perception of the witness.@ FRE 701 (a). The expert witness provisions contain *no such requirement*. *See* FRE 702. An expert witness= testimony is permitted where the Atestimony is based upon sufficient facts or data . . .@ *Id.*

of the case being tried. *Id.* A[T]he spirit of *Daubert*'s rules for qualifying an expert witness in federal trials, "does apply to administrative proceedings." *Niam*, 354 F.3d at 660.

The Fourth Circuit recently cited *Daubert* in *United States v. Farah*, where the Court upheld a conviction for using false statements to procure naturalization in violation of 18 U.S.C. ' 1425(a). Slip op., No. 06-4712 (Aug. 14, 2007). In *Farah*, the government presented the testimony of Dr. Lee Casinelli, a researcher of Somali culture. *Id.* Dr. Casinelli testified that Somalian clan membership is passed through the father. This testimony established that the defendant had lied about her clan membership. *Id.* The defendant objected to Dr. Cassinelli's testimony as unreliable because he had not interviewed the defendant, her family or her friends, and therefore lacked the requisite personal knowledge. *Id.* The Fourth Circuit dismissed these contentions, finding that, under *Daubert*, Dr. Cassinelli did not need personal knowledge of Farah's clan identity or a personal interview with Farah to opine about her clan identity. *Id.* at 23. His testimony was relevant and subject to cross examination and therefore properly admitted. *Id.*

The IJ's rejection of D. N'Diaye's testimony contravenes the holding of *Daubert* and *Farah*. The IJ accepted Dr. N'Diaye's expertise.⁸ DHS did not challenge Dr. N'Diaye's expertise. TR 20: 4, 10-12.⁹ The IJ noted that Dr. N'Diaye's testimony addressed both of his main concerns: (1) Athe contradictions

⁸ He acknowledged that Dr. N'Diaye's Acredentials indicate cultural knowledge of the Senegalese community. @ Dec. at 19. The IJ stated at the hearing that A[i]f she is going to testify with respect to the culture in Senegal concerning the women, I will accept her as an expert in that area. @ TR 158:12-14. Moments later he also recognized her expertise in the role of women in Senegalese religious practices as well as in Senegalese immigrant communities in [A EUROPEAN COUNTRY]. TR 158-59.

⁹ Counsel for DHS stated: AI=m happy to agree that she is an expert in the area of Senegalese women. . . A TR 157:22-23.

between Respondent's freedom to live in [A EUROPEAN COUNTRY] for nine years and her alleged treatment at home in Senegal,⁹ and (2) the fact that ARespondent's sisters do not receive the same pressure to marry as Respondent because Respondent is the *Tauw*.⁹ Despite qualifying her as an expert and acknowledging the relevancy of her testimony, the IJ rejected the substance of Dr. N'Diaye's testimony because she Ahas met Respondent on only two occasions⁹ and has Alimited knowledge of Respondent's specific situation.⁹ *Id.*

On the contrary, Dr. N'Diaye did not need to meet Ms. XXXXX at all for her testimony to be relevant and reliable and thereby admissible and meriting of full and fair consideration. Rather, an expert's opinion is reliable because it is based in the knowledge and expertise of her discipline. *Daubert*, 509 U.S. at 592 (1993). Under the *Daubert* test, as applied in *Farah*, the IJ here clearly erred as a matter of law when he rejected Dr. N'Diaye's testimony because she had Amet Respondent on only two occasions, and she bases her opinions on research she has done on the community at large.⁹ Dec. at 19. Just like the expert in *Farah*, it is precisely Dr. N'Diaye's knowledge of the Senegalese community at large that makes her testimony probative. Also, like the expert in *Farah*, her lack of personal familiarity with Ms. XXXXX, if anything indicates an absence of bias and thereby strengthens the reliability of her statements. A handwriting analyst might take the stand to compare two handwriting samples without having met the scribe. Dr. N'Diaye is likewise qualified to elucidate the cultural impulses at work in Senegal. She may also comment on whether or not Ms. XXXXX's account reflects larger patterns in Senegalese society, despite not knowing Ms. XXXXX personally. Substituting the relevant facts within the language from *Farah*, it is clear that Dr. N'Diaye Adid not need personal knowledge of [Ms. XXXXX or her family] to opine about [the prevalence of forced marriages in Senegal and the cultural influences that motivate the Senegalese population].⁹ Slip op., No. 06-4712 (Aug. 14, 2007) at 23.

Expert testimony must be credited and considered where reliable and probative.¹⁰ Where disregard for an expert's opinions results in the potential *refoulement* of a *bona fide* refugee, careful review is warranted. *Koval v. Gonzales*, 418 F.3d 798 (7th Cir. 2005); *see also Avetova-Elisseva v.*

¹⁰ Immigration hearings must conform to the Fifth Amendment's requirement of due process. *See Nwolise v. INS*, 4 F.3d 306, 308 (4th Cir. 1993). A non-citizen in removal proceedings must be afforded a reasonable opportunity to present evidence on her behalf. *See e.g., Niam v Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004). The failure to consider an asylum applicant's evidence may constitute a violation of due process. *See e.g., Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007) (the improper exclusion of an expert's affidavit for the sole reason that he was not available for cross examination, together with other procedural flaws, amounted to a due process violation).

INS, 213 F.3d 1192, 1197 (9th Cir. 2000) (It is particularly troubling to find Dr. Papzian's opinions, which were the most current and particularized in the record and hence the most salient evidence as to Avetova's potential future in Russia, discounted in that fashion).

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

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

Because Ms. XXXXX carried her burden of providing detailed, persuasive and consistent testimony, and because the IJ's adverse credibility determination is clearly erroneous, Ms. XXXXX has met her burden under the Real ID Act. Ms. XXXXX also provided corroborating evidence which is internally and externally consistent and was entered into the record at full weight, with no objection from opposing counsel. Ms. XXXXX has therefore met every standard of credibility outlined in INA ' 208(b)(1)(B)(iii), 8 U.S.C. ' 1158(b)(1)(B)(iii).

II. Ms. XXXXX Experienced Past Persecution when She Was Repeatedly Battered

A. Severe, Repeated Physical Abuse Constitutes Persecution

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

Ms. XXXXX endured repeated severe beatings. Serious physical harm is the prototypical example of harm rising to the level of persecution. *In re T-Z-*, 2 I. & N. Dec. 163 (BIA 2007). In January of 1996, Mr. XXXXX violently beat Ms. XXXXX by punching her body, slapping her face and chasing her, causing her to fall and badly burn her hand. TR 33:24, 35:2-8. Mr. XXXXX kept beating his daughter despite her serious burn. Aff. XXXXX at 1. The attack left Ms. XXXXX with an aching head and a bruised body. *Id.* 16-17. Over ten years later, Ms. XXXXX's hand is still scarred despite the medical treatment she received after the attack. TR 35:9,13. Seven months later, in July of 1996, after Ms. XXXXX refused to be presented to XXXXX's family, her father beat her again, A very hard, @ by punching her in the stomach, slapping her face and slamming her into the wall. TR 39:16, 25; TR 40:4-6.

In the summer of 2001, on the next occasion that Mr. XXXXX saw his daughter, he again beat her. TR 47:3, 21-24. He slapped her hard, beat her all over her body and slammed her forehead into the wall. *Id.* As a result, Ms. XXXXX lost consciousness. TR 48:4; Aff. XXXXX at 3. The right side of Ms. XXXXX's head was swollen and hurt very badly and she became terrified of her father. Aff. XXXXX at 3. Ms. XXXXX's father beat her for the duration of her six-week visit to Senegal in 2001. TR 48:7-14. Her father also subjected her to verbal abuse and imprisonment within the home. TR 48:14-25.

The beatings caused Ms. XXXXX such distress that she experienced difficulty focusing on her schoolwork in the years that followed. According to Ms. XXXXX's mother:

XXXXX has psychosomatic reactions to everything; she very often has abdominal pains for which they can find no medical cause. She is completely traumatized and profoundly hurt and she will need a long time for her to seize up and move forward.

Affidavit of XXXXX, Exh. 4, Tab A at 3.

These vicious beatings standing alone, or taken cumulatively with the threats and emotional abuse Ms. XXXXX endured, clearly constitute past persecution.

B. The IJ Applied an Erroneous Legal Standard when He Required Ms. XXXXX to Demonstrate that her Father Inflicted Harm on her to APunish@ Her

The Board defines persecution as the infliction of suffering or harm upon those who differ in a way regarded as offensive.@ *Matter of Acosta*, 19 I. & N. Dec. 211, 222-23 (BIA 1985). It is well-established that the persecutor's subjective intent is irrelevant for asylum purposes, as long as she is motivated by the protected ground. *See e.g., Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997); *see also In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (Asubjective >punitive=or >malignant=intent is not required for harm to constitute persecution@); *see also Matter of H-M-V-*, 22 I. & N. Dec. 256 (BIA 1998) (A . . .the intent or motive of the persecutor need not be malicious@) (*citing Matter of Kasinga*). In this instance, the IJ found no persecution, stating:

The meaning of persecution as developed through United States case law, contemplates harm or suffering inflicted upon a individual in order to *punish him* for possessing a belief or characteristic a persecutor seeks to overcome.

Dec. at 13 (emphasis added).

The IJ's extraneous requirement that Ms. XXXXX demonstrate that her father intended to punish her contravenes the Board's precedent. Its application to Ms. XXXXX amounts to legal error that must be overturned.

C. Because Ms. XXXXX Has Demonstrated Past Persecution, a Presumption Arises that She Has a Well-Founded Fear of Future Persecution

Because Ms. XXXXX has established past persecution (*supra* section II), she is presumed to have a well-founded fear of future persecution on the basis of the original claim. 8 C.F.R. ' 1208.13(b)(1). Consequently, it is DHS's burden to rebut the presumption by demonstrating, by a preponderance of the evidence, that : a) there has been a fundamental change in circumstances such that Ms. XXXXX no longer has a well-founded fear of persecution [,]@or b) Ms. XXXXX can safely relocate within Senegal, and it would be reasonable, under all the circumstances, for her to do so. 8 C.F.R. ' 1208.13(b)(1)(i)(B). DHS failed to present any evidence of changed country conditions or Ms. XXXXX's ability to safely and reasonably relocate. To the contrary, country conditions reports of record reveal that forced marriage and domestic abuse exist across Senegal. Exh. 4, Tabs C, D.

Ms. XXXXX's father is a long-time official for the XXXXX in Senegal. TR 24:23-24. As such he is an influential government official. He also has a cousin in the government with connections to the police. TR 50:22-25. Relocating within Senegal is not a viable option in light of Dr. N'Diaye's testimony that Ms. XXXXX's father's influence, money and family ties will make it easy for him to find Ms. XXXXX. TR 176-77.¹¹ Once Mr. XXXXX finds his daughter, the police will not protect her, and

¹¹ A . . . Senegal is a relatively small country and works by means of social networks and so it would be very, very difficult for someone within Senegal to run away and to get lost because there are extended families and there are also extended pseudo-

may even assist him in bringing her home. TR 187.

DHS also has not presented any evidence that it would be reasonable to expect Ms. XXXXX to find work and support herself without contact with her family in another part of Senegal. The expert testified that Senegal is a small, developing country and most of the professional work is centered in Dakar, XXXXX Ms. XXXXX's family's village of XXXXX. TR 187.

III. Ms. XXXXX was Persecuted on Account of her Political Opinion

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

Ms. XXXXX advanced her asylum application under three legal theories: political opinion, membership in a particular social group and religion. TR 212: 6-25, 213. The record is replete with evidence supporting each of these three theories. Despite this, and although the IJ noted that INA ' 208 contemplates asylum for an individual who is persecuted on account of her race, religion, nationality, membership in a particular social group or political opinion, the IJ completely omitted any analysis of Ms. XXXXX's political opinion and religion-based claims. This failure to adjudicate was clear legal

families. Because there is a very strong system of patronage, so that as a man of, as a person of influence [*sic*]. A person of influence has a lot of ties by virtue of his standing and by virtue of the money that he has to circumvent the law, and also to find out where people are. And it's a poor country, so there is, you know, there's a lot of incentive for people to follow the wishes of a rich and powerful

error and cannot withstand review.

The failure to even acknowledge Ms. XXXXX's articulated claims also amounted to a due process violation. *See e.g., Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) ("The Fifth Amendment guarantees due process in deportation proceedings."). In assessing whether an asylum hearing has comported with due process, courts apply the principles of *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which the Court recognized that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Where an adjudicator fails to provide a reasoned analysis of the legal and factual basis for her holding, her decision does not comply with due process. *Stoyanov v. INS*, 172 F.3d 731, 736 (9th Cir. 1999) . Here, by wholly failing to address two out of three of Ms. XXXXX's claims, the IJ abdicated his adjudicative duty and denied Ms. XXXXX due process of law.

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

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

Political opinion is broader than electoral politics. *See e.g., Al-Safer v. INS*, 268 F.3d 1143, 1146 (9th Cir. 2001) (recognizing that statements about unfair distribution of nutrition in Iraq are expressions that result in the imputation of a political opinion). In *Fatin v. INS*, the Third Circuit recognized that what it termed feminism or opposition to the government's gender-specific laws and social norms in Iran was clearly a political opinion. 12 F.3d 1233 at 1241 (3rd Cir. 1993) (We have no doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes).¹² Here, Ms. XXXXX possesses and expressed a deeply held political opinion that a woman should have the right to make her own decisions about marriage and sex, as well as the right to express her opinion about these issues.¹³ Such views about gender roles are recognized as political opinions. *See e.g., Fatin* 12 F.3d at 1241. That Ms. XXXXX's opposition to forced marriage falls within the political realm in Senegal is made clear by the fact that the Senegalese Constitution prohibits forced marriage, although this ban is not enforced, or even widely known. TR 161:18-19. What issues may be called political, if not those that are the subject of the highest laws? Dr. N-Diaye stated in her affidavit to the Court that, not only is the issue of forced marriage a political topic in Senegal, it is a topic at the *forefront* of political discourse.

The issue of forced marriage is one that, in Senegal, is the subject of ongoing and quite animated debate and struggles, with some affirming it as a legitimate traditional

¹² The *Fatin* Court ultimately found that the petitioner did not have a well-founded fear of persecution, but this in no way detracted from the recognition that opinions about the role of women in a society constitute political opinions in the asylum-law context.

¹³ Ms. XXXXX testified that she would like to get married some day but it's not my first occupation right now and I would take my time and make my own decision. I will choose the person with whom I would like to be married and I would choose also the moment. TR 65-66.

practice that still holds much value in the life of women, while others label it a harmful traditional practice that is oppressive of women and a major barrier to individual freedom of choice and self-fulfillment.

ATestimonial on Forced Marriage,@Diana Baird N=Diaye, PhD, Exh. 4, Tab D at 1.

Ms. XXXXX expressed her political opinion on many occasions. She testified that she had discussed her beliefs with her father before 1996 and that he had responded, even then, that Senegalese women should respect their parents= decisions on the subject. TR 67. This rift exploded in violence when the theoretical became actual. In January of 1996, Ms. XXXXX=s father told her about the marriage he had planned for her. TR 34. Ms. XXXXX told her father that she did not want to be married at that time, did not want to be married to someone that she did not know, and asserted that her consent was required. *Id.* She kept repeating her objection to the marriage and her father, enraged, began to beat her viciously, telling her that her consent was not needed. *Id.*; TR 34. Between January and October of 1996, Ms. XXXXX tried to change her father=s mind on numerous occasions, all to no avail. TR 42.

In the years that followed in [A EUROPEAN COUNTRY], Ms. XXXXX and her uncles also argued frequently. TR 42, 45: 1-6. Her uncles were very controlling and kept her under tight surveillance. *Id.* From [A EUROPEAN COUNTRY], on the telephone with her father, Ms. XXXXX Abegged him to give up the idea@of forcing her to marry. See Affidavit of XXXXX, Exh. 4, Tab A at 2. Ms. XXXXX confided in her friend, XXXXX,¹⁴ that she opposed forced marriage as a violation of Athe fundamental principal of a person=s having individual liberties.@ Affidavit of XXXXX, Exh. 4, Tab A at 2. In the summer of 2001, Ms. XXXXX returned to Senegal:

¹⁴ Ms. XXXXX also hid Ms. XXXXX in [A EUROPEAN COUNTRY] in her first

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

TR 47:12-18.

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

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

Affidavit of XXXXX, Exh 4, Tab A, at 2.

The record thus establishes that Ms. XXXXX possesses and expressed a political opinion.

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

An asylum seeker must establish that a reasonable person would understand the persecution to be "on account of" one of the five statutory grounds. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481B82 (1992). The current statutory language requires some evidence that the protected ground is at least on central reason for the persecution. INA ' 208 (b)(1)(B)(I), 8 U.S.C. ' 1158(b)(1)(B)(I).

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

days in flight. *Id.*

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

The IJ's own factual summary reveals the unmistakable connection between Ms. XXXXX's political opinion and the violent thrashing she received on each occasion that she expressed her opinion to her father. A Respondent notes that she objected to the plan [of marriage], and her father beat her in the stomach and on the face. Dec. at 3. A Respondent notes that when she objected to [being presented to XXXXX and his family], her father slapped, punched and slammed her into a wall. Dec. at 3. According to Respondent, she visited Senegal in July 2001 and tried to talk her father into changing his mind about the marriage to her cousin. She notes that her father became violent when she objected to the marriage, and he beat her. Dec. at 3-4. The IJ himself mentions the telling fact that Ms. XXXXX's mother suggested that she tell her father she accepted the marriage so he would stop beating her and not force an immediate marriage. Dec. at 4. As soon as Ms. XXXXX acquiesced and pretended to agree with her father, he allowed her to return to [A EUROPEAN COUNTRY] [temporarily]. *Id.*¹⁵ No reasonable fact finder could fail to see the obvious nexus between Ms. XXXXX's political opinion and her father's blows.

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

¹⁵ If a communist dictator mercilessly beat a dissident until he wrote a letter disavowing his earlier opposition and pledging allegiance to a communist agenda, at which point the beatings stopped, an Immigration Judge would be compelled to find that the beatings were motivated by the dissident's political opinion. The same is true here.

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

Affidavit of XXXXX, Exh 4, Tab A, at 2 [emphasis added].

Ms. XXXXX explains that in the summer of 2001, when she returned home and again voiced her opposition, her father beat her after she again tried to change his mind and they got into an argument.

TR 47:12-22. Thereafter, during that visit, he beat her whenever [she] disagree[d] with him . . . [b]ecause he wanted [her] to agree with all his decisions while [she] was there. TR 48:9-11. In 2001, once again, XXXXX convinced her daughter to pretend to agree with her father in order to gain the limited freedom to return to [A EUROPEAN COUNTRY] to finish her studies. TR 51-52.

The "on account of" or so-called "nexus" requirement can also be established by showing broader societal reasons for the persecution. *In re Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996). This explains both the motivation of the individual in the societal context, and the failure of the state to intervene. If the state is unwilling to intervene then the agent of persecution is emboldened to act with impunity. Here, despite the fact that Article 18 of the Senegalese Constitution prohibits forced marriage, marriage rights [are] not enforced because of socio-cultural pressures, judicial reluctance to enforce the law, and a lack of information on marriage laws. U.S. Dept. of State Report, Exh. 4, Tab C. Spousal abuse is widespread and laws to protect victims are not enforced, and police in Senegal do not intervene in domestic disputes. *Id.* Spousal rape is not considered a crime. *See* Exh. 4, Tab D at 6.

According to Dr. N-Diaye, when women [in Senegal] gain access to modern education and intellectual and professional freedom, they are viewed as threats to religious and patriarchal power

structures.@ TR 165. When Ms. XXXXX's father grew up, the patriarchal view of Islam was even stronger in Senegal. TR 169. To men of his generation, especially those that have been abroad and fear being seen as westernized, there is a need to be seen as traditional, African, Muslim, and in control of their household. TR 181. If a woman refuses to give her consent to an arranged marriage she will be viewed as a threat to the patriarchal family order. TR 165.¹⁶ In light of this evidence, a reasonable fact finder can only conclude that Mr. XXXXX was motivated to beat his daughter because of her expression of opposition to the forced marriage and her belief in her right, as a woman, to self-determination.

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

A. Ms. XXXXX's Particular Social Group is Legally Cognizable

¹⁶ A . . .by disagreeing, she is not only disagreeing with one person, she is disagreeing with basically what the society has as a role for her.@

Ms. XXXXX's father persecuted her on account of her membership in the particular social group of young, single daughters from the XXXXX ethnic group in Senegal who oppose forced marriage. For the purposes of asylum law, a "particular social group" is one united by a common innate characteristic that its members either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *rev'd on other grounds*, by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). This test has been adopted by almost all of the federal circuit courts¹⁷ and has been cited favorably by the highest courts of the United Kingdom and Canada.¹⁸ Gender, marital status, nationality and ethnicity are consistently understood to be fundamental and immutable characteristics which may form the basis of a particular

¹⁷ *Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir. 1998); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005).

¹⁸ See e.g., *Islam (A.P.) V. Secretary of State for the Home Department*, *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A 11 E.R. 545 (H.L. 1990); *Canada (Att'y Gen'l) v. Ward*, [1993] 2 S.C.R. 689.

social group. DHS itself takes this position.¹⁹

The Board has found that sex can be a defining characteristic of a social group. *Acosta*, 19 I. & N. Dec. At 214. The Third Circuit determined that the applicant in *Fatin*, as a woman, was a member of a particular social group under the INA. 12 F.3d at 1240-41. In *Matter of Kasinga*, the Board recognized the particular social group of young women of the Tchamba-Kusuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. 21 I. & N. Dec. 357 (BIA 1996). In *Shoaf v. INS*, the Ninth Circuit recognized that the rape by an Ethiopian government official was motivated in part by the applicant's Amharic ethnicity. 228 F.3d 1070, 1075B76 (9th Cir. 2000).

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

Ms. XXXXX's particular social group is analogous to the group recognized in *Kasinga* which was defined by gender along with other immutable and fundamental characteristics. Here the group is defined by gender, marital status, familial status, ethnicity, nationality and fundamental beliefs. Ms. XXXXX is powerless to change her gender, ethnicity, familial status and nationality. She should not be required to change her marital status or her opposition to forced marriage as these characteristics are fundamental to her individual identity and conscience.²⁰

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

The size of the group has sometimes been used as a basis for refusing to recognise women generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate or that every member of the group is at risk of persecution.²¹

The Tenth Circuit, in *Niang v. Gonzales*, reasoned that:

There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to

²⁰ See *supra* section C.2, (Ms. XXXXX's opinion that she should be free from forced marriage is fundamental).

²¹ United Nations High Commissioner for Refugees Guidelines on International Protection: Gender-Related Persecution (HCR/GIP/02/01, 7 May 2002), & 31 ("UNHCR Gender Guidelines), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

obtain asylum on the ground that women are persecuted there . . . But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted on account of their membership.

422 F.3d 1187, 1199-1200 (10th Cir. 2005).

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

The Board recently stated that a particular social group will generally be recognizable by others in the community, have social visibility and be perceived as a group by society. *In re A-M-E-*, I. & N. Dec. 69, 74 (BIA 2007); *In re C-A-*, 23 I. & N. Dec. 951, 959-60 (BIA 2006). The IJ himself acknowledges that being young, female, and Senegalese may be highly visible. Dec. at 20. The engagement ceremony intended to show the entire village that Ms. XXXXX was no longer available for marriage also supports a finding that this group is visible. Country conditions reports and expert testimony also demonstrate the social visibility of Ms. XXXXX's group within Senegalese society. On a regular basis, girls as young as 13 years old and women across a broad age and class range face the prospect and reality of [being forced into marriage] Testimonial on Forced Marriage, Diana Baird N-Diaye, PhD, Exh. 4, Tab D at 2. Various Senegalese directors, artists and musicians use their art to draw attention to the plight of single young girls and women in Senegal. *Id.* The group of young, single, daughters in Senegal who oppose forced marriage is growing. *Id.* (More and more young women, such as Ms. XXXXX, who are in danger of being obliged to submit to this practice, are opting for life away from their home communities and countries). The fact that women who actively oppose forced marriage are socially ostracized also demonstrates that this particular social group is socially visible. TR 145.

B. Ms. XXXXX's Father Harmed Ms. XXXXX on Account of Her Membership in the
Particular Social Group of Young, Single Daughters from the XXXXX Ethnic

Group in Senegal Who Oppose Forced Marriage

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

Mr. XXXXX=s actions demonstrate that he was motivated by Ms. XXXXX=s status as a young, single, daughter from the XXXXX ethnic group in Senegal who oppose forced marriage when he beat her severely on numerous occasions. The Aon account of@ requirement is satisfied where an applicant demonstrates that the persecution is Amotivated by@ an actual or implied protected ground. *See e.g., Matter of S-P-*, 21 I. & N. Dec. 486, 489-90 (BIA 1996). Here, Mr. XXXXX believes that, as the father and head of household, it is up to him, and him alone, to make decisions about Ms. XXXXX=s marital status. He told Ms. XXXXX that Senegalese daughters²² should respect their parents=decisions when it comes to marriage. The beatings were motivated by Ms. XXXXX=s gender, age, ethnic group, nationality, status as a daughter, and opposition to forced marriage.

V. The Harm Ms. XXXXX Fears Rises to the Level of Persecution

A. Forced Marriage Constitutes Persecution

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

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

The Board=s recent decision in *In re A-T-* denying asylum to a woman from Mali who had experienced female genital cutting and who feared an arranged marriage to her cousin was based on

²² Ms. XXXXX explained: A[i]f I were a boy everything would have been different.@ Aff. XXXXX at 1.

factual determinations that are wholly divergent from Ms. XXXXX's circumstances. 24 I. & N. Dec. 296 (BIA 2007). First, the Board found the marriage at issue in *A-T-* to be an arranged marriage, not a forced marriage. *Id.* at 302-03. The Board determined as a factual matter that the marriage in *A-T-* involved the Areluctant acceptance of family tradition over personal preference.@ *Id.* at 303. This contrasts sharply with Ms. XXXXX's absolute and uncompromising rejection of the marriage her father wishes to force her into. Second, the Board found that the applicant in *A-T-* did not appear to have explicitly rejected the marriage nor to have experienced any verbal or physical abuse for her opposition. Again Ms. XXXXX's circumstances are vastly different. Third, the Board ruled that applicant in *A-T-* presented no evidence about any consequences for her refusal to submit to the marriage. *Id.* at 303 (A[A-T-] gives little indication of what [her father] might do if she disobeys him.@ Ms. XXXXX, on the other hand, has been, and will clearly continue to be subjected to serious abuse for refusing the marriage . Fourth, while the Board ruled that Ait appears that the respondent [in *A-T-*] and her intended fiancé are of similar ages and backgrounds,@and thus the respondent would not be in Aa disadvantaged position,@ Ms. XXXXX and XXXXX differ in age, religion, views about women's rights and gender roles, current marital status and education. *Id.* at 302. Ms. XXXXX would be significantly disadvantaged as XXXXX's wife; she would face beatings, rape, and confinement, and would be forced to forego her career. Fifth, the Board relied upon the fact that the applicant's uncle in *A-T-* testified that the applicant could relocate within Mali to avoid the marriage. The same is not true for Ms. XXXXX (*see infra* section XIII.A).

Ms. XXXXX does not face an *arranged* marriage, but a *forced* one. Many of the world's marriages are arranged, based on a mutual consensus between the spouses and/or their parents. A

forced marriage is distinguished by the overt coercion involved.²³ Dr. N=Diaye testified that forced marriage is Aa marriage made by coercion in which the prospective wife does not agree with the marriage that has been arranged for her and coercion can be either physical or verbal through threats.@ TR 160-61. The Board recently held that an abortion is not forced Aunless the threatened harm for refusal would if carried out, be sufficiently severe that it amounts to persecution.@ *In re T-Z-*, 24 I. & N. Dec. 163 (BIA 2007). Under *T-Z-*, an abortion is persecution where it is forced by threats of harm that a reasonable person would objectively view to be genuine, and where the threatened harm, if carried out, would rise to the level of persecution. *T-Z-* was decided under the specific coercive family planning provision of the refugee definition at INA ' 101(a)(42); 8 U.S.C. ' 1101(a)(42).²⁴ This provision does not apply to the instant application. However, the Board=s rationale as to when an activity is Aforced@is applicable here because it provides an analytical framework for determining when a marriage is *arranged* and when it is *forced*. The union Ms. XXXXX fears is forced because it is coerced by threats of harm

²³ U.K. Home Office, *Dealing with cases of Forced Marriage - Guidelines for Police*, (Aa clear distinction must be made between a forced marriage and an arranged marriage. In arranged marriages the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals. In forced marriage at least one party does not consent to the marriage and some element of duress is involved.@ available at http://www.lbp.police.uk/publications/dealing_with.htm, [last visited September 3, 2007].

²⁴ A . . . a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion . . .@ *Id.*

and beatings that a reasonable person would objectively view to be genuine and because the harm that is threatened, if carried out, would rise (and did rise) to the level of persecution.

The evidence of record conclusively establishes that Ms. XXXXX faces a forced marriage, not an arranged one. Neither Ms. XXXXX's father, her future husband, nor her in-laws were willing to consider her consent or opposition. Quite the opposite, Ms. XXXXX was punished severely for expressing her opposition. Ms. XXXXX immediately voiced her opposition to the planned marriage when she first heard about it in January of 1996 and was battered and brow-beaten in response. TR 34. Her father told her that he did not need her consent to marry her off and that he would do anything necessary to force her to marry her cousin. *Id.* Ms. XXXXX repeated her staunch opposition on that occasion and on many occasions in the years that followed. TR 36:21. Ms. XXXXX expressed her opposition again on the day before the presentation ceremony and was thrashed as a result. TR 39-40. She only attended the ceremony in order to make [her] father stop the beatings. TR 41:2-3.

In [A EUROPEAN COUNTRY], Ms. XXXXX's paternal uncles closely monitored and controlled her life. TR 42-45. Her uncle XXXXX beat her when she did anything to threaten the successful performance of her father's promise and the intact delivery of the goods that had been bartered (a chaste and unattached bride).²⁵ TR 42. Her uncle XXXXX restricted and controlled her as well. TR 45.

On her next visit to Senegal, in 2001, Ms. XXXXX again attempted to plead with her father and

²⁵ AI could not go to any party with my friends or have a boyfriend, as I was already promised to my cousin. Aff. XXXXX at 2. Whenever a friend called me at home, [my uncles] always questioned me to make sure that it was not a man. And when they did not believe me, they beat me, because they had been given this permission by my father. *Id.*

change his mind. TR 47. She told him she would never get married to [her] cousin.@TR 47:16. Mr. XXXXX told Ms. XXXXX that if she did not follow him back to Senegal in May of 2006, when he came to collect her, he would beat [her] again until [she] accept[s].@ TR 12-14. Upon learning of her father's intent to come to [A EUROPEAN COUNTRY] early, Ms. XXXXX knew her father would force her to return to Senegal and marry against her will. Ms. XXXXX's flight from [A EUROPEAN COUNTRY] to the United States was the final expression of her abhorrence for the marriage her father had sold her into. These facts necessitate the conclusion that Ms. XXXXX fears a forced marriage and not an arranged marriage.

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

The Board has long defined persecution as the infliction of suffering or harm upon those who differ in a way regarded as offensive.@ *Matter of Acosta*, 19 I. & N. Dec. 211. Where a serious human rights violation is motivated by one of the five protected grounds, it may constitute persecution. See *Matter of T-*, 20 I. & N. Dec. 571, 577 (BIA Oct. 13, 1992). According to the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status, & 51 a threat to life or freedom or other serious human rights violation, on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.²⁶

Forced marriage is a threat to freedom and a serious human rights violation.

The legacy Immigration and Naturalization Service (INS), now DHS, recognized forced

²⁶ The United States Supreme Court recognizes the UNHCR Handbook as guiding authority for interpreting asylum law. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 n. 22 (1987). See also U.S. Dept. Of Justice Proposed Asylum Rule, 65 Fed. Reg. 76588, 76590 (Dec. 7, 2000) (recognizing that the UNHCR Handbook provides guidance for defining persecution).

marriage as a gender-specific harm in its gender guidelines as early as 1995.²⁷ Immigration Judges have also determined that forced marriage constitutes persecution. In *Matter of [name redacted]*, A#76-512-001 (Chicago, IL, Imm. Ct., Oct. 18, 2000), an IJ granted the asylum application of a sixteen-year old Chinese minor who opposed and fled a forced marriage. See Exhibit A, addendum hereto. In *Matter of [name redacted]*, A# redacted, (Atlanta, GA, Imm. Ct., July 3, 2002), an IJ granted asylum to a woman facing forced polygamous marriage. See Exhibit B, addendum hereto.

Other areas of American jurisprudence also recognize that marriage is a fundamental freedom. In *Zablocki v. Redhail*, the United States Supreme Court affirmed the fundamental nature of the right to marry. 434 U.S. 374, 386 (1978). It did the same in *Meyer v. Nebraska*, where it held that the Due Process clause protects the liberty to marry, establish a home and bring up children.[@] 62 U.S. 390 (1923); see also *Escobar v. I.N.S.*, 896 F.2d 564, 569 (D.C. Cir. 1990); see also *Theck v. Warden, I.N.S.*, 22 F. Supp. 2d 1117, 1122 (C.D. Cal. 1998).

If Ms. XXXXX is removed to Senegal, she will be forced into a marriage against her core

²⁷ See Phyllis Coven, U.S. Dept. of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, at 9 (May 26, 1995) (U.S. Gender Guidelines).

convictions, in violation of her fundamental freedom to marry of her own free will. Being forced to marry a person one does not wish to be married to is clearly suffering and harm amounting to persecution under long established asylum jurisprudence. This harm will be felt all the more intensely by Ms. XXXXX who explained that she will never accept the marriage and never be a submissive wife. Aff. XXXXX at 4. Because Ms. XXXXX does not want to be married to anyone at this time, forcing her into any marriage is serious harm. TR 65-66. Ms. XXXXX's focus is her education and her profession. *Id.* Her goal is to obtain a Ph.D. in international studies. TR 65:11-13. Someday, Ms. XXXXX would like to marry and have children, but she wants to choose her spouse, and choose the timing of their union. TR 65-66. Instead of obtaining her dreams,²⁸ Ms. XXXXX will be forced to actualize the marriage into which she has already been sold.²⁹

²⁸ She has already worked very hard and obtained numerous degrees towards this goal.

²⁹ The knowledge that her own father sold her for financial gain also harms Ms. XXXXX. Mr. XXXXX bartered his daughter's body and lifetime capacity for labor, sexual relations, and childbearing in exchange for money, fabrics, jewelry and a parcel of land on which he built apartments to rent for profit. *See* Affidavit of XXXXX, Exh. 4, Tab A at 2. There is no principled, substantive distinction between this transaction and the sale of a prized slave at auction, despite the decorative trappings of the former example. The for-profit sale of another human being against her will is clearly serious harm.

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

3. Forced Marriage Constitutes Persecution under International Human Rights Norms

Courts look to international human rights instruments for guidance about whether a given harm constitutes persecution. *See Matter of Kasinga*, 21 I. & N. Dec. 357, 377 (BIA 1996) (Rosenberg J., concurring); *see also* U.S. Gender Guidelines at 2 (Agender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations³⁰). The U.S. Gender Guidelines specifically cite to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³⁰ and the

³⁰ Annex to G. A. Res. 34/180, 34 U. N. GAOR Res. Supp (No. 46) 194, U. N. Doc. A/34/46, Art. 4(1) (1979) Dec. 18, 1979, art. 16(1)(b) (requiring state parties to ensure on a basis of equality of men and women . . . the same right freely to choose a spouse and to enter into marriage only with their full and free consent³⁰). Senegal ratified the CEDAW on Feb. 5, 1985. *See also* Committee on the Elimination of All Forms of Discrimination against Women, Gen. Recommendation No. 21, & 16, U.N. Doc HRI\GEN\1\ Rev 1 (1994) (a woman's right to choose a spouse and enter freely into marriage is central to her life and her dignity and equality as a human being³⁰).

Declaration on the Elimination of Violence Against Women,³¹ both of which recognize forced marriage as a violation of a woman's fundamental human rights. U.S. Gender Guidelines, at 2. Many other international instruments also note that forced marriage is a human rights violation. Examples include such paramount treaties as the Universal Declaration of Human Rights³² and the International Covenant on Civil and Political Rights,³³ to which both the U.S. and Senegal are parties. Forced marriage is also

³¹ Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Art. 2(a), U.N. Doc. A/48/629 (1993) (Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.)

³² U.N. Universal Declaration of Human Rights, G. A. Res. 217A (III), U. N. Doc. A/810 (1948) (Marriage shall be entered into only with the free and full consent of the intending spouses.)

³³ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 23(3) (No marriage shall be entered into without the free and full consent of the intending spouses.)

understood to be a form of violence against women.³⁴

4. Forced Marriage Constitutes Persecution under Refugee Jurisprudence from Other Countries

Refugee tribunals from numerous countries have recognized forced marriage as a basis for

³⁴ UNHCR, Elimination of Violence Against Women, Commission on Human Rights Resolution 2001/449, & 3 (2001) (Affirm[ing] that the term >violence against women= means any act of gender-based violence including . . . forced marriages.)

asylum, including Canada,³⁵ Australia,³⁶ Belgium,³⁷ Switzerland,³⁸ and France.³⁹ Government-issued

³⁵ See e.g., *Vidhani v. Canada*, [1995] 3 F.C. 60 (A women who are forced into marriages against their will have had a basic human right violated . . . the right to enter freely into marriage is a basic human right), available at <http://reports.fja.gc.ca/en/1995/1995fca0157.html/1995fca0157.html.html> [last visited, Sept. 3, 2007]; T99-07761, [Sept. 27, 2000] Convention Refugee Determination Division (CRDD) (applicant's forced marriage amounted to statutory rape without her consent), available at http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/151c/crdd/T9907761S_e.rtf; T99-14088, [June 2, 2000] CRDD (reasons signed July 17, 2000) (applicant faced persecution based on her membership in a particular social group: women in forced marriages), available at http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/147c/crdd/T9914088S_e.rtf [last visited, Sept. 3, 2007]; 99-098877, [May 17, 2000] CRDD (reasons signed June 5, 2000) (applicant facing forced marriage had established a serious probability of persecution), available at http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/145c/crdd/T99098877S_e.rtf [last visited, Sept. 3, 2007]; See also TA2-00417, [Nov. 13, 2002] Refugee Protection Division (RPD) (women subject to forced levirate marriage (compulsory marriage of a widow to a brother of her deceased husband) constituted a valid particular social group), available at http://www.irb.cisr.gc.ca/rtfreflex/fulltext/204c/rpd/TA200417S_e.rtf [last visited, Sept. 3, 2007]; MA1-8227, [Aug. 19, 2002] RPD (A fundamental human right of women is violated when they are forced to enter into marriage against their will), available at http://www.irb.cisr.gc.ca/rtfreflex/fulltext/197c/rpd/MA108227S_e.rtf [last visited, Sept. 3, 2007]; TA1-21612, [Sept. 9, 2002] RPD (recognizing that forced levirate marriage and domestic violence in Zimbabwe is persecution), available at http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=article.view&id=10106 [last visited, Sept. 3, 2007].

³⁶ V 96/04445 (July 23, 1996), Refugee Review Tribunal (granting asylum to a woman facing forced marriage, and concluding that it violated article 16(2) of the UDHR and article 23 of the ICCPR), available at <http://www.worldlii.org/au/cases/cth/rrt/V9604445.html> [last visited, Sept. 3, 2007].

³⁷ Decision 01-0668/F1356/cd, Commission Permanente de Recours de Réfugiés, Mar. 8, 2002 (granting asylum to a 15 or 16 year-old girl from Cameroon who feared polygamous marriage to an older man), in Heaven Crawley and Trine Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, at 36 (2004), available at www.unhcr.org

[last visited, Sept. 3, 2007].

- ³⁸ Entscheidungen und Mitteilungen der ARK [EMARK] [Swiss Asylum Appeal Commission] 93/9, EMARK 96/16, in *Crawley & Lester, supra*, at 95-96.
- ³⁹ Mlle Ayten Tas., Commission des Recours des Réfugiés (CRR), March 4, 2005, 489014. (Fr.), *available at*: <http://www.unhcr.org/cgi-bin/teXis/vtx/refworld/rwmain?docid=42c5317e4> [last visited, Sept. 3, 2007] (granting asylum to a Kurdish woman refusing a forced marriage who belongs to a particular social group of women who refuse forced marriage in Kurdistan in Turkey); Mlle T., CRR, SR, July 29, 2005, 519803, *Appartenance a un certain groupe social, available at*: <http://www.unhcr.org/cgi-bin/teXis/vtx/refworld/rwmain?docid=43abfa5c4>) [last visited, Sept. 3, 2007]; (recognizing that forced marriage can constitute persecution but denying the applicant's claim for other reasons); Mlle Noreen Niaz, CRR, SR, Oct. 15, 2004, 444000 (Fr.) (granting asylum to a Pakistani woman who

gender guidelines in both Canada and the United Kingdom also recognize forced marriage as persecution.⁴⁰ These cases reflect a growing international consensus that forced marriage constitutes persecution.

B. Rape Constitutes Persecution

feared honor killing for refusing a forced marriage), *available at*: <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=418894274>) [last visited, Sept. 3, 2007].

⁴⁰ Canadian Gender Guidelines , Immigration Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* ' B (1996) (*available at* http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm); U.K. Gender Guidelines, Immigration Appellate Authority, *Asylum Gender Guidelines* at 3 (2000) *available at* <http://www.asylumsupport.info/publications/iaa/gender.pdf> [last visited, Sept. 3, 2007].

Once Ms. XXXXX has been forced into the marriage she will be subject to numerous additional forms of persecution such as rape, domestic violence, false imprisonment and forced domestic servitude. It is well-established that rape constitutes persecution. *See e.g., Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir. 2007); *Menendez-Donis v. Ashcroft*, 360 F.3d 915 (8th Cir. 2004) (J. Lay dissenting); *Matter of DV*, Interim Dec. 3252 (BIA 1993). If Ms. XXXXX is forced to marry XXXXX, she will be subject to rape for the remaining years of her life. United States courts recognize that forced marriage leads to rape. Warren Jeffs, leader of the Fundamentalist Church of Jesus Christ of Latter Day Saints, was recently convicted of two felony counts of being an accessory to rape for forcing a fourteen year old follower to marry her nineteen year-old cousin.⁴¹ Senegalese laws do not recognize forced sex within a marriage as rape. *See* *The Persecution of Women in Senegal*, Cecilia Royal, April 2006, Exh. 4, Tab D. at 5. Prevailing views are that wives are obligated to obey husbands in sexual relations. *Id.* at 6. According to Dr. N=Diaye there is a saying in Senegal that the wife, in Islam . . . is the field of the husband. TR 177:13-14. Because the evidence thus demonstrates that Ms. XXXXX will have to submit to XXXXX=s demand for sex and will not have a right to refuse, her forced marriage to him will necessarily lead to rape.

Country conditions reports make clear that contraceptives are stigmatized in Senegalese society, that abortion is outlawed except in very limited situations, and that childbearing is commonly understood to be a wife=s duty. *Id.* Dr. N=Diaye explains that reproductive choice will be the husband=s prerogative and that birth control is discouraged in an XXXXX marriage. TR 177:21-25. Upon return

⁴¹ John Dougherty and Kirk Johnson, *Sect Leader Is Convicted as an Accomplice to Rape*, N.Y. Times, Sept. 26, 2007, available at http://www.nytimes.com/2007/09/26/us/26jeffs.html?_r=1&oref=slogin [last visited October 5, 2007].

to Senegal, Ms. XXXXX will have no control over whether and when she bears children. These choices will be XXXXX's prerogative alone. Especially in light of XXXXX's XXXXX faith, Ms. XXXXX will have no autonomy over her body's reproductive system.

C. Abduction and Involuntary Servitude Constitute Persecution

Ms. XXXXX fears that her father and uncles will kidnap her and that she will be falsely imprisoned, forced into domestic servitude and unable to leave the marriage with XXXXX. Country conditions reports indicate that escape from the marriage will be close to impossible. Abduction and enslavement is harm that is severe enough to constitute persecution. *See e.g., Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3rd Cir. 2003) (recognizing that an abducted and enslaved former child soldier had experienced past persecution); *see also Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) (*disapproved for other reasons by Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997)).

D. Serious Physical Abuse Constitutes Persecution

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

VI. Even Absent the Presumption, Ms. XXXXX's Fear of Future Persecution in Senegal is Well-Founded

A. Ms. XXXXX's Fear is Genuine

A fear is well-founded if it is subjectively genuine and objectively reasonable. *Cardoza-Fonseca v. INS*, 480 U.S. 421, 440 (1987). Astonishingly, the IJ found that Ms. XXXXX had established neither a well-founded, nor a genuine fear. Dec. at 21. The IJ held that Ms. XXXXX's fear could not be genuine because she did not seek asylum in [A EUROPEAN COUNTRY] during the years that she lived there. In support for this conclusion, the IJ cited the U.S. Department of State report for [A EUROPEAN COUNTRY] which states that government and non-profit organizations help battered women B implying that she could have received protection but failed to seek it. Dec. at 21. The IJ's reliance is misplaced.

First, the report does not discuss the specific situation of visiting students who are non-residents and non-citizens living within the Senegalese community in [A EUROPEAN COUNTRY]. Second, the IJ cites nothing in the report to counter Dr. N=Diaye's testimony that the [EUROPEAN COUNTRY-S] authorities and non-governmental groups do not provide effective protection to Senegalese immigrants living in [A EUROPEAN COUNTRY]. The federal courts frequently issue cautions against excessive reliance on reports prepared by the U.S. State Department. *See e.g., Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005); *see also Ge v. Ashcroft*, 367 F.3d 1121, 1126 (9th Cir. 2004) (to the extent that the IJ relied on blanket statements in the State Department report regarding detention conditions in China, the IJ's finding was not sufficiently individualized). Caution with a generalized report is especially appropriate where, as here, the record contains expert testimony which applies more precisely to the specific circumstances at issue. Second, the IJ cites nothing in the report to counter Ms. XXXXX's consistent testimony, and the testimony of her uncle XXXXX, that she would not be safe in [A EUROPEAN COUNTRY] because of the risk that her father and uncles would kidnap her and her father's influence in the [EUROPEAN COUNTRY-S] government would permit him to do so and get

away with it.

Ms. XXXXX testified consistently about her subjective, genuine fear. AI became extremely frightened of [my father];@AI fear my father=s reaction and violence;@AI if I am brought back to Senegal by force, I am so scared of what they might do to me,@AI am very afraid of how [XXXXXX] will take his anger out;@AI fear that I will be subjected to repeated emotional, physical and sexual abuse by my future husband.@ Aff. XXXXX at 3, 4. The record compels the conclusion that Ms. XXXXX=s fear is genuine.

B. Ms. XXXXX=s Fear is Reasonable

An applicant=s fear of persecution is objectively reasonable where there is a one in ten chance of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 431. Here, through credible testimony and corroborating evidence, Ms. XXXXX has demonstrated that there is far greater than a ten percent chance that, upon return to Senegal, she will be forced into a marriage she does not consent to, physically and emotionally abused for her opposition to such a marriage, raped, subjected to spousal abuse, virtually imprisoned and subjected to forced domestic servitude.

Ms. XXXXX and her relatives testified that Ms. XXXXX has brought shame on her father in the eyes of the community by escaping the forced marriage. The community=s perception is of utmost importance to Mr. XXXXX who wishes to become a tribal Chief one day. This shame is only rectifiable by beating Ms. XXXXX into submission and proving that he is a man of his word who can control his family.

XXXXXX batters his first wife. His religion instructs a man to beat his wife when she has sinned by refusing to submit to his will. XXXXX and his family are aware that Ms. XXXXX fled the wedding

because she opposes it. Ms. XXXXX disrespected XXXXX by fleeing and she will be punished as a result. Additionally, Ms. XXXXX testified that she is not prepared to be a submissive wife to XXXXX. She is therefore likely to be beaten and raped routinely throughout the marriage. Ms. XXXXX's fears are objectively reasonable.

VII. The Harm Ms. XXXXX Fears Will Be on Account of Her Membership in the Particular Social Group of Senegalese Women from the XXXXX Ethnic Group Who Have Been Sold into Marriage (Whether or Not the Marriage has Taken Place)

A. Ms. XXXXX's Particular Social Group is Legally Cognizable

Each of the characteristics of Ms. XXXXX's social group clearly met the *Acosta* test. *Id.* Ms. XXXXX is unable to change the characteristics of her gender, nationality, ethnicity, her family's residence, and the past experience of having been sold into marriage.

The Board has held that a particular social group cannot be defined exclusively by the fact that its members have been subjected to harm. *In re A-M-E-*, 24 I. & N. Dec. at 74. Ms. XXXXX's social group is not so defined. Rather, a very specific list of traits combine to form a small cross section of Senegalese society which is subject to persecution. The group is internally recognized within Senegal. Women who resist arranged marriages are ostracized by family and friends. TR 145. The struggle of this social group is dramatized in a few creative works that . . . mirror existential realities. *Testimonial on Forced Marriage*, Diana Baird N-Diaye, PhD, Exh. 4, Tab D at 3.

The IJ's analysis of Ms. XXXXX's social group is flawed as a matter of law. The IJ states: Respondent failed to show how Senegalese who do not know her will identify her as a person facing forced marriage. *Id.* Dec. at 20. The proper question is rather whether Ms. XXXXX is identifiable in her community or to her persecutors as a Senegalese woman from the XXXXX ethnic group who has been

sold into marriage. *See e.g., Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991) (AA particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor -- or in the eyes of the outside world in general@). The community is already aware of the engagement ceremony, which was presided over by XXXXX's tribal Chief. The community is also aware of the land trade. In fact, Ms. XXXXX's father's future as a respected member of the society hangs in the balance. Ms. XXXXX is also identifiable to her persecutors.

B. The Harm Ms. XXXXX Fears Will Be on Account of Her Membership in Her Particular Social Group

Ms. XXXXX's father's family and XXXXX's family will target Ms. XXXXX because Ms. XXXXX is female, Senegalese, XXXXX, and has already been sold into the marriage. Each of these factors motivate her persecutors. Each of these factors permit her persecutors to act with impunity. Ms. XXXXX's friend, XXXXX, was similarly situated to Ms. XXXXX. She too was a young, single daughter in Senegal.⁴² She too was Agiven,@without her consent, in marriage to a friend of her parents. Affidavit of XXXXX, Exh. 4, Tab A.

Because Ms. XXXXX is female, Senegalese, XXXXX, and has been sold into an enforceable marriage, she will be forced into the marriage if she returns to Senegal. Mr. XXXXX will be motivated by the contract he entered into, by his daughter's gender, her ethnicity, nationality, and the fact that such marriages are enforceable amongst the Senegalese XXXXX. XXXXX will also be motivated to force Ms. XXXXX into marrying him because of her gender, ethnicity, nationality, and the fact that his family

⁴² (although it is unclear from the record what her ethnic group was)

already rendered valuable consideration for her, establishing nexus under the Board's precedent. *See e.g., Matter of S-P-*, 21 I. & N. Dec. 486, 489-90 (BIA 1996).

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

As a woman sold into marriage, Ms. XXXXX will also be subject to marital rape, enslavement, and domestic abuse. A[T]here is a saying in Senegal that the wife, in Islam . . . is the field of the husband. . . . if the wife refuses to be the field, that would be grounds for verbal abuse certainly and physical abuse if that didn't work.@ TR 177:13-16. Because XXXXX will see Ms. XXXXX as his wife, he will feel entitled to treat her as he treats his other wife -- to physically abuse her. Because he will see her as his wife, he will feel entitled to have sexual relations with her despite her objections. He will see it as his choice whether to impregnate her, regardless of her consent. He will be free to establish rules about what she can wear, when, and if, she can leave the house, and whether she can undertake a profession.

The Senegalese Constitution outlaws violence against women, but Athe government [does] not enforce the law in practice@ and A spousal abuse is a widespread problem@ according to the U.S. Department of State. *The Persecution of Women in Senegal*, Exh. 4, Tab D at 4. A Senegalese newspaper reported in May of 2003, that fifty-nine percent of the women it surveyed in the cities of Dakar and Kaolack had suffered from domestic violence. *Id.* The head of the African Assembly for Human Rights Department for Women and Children on Gender Violence, estimated that two of every five Senegalese women are victims of violence. *Id.* He explained that violence against women is caused by deep-rooted socio-cultural beliefs and the influence of conservative interpretations of Islam. *Id.* It is a husband's right to A correct@ disobedient wives with beatings when verbal reprimands do not work. *Id.* According to legal scholars, marital rape is not criminalized in Senegal. *Id.* at 5-6. AAlthough rape is a

punishable crime in every Muslim society, nowhere is the criminal sanction extended to rape within marriage, because sexual access is deemed elemental to the marriage contract. @ *Id.* at 6. The official acceptance of domestic violence naturally bolsters the abusive spouse's feelings of entitlement.

VIII. The Harm Ms. XXXXX Fears will be on Account of Her Political Opinion

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

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

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

Affidavit of XXXXX, Exh. , Tab A at 4.

XXXXX also believes that XXXXX will beat Ms. XXXXX because of her opposition to the marriage:

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

Id.

This assessment is corroborated by cultural expert Dr. N-Diaye who explained that XXXXX will basically feel that he has paid for her and . . . he's been waiting a while. He will want to show his

dominance over her and punish her, in effect, for having even tried to resist or tried to run away from the situation.@ TR 179:12-17.

IX. The Harm Ms. XXXXX Fears Will Be on Account of Her Religion

In *Matter of S-A-*, the Board determined that a young woman with liberal Muslim beliefs had established past persecution and a well-founded fear of future persecution at the hands of her father on account of her religious beliefs. 22 I. & N. Dec. 1328 (BIA 2000).

We find that the persecution suffered by the respondent was on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society. The record clearly establishes that, because of his orthodox Muslim beliefs regarding women and his daughter's refusal to share or submit to his religion-inspired restrictions and demands, the respondent's father treated her differently from her brothers.

Id. at 1336

Despite the fact that Ms. XXXXX asserted a religion-based claim, the IJ wholly failed to address it. TR 212. In fact, the IJ went so far as to cut off questioning about her Muslim faith and the Muslim religious context in Senegal on two occasions.⁴³

This case is strikingly similar to *S-A-*. The records demonstrates that XXXXX will persecute Ms. XXXXX on account of her religious beliefs, as they differ from his concerning the proper role of women in Senegalese society. The IJ's failure to even consider Ms. XXXXX's religious persecution claim was clear error.

Ms. XXXXX has a well-founded fear of persecution on account of her religion. Ms.

⁴³ When Ms. XXXXX's attorney attempted to elicit testimony about Ms. XXXXX's pilgrimages to Mecca and Medina, the IJ interrupted and closed off questioning. TR 26:23. The same happened when the attorney attempted to elicit testimony from Dr. N'Diaye about religion. The IJ's remarks and decision during the hearing make clear that he did not even contemplate Ms. XXXXX's fear of persecution on account of her religion.

XXXXX is a Muslim. She explains her beliefs, and how they differ from those of the man to whom she has been sold:

Until now, I often go with my head uncovered as my father never asks us to wear a scarf. But once I will be married, I will have to cover myself and to wear Muslim clothes as all women do in his family. I do not agree with their views concerning Islam. I am a Muslim woman, but I believe that Islam teaches us that a man should treat his wife with respect, and that men and women should be viewed as equals in the eyes of God. I believe that as a woman, I have the right to be treated as a human being.

Aff. XXXXX at 4.

XXXXX spoke to XXXXX's current wife, who had been unaware of the engagement between her husband and Ms. XXXXX and opposes it but will unlikely speak out. Affidavit of XXXXX, Exh. 4, Tab A at 5. Ms. XXXXX's mother agrees that XXXXX will demand that she be submissive, respectful and veiled. See Affidavit of XXXXX, Exh 4, Tab A, at 3. If not, he will beat her into submission. *Id.* Dr. N=Diaye explains that in the XXXXX ideology, a husband may beat his wife if the wife is being disobedient. TR 176-77. He may beat her for challenging his authority or refusing his orders. TR 177:6-7. Ms. XXXXX explains that she will never accept the marriage and even less be a submissive wife. TR 64. More moderate views of Islam, such as Ms. XXXXX's, do not tolerate spousal abuse. TR 176-77. If Ms. XXXXX expresses her moderate interpretation of Islam by speaking out when she disagrees with XXXXX, he will beat her for this expression. Ms. XXXXX thus has a well-founded fear of persecution on account of her religion.

X. The Senegalese State is Unwilling or Unable to Protect Ms. XXXXX from Her Father and Her Future Husband

For asylum purposes, the persecutor must either be the state or an agent that the state is unwilling or unable to control. *Elias-Zacarias*, 502 U.S. at 481-83. Here, Ms. XXXXX's father is a XXXXX government official. Additionally, the state of Senegal is both unwilling and unable to control violence against women inside the home and to protect women from forced marriage. According to the U.S. State Department, women's rights to choose when and whom they marry are restricted in Senegal. Exh. 4, Tab D. [T]he government does not enforce the law [against domestic violence] in practice. *Id.* Victims of domestic violence are frustrated that judges in Senegal do not apply the law in cases of

domestic violence. *Id.* Marital rape is not even criminalized *de jure*. The Persecution of Women in Senegal, Exh. 4, Tab D at 6.

XI. Ms. XXXXX's Asylum Application Warrants the Favorable Exercise of Discretion

Ms. XXXXX merits a favorable exercise of discretion under *Matter of Pula*. The Board in *Pula* outlined a "totality of the circumstances" test and counseled that "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Id.* at 473-74. In Ms. XXXXX's case, the severity of the harm she has already experienced and the harsh fate that awaits her in Senegal today weigh heavily in favor of a grant.

Under the *Pula* test, there are many factors in Ms. XXXXX's favor. Ms. XXXXX applied for asylum affirmatively and immediately upon entering the country. Her uncle, XXXXX, describes Ms. XXXXX as a "very talented young woman," "open-minded, caring and reliable," a woman who displays "kindness, honesty, generosity and truthfulness." Exh. 4, Tab A at 1. She received her MBA "with distinction." Exh. 6, Tab I. She has experienced severe harm in Senegal and fears more of the same and worse. Under the totality of the circumstances test, Ms. XXXXX clearly merits a favorable exercise of discretion.

The IJ cited *Pula* and articulated the proper test, but neglected to consider all the relevant factors when he denied the claim in the exercise of discretion. Dec. at 21. The IJ did list some of the favorable factors: Ms. XXXXX has maternal relatives and a friend in the United States and she has no criminal record. *Id.* The IJ failed, however, to consider the severity of the harm Ms. XXXXX has endured and faces. *Id.* The IJ determined that Ms. XXXXX's studies and temporary residence in [A EUROPEAN

COUNTRY] outweigh the positive factors in her case. *Id.* Moreover, he based his discretionary denial on the repealed safe haven doctrine. *Id.*⁴⁴ Ms. XXXXX was far from safe in [A EUROPEAN COUNTRY], where she had already experienced violence at the hands of her uncle and where her father could easily abduct her. In her final days in [A EUROPEAN COUNTRY], fearing an imminent abduction, Ms. XXXXX was forced to hide [in her friend's dormitory] to elude her persecutors. *Pula*, at 473-74. *Pula* itself stands for the proposition that a third country is not a safe haven where, as here, the applicant has insecure living conditions or is forced to remain in hiding to elude persecutors. 19 I.&N. Dec. 467, 473-74 (1987). The IJ's decision on this issue was thus an abuse of discretion.

XII. Ms. XXXXX is Eligible for a Humanitarian Grant of Asylum

In cases of past persecution, an applicant may obtain asylum regardless of whether or not she has a well-founded fear of persecution in the future, provided that she has compelling reasons for being unwilling to return because of either: the severity of the past persecution or a reasonable possibility that she may suffer other serious harm upon returning to that country. 8 C.F.R. ' 1208.13(b)(1)(iii)(A), (B). *See also Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989). Ms. XXXXX meets the requirements for a humanitarian grant based on the other serious harm she may suffer upon returning to Senegal. Because Ms. XXXXX has demonstrated past persecution and because she fears the serious harm⁴⁵ of a forced

⁴⁴ Reliance on the outdated safe haven doctrine is no longer justified. While it is true that the Board held in *Pula*, that whether an applicant has obtained safe haven in another country is a factor to consider in the exercise of discretion, *Pula* was decided in 1987, prior to the 2001 repeal of the safe haven regulations. 19 I.&N. Dec. 467, 473-74 (1987).

⁴⁵ Forced marriage, beatings and rape constitute persecution, *see supra* section II. If the Board were to determine that these harms do not rise to the level of persecution, or are not inflicted on account of an enumerated ground, they can still be found to constitute serious harm, which does not require a nexus to a protected ground.

marriage, beatings and rape, she has demonstrated eligibility for asylum under 8 C.F.R. ' 1208.13(b)(1)(iii)(B).

XIII. Ms. XXXXX is Entitled to Withholding of Removal under the INA

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

The IJ erred when he denied Ms. XXXXX's application for withholding of removal. Dec. at 22. In order to qualify for withholding of removal, an applicant must show that her life or freedom would be threatened if she is returned to her homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. INA ' 241(b)(3), 8 U.S.C. ' 1231(b)(3). This requires a showing that it is more likely than not that the applicant will be subject to persecution upon deportation. *Cardoza-Fonseca*, 480 U.S. at 430. Unlike asylum, withholding is a mandatory form of relief. INA ' 241(b)(3), 8 U.S.C. ' 1231(b)(3).

Past persecution generates a presumptive eligibility for withholding. 8 C.F.R. ' 1208.16(b)(1)(i). Ms. XXXXX has demonstrated past persecution and the burden shifts to DHS to demonstrate by a preponderance of the evidence that there has been a fundamental change in circumstances, or that the applicant could reasonably relocate internally to avoid a future threat to life or freedom. 8 C.F.R. ' 1208.16(b)(1)(i) & (ii). No such showing has been made. *See* section II, C, *supra*.

- B. Even Absent the Regulatory Presumption, Ms. XXXXX is More Likely than Not to Face Threats to Life or Freedom

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

XIV. Ms. XXXXX is Entitled to Withholding of Removal under the CAT

A. Ms. XXXXX is More Likely than Not to Experience Torture Upon Removal to Senegal

An applicant for protection under the Convention Against Torture (CAT) must demonstrate that it is more likely than not that she will be tortured ~~Ab~~ or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.@ 8 C.F.R. ' 1208.18(a)(1). Ms. XXXXX is eligible for CAT relief because she has already been beaten severely and it is more likely than not that she will again be beaten, forced into marriage, raped and subjected to continued domestic violence.

Evidence of past torture is relevant to a determination of eligibility for relief. 8 C.F.R. ' 1208.16(c)(3). Torture is defined as ~~A~~any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.@ 8 C.F.R. ' 1208.18(a)(1). Clearly, Ms. XXXXX experienced severe pain and suffering when her head was slammed into the wall, her face was slapped hard and her body was punched. She also experienced extreme mental anguish as a result of her father's brute force. Mr. XXXXX intentionally inflicted this pain on Ms. XXXXX. As such, the severe, repeated beatings constituted torture and make it more likely than not that she will experience such pain and suffering again. Ms. XXXXX is also more likely than not to be raped repeatedly if she is returned to

Senegal. Courts recognize rape as torture. *See e.g., Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3rd Cir 2003) (A[r]ape is a form of aggression constituting an egregious violation of humanity); *see also Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (listing rape as an example of torture).

Evidence of flagrant human rights violations are also relevant to the likelihood determination. 8 C.F.R. ' 1208.16(c)(3). Ms. XXXXX's personal circumstances, in combination with general conditions for women in Senegal, make it more likely than not that Ms. XXXXX will be tortured upon removal to that country.

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

B. The Senegalese Government is More Likely than Not to Acquiesce to Ms. XXXXX's Torture

Here, the IJ began by articulating the correct regulatory standard, but proceeded to analyze the claim under an improper standard. A Respondent provided no claim or evidence that public officials or persons acting in an official capacity in Senegal intended to torture Respondent. @ Dec. at 22-23. Ms. XXXXX need not show that an official will torture her, only that an official will acquiesce in her torture. This was error as a matter of law.

Ms. XXXXX's father, who has already battered her severely on numerous occasions, is a XXXXX Senegalese government official. He is also well-connected and has a XXXXX in the XXXXX

who works closely with the police. The U.S. Department of State reports that the Senegalese police do not enforce laws against domestic violence, that marital rape is not criminalized, and that a woman's right to choose when and whom she marries are restricted in Senegal. Exh. 4, Tab D. Dr. N=Diaye testified that it would likely be impossible for a woman to flee a forced marriage in Senegal, and that the police might even assist a powerful patriarch such as Mr. XXXXX, by returning his daughter to him if she runs away. TR 186-87. Because the country conditions evidence of record establishes that the Senegalese government turns a blind eye to forced marriage, domestic violence and marital rape, it is more likely than not that the Senegalese government will acquiesce to Ms. XXXXX's torture. *See e.g., In re Y-L-*, 23 I. & N. Dec. 270, 281 (BIA 2002) (dismissing a CAT claim because the Board determined that Haiti did not turn a blind eye to torture). Ms. XXXXX has made the requisite showing of official involvement and, alternatively, acquiescence.

CONCLUSION

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

grant of asylum. Alternatively, *amicus* submits that Ms. XXXXX qualifies for withholding of removal under both the INA and the CAT.

Respectfully submitted this May _____, 2008, by

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