Adelaide Abankwah, Fauziya Kasinga, and the Dilemmas of Political Asylum

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Abstract

This essay will appear as a chapter in a volume that tells the background story to well-known cases in immigration law, covering human impact, litigation strategy, political maneuvering, and developing doctrine, as appropriate to the case under consideration. The book will appear in Foundation Press’s Stories series, and should prove valuable as a companion to casebooks used in a basic immigration course.

This chapter examines closely two political asylum cases wherein the claim was based on the risk that the applicant would be subjected to female genital mutilation (FGM) if returned to her home country. Matter of Kasinga, decided by the Board of Immigration Appeals in 1996, established basic doctrine favorable to such a claim and represented a global milestone in the consideration of gender-related asylum cases. The chapter tells the story behind this application, filed by a young woman from Togo who had been shielded from the practice by her father until his death when she was 16. It also sketches the background legal framework and situates the Board’s rulings in the context of developing asylum doctrine. In Abankwah v. INS, decided in 1998, the Second Circuit reversed a ruling by the Board that denied asylum to a young woman who asserted that she would be subjected to FGM as punishment, because she was about to become queen mother of her tribe and the elders would discover in that process that she had not remained a virgin as required by tribal rules regarding that role. The chapter’s account provides a detailed insight into how an asylum case proceeds before an immigration judge, the BIA, and the courts, portrays the important role of counsel (asylum applicants often must rely on pro bono attorneys; it took Abankwah seven continuances to secure counsel), and examines the importance of credibility determinations. Certain surprise developments involving Abankwah after the court’s
ruling reveal additional facets of the acute policy challenges presented by political asylum, and suggest lessons about cross-cultural complications in assessing such applications.
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The story of Adelaide Abankwah reveals both real strengths and disquieting weaknesses in the institution of political asylum and in the American system for receiving and resolving asylum claims. The revelations become particularly sharp when Abankwah’s case is viewed against the backdrop of a precedent decision decided just nine months before she arrived in the United States, Matter of Kasinga. Both Abankwah and Fauziya Kasinga based their claims on the threat that they would be subjected to female genital mutilation (FGM) in their home countries in West Africa. Both applications for asylum encountered skepticism and resistance, on factual and legal grounds. Both women endured lengthy periods in detention while awaiting resolution of their cases, and both achieved a remarkable degree of public notoriety during the wait. Not until the Board of Immigration Appeals (BIA) decided to grant asylum to Kasinga in 1996 did the U.S. system fully come to grips, as a matter of doctrine, with asylum claims based on this sort of ingrained cultural practice. That ruling resolved several key legal issues, but it did not make the subsequent administrative and judicial decisions in the Abankwah case easy or straightforward. In fact, Abankwah’s case ultimately reached an unexpected ending that required over six years to unfold.

American law, like that of most other developed nations, offers asylum to persons who demonstrate that they are unwilling to return to their home countries because of a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” A successful claim ordinarily trumps other violations of immigration law, and it can lead after a few years to full lawful permanent resident status and ultimately to U.S. citizenship. Asylum cases present significant challenges, of both fact and law. How can adjudicators predict what would befall an individual upon return to a distant country? What proof should applicants offer? How can adjudicators tell if the applicant is embroidering the story, or making it up out of whole cloth? What sorts of harm amount to persecution? How great must the risk be to make the fear well-founded? When does persecution have an adequate nexus to one of the five grounds listed in the statute? What is one to make of the most vague or

*FGM involves the cutting away of some or all of a girl’s or young woman’s external genitalia, usually in the belief that it prepares her for adulthood or preserves her purity. Practices vary, but the cutting can range from removal of part or all of the clitoris to removal also of the labia minora and closure of most of the vaginal opening. Often performed under unsanitary conditions, the cutting can cause long-term physical as well as psychological harm. An estimated 80-140 million women now alive have been subjected to this procedure, in one or another form, mostly in Africa but also in some parts of Asia.
open-ended factor in that list, membership in a particular social group (PSG)? How should asylum claimants be housed and cared for while their cases are adjudicated? Under what circumstances should they be detained? Each of these questions played a role in the Kasinga and Abankwah stories.

I. Abankwah’s History

A. Arrival and initial proceedings

Adelaide Abankwah, a 27-year-old citizen of Ghana, arrived at New York’s JFK airport on March 29, 1997, bearing what a forensic document expert later described as a “fairly sophisticated” altered passport. According to one published account, she was initially cleared through the border inspection process and was searching for the proper exit when a different officer called her back for further checking. After a closer interview, the inspector decided to hold her for a formal removal hearing before an immigration judge (IJ), and sent her to the Wackenhut detention facility near the airport, operated by a private corporation under contract with the Immigration and Naturalization Service (INS). Wackenhut became her home for the next 27 months.

She first appeared before an immigration judge four days later, at an abbreviated hearing known as “master calendar,” analogous to a status call in a civil case. The judge advised her about the charges, her rights, and the immigration court process that would unfold, in the normal course, over the next few weeks. He also provided her, as the regulations require, a list of pro bono legal services potentially available in the New York area, urging her to get a lawyer: “[Y]ou better prepare, okay? And you’ll need some help.”

These required advisories by the judge reflect certain key features of the U.S. immigration court system. Immigration cases often require sophisticated legal representation for full and fair presentation of any possible defenses, particularly asylum claims. The Immigration and Nationality Act guarantees the right to a lawyer, but – pointedly – “at no expense to the government.” As though out of embarrassment at the system’s failure to provide appointed counsel when the stakes are potentially so high, administrative practice has generated a rough accommodation: aliens in removal proceedings are given a regularly updated list of local persons or organizations who provide pro bono legal services. Pro bono attorneys, however, having limited resources, often insist on interviewing the caller in detail, usually in person, before deciding whether to accept the case. The attendant delays often frustrate both the individual and government officials wanting to move the caseload – and indeed Congress, particularly if INS is paying for detention costs in the meantime (which can run $50 to $200 per day). By statute, Congress has essentially signaled that it considers 10 days long enough to secure counsel and that the individual should proceed pro se if no attorney has been arranged by then. But immigration judges, more familiar with the human realities involved, regularly grant additional time.

Adelaide Abankwah received seven more continuances before she was able to appear...
with counsel. She made telephone calls, but always seemed to encounter problems. In one of several confusing dialogues with the judge, on April 25, at the fourth master calendar, she said that after she explained her case over the phone, the lawyer “said my case, I have to go back. And I told her I cannot go back because I ran away with that passport. And she said she can’t do anything about that.” The attorney also told her that “asylum is supposed to be political. And I said mine is not political. It’s my working place.” The judge then seemingly tried to discourage her from continuing with an asylum claim, pointing out that problems with her employer would not fit the asylum standards. In response, Abankwah, for the first time, spoke of additional problems in her village, relating somehow to her mother’s role as a former queen mother of the tribe. In the end, the judge pressed her to complete the asylum application form, Form I-589, on her own even if she had difficulty in getting an attorney. On May 20, she said she had completed the form but had met new difficulties in nailing down the services of attorneys she had thought would help. Perhaps discouraged by these problems and the detention still awaiting her, she openly considered withdrawing the claim and going home. But the judge was patient, carefully pointing out that she could ask for asylum without an attorney, if necessary. She ultimately decided to persevere. The judge accepted the I-589 for filing, but did not at that time have her sign it. Finally, on July 3, Abankwah appeared at a master calendar hearing with counsel: Olga Narymsky, staff attorney for the Hebrew Immigrant Aid Society, a well-established refugee assistance organization. But counsel needed additional time for preparation, costing Abankwah another two months at Wackenhut.

B. Abankwah’s merits hearing

1. Preliminaries: the documentary filings

On September 9, 1997, the merits hearing finally commenced before Immigration Judge Donn Livingston. He had earlier ordered that Abankwah have the assistance of a Fanti interpreter, although she had maintained in earlier proceedings that she was capable of proceeding in English. (This form of assistance, unlike legal representation, is provided at government expense.) The judge inquired whether Abankwah would rely on the I-589 form previously submitted. “With certain corrections,” was Narymsky’s reply. Abankwah had written “Biriwa” when asked for her religion, but that was her home village. The entry was accordingly corrected to “Christian.” And Abankwah had listed a spouse and date of marriage in September 1996 on the form. But, Narymsky stated, “she’s not married. The person she listed as her husband is her boyfriend.” With those changes noted, the judge asked Abankwah to sign and formally swear to the truth of the information contained in the application form. It was then entered into the record, along with a September 5 Abankwah affidavit elaborating on the claim, two State Department memoranda – one discussing in general asylum claims from Ghana, the other titled “Female Genital Mutilation (FGM) in Ghana” – and a variety of other supporting documents.

These documents reveal the value added by attorney representation. The application form, filled out in longhand by Abankwah without counsel and submitted in May, is hard to
follow and mentions a grab-bag of concerns about what would happen to her if she returned to Ghana. In responding to the key questions concerning why she was applying for asylum and what she thought would happen to her if she returned to Ghana, Abankwah’s reply first discusses at some length her Accra employer’s pursuit of her for money lost while she was employed there. Only then does she begin to discuss the reasons for fear of returning to her village: primarily, that she could not accept the role of queen mother, succeeding her own mother who recently died. She mentions many objections to taking on that role. They seem to include certain ceremonial clothing requirements, an obligation to take part in a ceremony that involves pouring blood on her feet, and concern about what she might have to do during royal funerals: “[Y]ou have to attend the funeral with human head because they will do the same when you also die.” At several points, the handwritten explanation also addresses her fear of what would happen to her because she had previously had sex with a man. “And the worst thing is when they will fine out that you are not virgin they will cut your [illegible] so that you wouldn’t feel for men, and true that you can die.”

Asylum applications prepared with the assistance of skilled counsel from the beginning usually answer the questions on the Form I-589 far more concisely, and are then accompanied by a detailed affidavit executed by the applicant, stating in chronological narrative the key parts of the person’s background history and the central reasons why she fears return. Such an affidavit is usually prepared after hours of interviews with the client, during which the attorney can identify those parts of the story that are legally relevant to the asylum claim and present them in a logical order. It is common for clients to have only a general idea of the meaning of asylum. Often the bad things most on their minds that might happen if they return to their homeland, such as crop failures or severe drought, are simply not grounds for protection. Abankwah’s rambling handwritten application, highlighting the Accra dispute, shows this tendency. An attorney can help clients understand what is legally relevant.

Narymsky chose not to file a new form, perhaps because the first one had already been filed with the court and shared with INS when she took up her role as counsel. Instead she asked only for the two limited modifications before Abankwah swore to it, and then filed a compact supplemental affidavit from Abankwah, consisting of seven paragraphs. Providing a more logical account of Abankwah’s background, the affidavit also focused on the core element of the claim – certainly the part that would capture public attention.

The first paragraph is crisp and to the point: “I am a native and citizen of Ghana. I fled my country to avoid the practice known as female genital mutilation (FGM).” The affidavit then weaves in skillfully some of the less relevant material mentioned in the handwritten form, downplaying it in the process. For example, the ceremony that involves blood – now revealed as sheep’s blood – running on the feet has shifted from a possible objectionable practice to simply an illustration, among several others, of the religious responsibilities of a queen mother. (No mention is made, however, of human heads at funerals, nor of the Accra financial dispute.) The affidavit then describes Abankwah’s conversion to Christianity when she went away to school.
The next three paragraphs set forth the central elements of the claim:

4. As an oldest daughter, I was supposed to become the “Queen Mother” after my mother’s death. The tradition required that the woman who is next in line to become the “Queen Mother” must remain a virgin until she is enstooled. After she is enstooled, the village elders select a husband for her. I never wished to become the “Queen Mother” because it went against my Christian believes. I did not obey the tradition, and became secretly involved with a young men whom I loved. When my mother died, and it was my turn to become the “Queen Mother,” I was no longer a virgin.

5. I knew that the elders would discover that I was not a virgin. Before being enstooled, the newly selected Queen Mother has to go through a ritual which is supposed to reveal whether or not she is a virgin. She must hold a bowl filled with water, as the elders perform a ritual prayer. If the woman had known men before, she will start to shake and will drop the bowl. Even if she does not betray herself at this stage, once she is married, it will be discovered that she is not a virgin.

6. In my tribe, sex before marriage is condemned, and the woman is punished by being forced to undergo FGM. I personally knew three women who were mutilated for this reason. If I refuse to become the “Queen Mother,” the people will know that something is wrong and will suspect that I must have had an affair. I will be mutilated, and my lover will be found and executed. After that, I will have to live the rest of my life in shame.

Narymsky, again following good practice in asylum representation, also provided additional documentary evidence to support her client’s case, mindful of the BIA’s recent insistence on corroboration wherever it might appear possible.20 Narymsky located a Ghanaian-born U.S. citizen, Victoria Otumfuor, a Pentecostal minister who often traveled to Ghana, to provide a short affidavit that modestly bolstered some of the specific details in Abankwah’s account.21 Effective asylum attorneys also annex to the application form additional background information to provide context, including general information documenting human rights abuses in the country of origin. Narymsky submitted a collection of published studies, 140 pages in total. One report, done by an advocacy and research organization called Rainbo, provided a general description of FGM and its incidence. The other two were academic studies focused specifically on FGM in Ghana, chartered by the Ghanaian Association for Women’s Welfare.22

2. Direct examination of Abankwah

With the documents introduced, Narymsky called her client to the stand. Abankwah’s testimony on direct examination, done this time with the services of the interpreter (and therefore far clearer than her testimony in English at the master calendar hearings), initially followed fairly
closely the account sketched in her affidavit. Then counsel asked her to explain the problems she encountered in Accra, and why she did not feel she could safely return there. Perhaps Narymsky pursued this theme in order to ward off any INS effort to undermine Abankwah’s credibility by noting that her earlier comments and filings had emphasized a different risk. This line of inquiry also helped counter one other possible reason for denying asylum, often called the “internal flight alternative” – the chance that she could find safety in a different part of her own country and therefore did not need refuge outside Ghana. Abankwah explained that when she could not pay the money her employers demanded of her, they went to her home village to seek her. “Then the villagers got to know that I have been in Accra.” She elaborated: “If I return to Accra, I don’t know where to go in Accra at the moment. I have to return to my village, and when I go to my village, they will kill me. That’s why I came over here.” On redirect she would speak twice more of the risk that they would kill her, thus escalating her description of the consequences of return.

Narymsky also used direct examination for another bit of anticipatory defense, by asking about Abankwah’s passport and why she did not admit under early INS questioning that her document was false. Case law makes it clear that the use of false documents as part of the immediate escape from the country of persecution should not count against the individual, but immigration judges are often wary of the credibility of such persons if they do not own up to the fraud and reveal the full story promptly after arriving in a safe country. She conceded that she said several times to the border inspectors that the passport was really hers. Only when assured that she would be taken to court if she told the truth did she relent. Some friends in Accra had offered to help her get the documents, she said; she only had to supply them with two pictures of herself.

3. Cross examination of Abankwah

It was then time for cross-examination by the INS trial attorney, James Paoli. Trial attorneys carry heavy caseloads and typically have only an hour or two preparation time before a merits hearing in an asylum case, though complex or novel cases may give rise to longer allowances. Their research may consist only of reviewing the file and perhaps pulling together some readily accessible information about general conditions in the country of origin. Consequently, trial attorneys often must rely primarily on their litigator instincts, refined over the course of the numerous asylum cases each attorney handles, to develop their trial strategy on the spot. They probe for apparent inconsistencies in the story or other possible indications of falsehood, or home in on undeveloped issues that might call for a legal conclusion that the claim does not meet the standards. Properly trained and supervised trial attorneys, however, do not understand their mission to be to defeat the asylum claim at all costs. If the applicant’s story holds up under scrutiny, they are authorized to tell the judge at the end that the government does not object to a grant.

In cross-examining Abankwah, Paoli pursued three main themes. First, he zeroed in on the exact nature of her FGM claim, to enable him to emphasize later how it differed in important
respects from the pattern in *Matter of Kasinga* and in other FGM cases.

Q. Now you told us that if they find out you’re not a virgin that they would perform circumcision. Is that coarct [correct]?
A. Yes, I did.
Q. So is this a form of punishment?
A. Yes, because they mean that you are disgraced the gods, so they will punish you. 

Q. Well, are there any – is the female circumcision used for other purposes in your tribe?
A. In my village, if they find you a man and then you marry that man, that means you are a good person; they wouldn’t do that to you. But if you disobey them, and then they find out, they want to punish you, then they will do that to you as punishment.
Q. Do any people do it voluntarily in your village?
A. No.28

Second, Paoli sought to establish that Abankwah might be able to get government or private assistance in avoiding circumcision. The State Department documents in evidence stated that Ghana outlawed female circumcision in 1994 and had initiated at least two prosecutions,29 but Abankwah testified that it is still practiced in her village. He pointed out that certain nongovernmental organizations (NGOs) offer refuge throughout Ghana. Couldn’t she use those services? “I didn’t know that before,” she admitted. But she persisted, through several avenues of cross-examination, in stating that wherever she went in Ghana, she would be found. Trading people would notice her, or the chiefs would communicate.30

Third, Paoli focused on her name and on oddities in her documents connected with it. She had stated on her I-589 that she was known by another name, Kukwa, and he asked her about that. “It means I was born on a rainy day. And Adelaide is a Christian name they gave to me when I went to school.” He continued “What’s your last name?” “My other name is Kukwa Norman, but they never used that name Norman; they call me Kukwa.”31 Paoli then asked if she had any other ID documents from Ghana with the Abankwah name. She said no, but when pressed, offered that she might be able to get some through a woman she knew.

Paoli pursued the issue by asking how the name Abankwah got on the passport she carried on arrival. She didn’t know; she just gave her name and photos to “those people” and they got it for her. “This is in February of 1997?,” Paoli asked. “Yes, when I came to Accra.”32 He then showed her the passport she presented at the airport. A forensic document report already in evidence stated that the main passport photo had been carefully inserted into the spot where the original had been sliced out, but that the photo incorporated into the U.S. visa had merely been retouched to alter its appearance.33 She essentially conceded that the main photo was of her, and the visa photo was not. Paoli continued:

Q. Ma’am, this visa is a valid United States visa, according to [the forensic
document report]. And this visa was issued to someone named Adelaide Abankwah. She has the same name as you. This was issued in August of 1996, before you gave them your name and your picture. So that means that this person right here is Adelaide Abankwah. So, ma’am. Ma’am. Can you explain, if you know, how there could be two people with the exact same name as you and how you ended up with her passport?

A. I cannot tell how they got it. Maybe it belongs to somebody when they gave it to. But I don’t know how they got it.

Q. Ma’am, is it possible that your true name is Kukwa Norman and the name Adelaide Abankwah is just the name you got off this passport?

A. No, my real name is Adelaide Abankwah. In my house, they call me Kukwa.34

4. Final stages of the hearing

Following a brief redirect examination, Narymsky stated to the IJ that she was waiting for some other documents, including Abankwah’s birth certificate, which were being obtained through the efforts of Victoria Otumfuor, the affiant, who would also be available to testify within the next few weeks. The judge then held a brief colloquy with Narymsky, candidly revealing several questions that were on his mind as he looked ahead to resolving this case. One was “really troublesome,” the name on the passport. It shows an Adelaide Abankwah born in 1973; the person in the court room was born in 1969, according to her I-589. “So it’s an Adelaide Abankwah with a different birthday.” Narymsky’s responses suggest that she had not previously noticed the discrepancy.35

The hearing reconvened three weeks later, on October 1. One further affidavit was submitted, but no birth certificate or other ID documents. The affidavit was from the son of Victoria Otumfuor, still in Ghana and unavailable for cross-examination. It essentially reported statements Abankwah had made to him when he knew her there. Otumfuor then took the stand. She was a 20-year U.S. resident and 2-year citizen. As a Pentecostal minister and family counselor, she still made frequent trips back to her native Ghana. She had met Adelaide briefly in Ghana, at Otumfuor’s daughter’s funeral, and then came to see her in the detention center. But her testimony went primarily to practices in Ghana. She described the institution of queen mother and the consequences of refusing the position, which vary from place to place. FGM is practiced primarily in the north of Ghana, but she said she had heard of FGM being used as punishment in the central region, and she knew that Adelaide was from the central region (which, confusingly, lies along the south coast of Ghana). She was still trying to obtain Adelaide’s birth certificate, thus far without success, but she did know that Adelaide Abankwah was her name.36

Paoli’s cross-examination produced a candid statement that Otumfuor did not know much about Abankwah’s tribe, the Nkumssa, and that she did not know specifically that it used FGM as punishment. He suggested gently that her knowledge of Ghana could be dated; she was unaware that the government was trying to eliminate FGM.37

When Paoli concluded, Judge Livingston then began fairly lengthy questioning of the
witness (a not uncommon practice in immigration court) that revealed his own struggles with this case. After a few questions covering the Ghanaian government’s current efforts to eradicate FGM, he noted that there was no mention in any of the documents that FGM is used as a punishment. (Narymsky pointed out, however, that the background documents stated that information on FGM is incomplete.) He then asked Otumfuor if she knew of such usage of FGM or only thought it possible. She said she had heard of one incident when it had been used to punish for premarital sex – which had occurred in the central region. But this was back in 1963 or 1964.38

Narymsky’s closing statement focused on credibility. Otumfuor had been candid in owning up to her limited knowledge of Abankwah’s tribe. This showed how careful her testimony was, and it supported the claim. “I also believe my client’s testimony. And one of the main reason which – well, one of the reason which makes me believe her is because she’s been in the detention center already for six months, and if that’s not an indication of her fear of returning, obviously she has a fear; she has a subjective fear.”39

Judge Livingston then engaged the attorney in a lengthy dialogue, again revealing his concerns. What about government protection, now that Ghana has outlawed FGM? Narymsky pointed out that the evidence still showed that 30 percent of Ghanaian women had been circumcised; obviously the protection is inadequate. In any event, Abankwah could be subjected to other sanctions. Which of the five grounds are involved here? Religion and particular social group: “not being a virgin, it’s a social group. It’s a female.” But Abankwah had said her lover would be killed, the IJ pointed out: “I mean, it’s even handed that way.” Narymsky gave a somewhat startling reply: “Well, the female genital mutilation is on account of being a female, because the boy will not be mutilated, he will just be killed.” Could a society make a law against extramarital sex, the judge asked, and then enforce it with punishments? Answer: the punishment cannot be disproportionate to the crime, and FGM is disproportionate.40

Paoli’s closing statement for the government initially suggested that this was not really an FGM case. It had not been established, he contended, that FGM is practiced by Abankwah’s tribe or is imposed as punishment. The State Department profile said that FGM happens in the north of Ghana. Otumfuor “was a very nice woman,” but her knowledge of FGM as punishment was double hearsay, “a friend telling of a friend who had a friend 20 years ago who was punished. I don’t think that that’s enough corroboration.” The Ghanaian government by now was actively prosecuting practitioners of FGM, at least if people cooperated in reporting such incidents, and NGOs were providing refuge. “I find it rather unbelievable that a small tribe is going to send their elders or officers out to widespread Ghana to try to find somebody who refuses to be queen mother. It’s an honor.”41

Immigration judges typically recess for a few minutes at the end of a removal case, then reconvene on the record and immediately deliver their rulings orally, incorporating a discussion of facts and law. If the case is appealed, the judge’s opinion is transcribed along with the rest of the proceedings, in order to provide a full basis for the BIA to consider the legal and factual
issues. \(^{42}\) (Immigration court proceedings are recorded on a tape recorder operated by the judge, not through the services of a court reporter.) The judge can usually base part of his oral opinion on standard paragraphs describing the relevant law, with citations, that he has developed over the course of hearing dozens or hundreds of cases involving similar legal questions. He can then weave in a summary and assessment of the facts from his notes and his still-fresh recollection of the proceedings that have just concluded.

Judge Livingston followed a variant of this practice here. Stating that the case presented “an extremely difficult issue” and was “very unusual in my experience,” he indicated that he would take a week to think about it and then reconvene in his courtroom for the oral decision. \(^{43}\)

II. Fauziya Kasinga’s Case and the Background Legal Doctrine

One legal issue that had stirred widespread debate just 18 months earlier no longer needed to trouble Judge Livingston. Fauziya Kasinga’s case had settled that FGM can legally count as the type of persecution that gives rise to a valid asylum claim. \(^{44}\) This conclusion may seem commonplace or unsurprising today, but it was an open issue for refugee status adjudicators worldwide in the early 1990s, and it is worth looking at the difficulties and how the Board resolved them. A brief outline of Kasinga’s situation sets the stage. It had many remarkable parallels to Adelaide Abankwah’s case, but also a few differences – including one major one that would not be fully revealed until years later.

A. Kasinga’s journey

Fauziya Kasinga grew up in Kpalimé, Togo. Her family belonged to the Tchamba-Kunsuntu tribe, which traditionally subjected its daughters to FGM at about age 15, as a regular ritual expected of all women. But her influential father did not believe in the practice, and he had shielded Fauziya and her sisters from it. Some of her older sisters had married successfully, despite this departure from custom, but Fauziya was only 16 years old when her father died in 1993. A paternal aunt then took over authority in the family. Disapproving of the way the family was run, she forced Kasinga’s mother to leave. She then arranged for Kasinga to marry a 45-year-old man who already had three wives. The wedding was performed in October 1994, but Kasinga refused to sign the marriage certificate. The aunt also scheduled an older woman to come a few days later, “to scrape my woman parts off,” as Kasinga later explained it. After allowing forty days for healing, the marriage would then be consummated. Before the cutting took place, however, Kasinga’s sister helped her escape the house and drove her to the Accra airport in neighboring Ghana, providing her with $3,000 sent by her mother (who had obtained it at some hardship by disposing of most of her inheritance). Kasinga flew to Germany, and was able to find housing with a German woman who had befriended her while she was wandering, confused and uncertain, in the Dusseldorf airport. Two months later, equipped with a false passport provided by an African she met in Germany, she flew to the United States, where a cousin lived. Upon her arrival at JFK airport, in December 1994, she immediately told the inspector the truth about her false documents (in contrast with Abankwah) and asked for asylum.
Based on the threatened FGM.45

She was interviewed and then placed in detention – obviously a severe prospect for an 18-year-old, but she had the further misfortune of being assigned to the Esmor facility in Newark, a private prison run under contract with INS. There, as a frightened young woman barely of age, in a wholly alien culture, she suffered several humiliations and guard mistreatment. The conditions were so bad at Esmor that the inmates rioted six months after Kasinga arrived (she did not take part). INS then closed the Esmor facility and launched a hard-hitting investigation into what had gone wrong.46 Kasinga was not released, however; she was simply moved to another jail in York, Pennsylvania. The Esmor turmoil delayed her hearing well beyond the norm for detainees. Finally, in August 1995, she appeared before IJ Donald Ferlise, who rejected her claim after a hearing. “The court wonders then how absolute can this tribal law be with so many exceptions being allowed for that rule,” he stated. But his key ruling rested on credibility: “I have taken into account the lack of rationality, the lack of internal consistency and the lack of inherent persuasiveness in her testimony, and have determined that this alien is not credible.”47 Kasinga’s lawyers appealed to the BIA.

INS had opposed the grant of asylum in the immigration court, but the FGM issue gathered sustained high-level attention at headquarters as the appellate brief was being prepared.48 After careful internal review, INS decided to support firmly the BIA’s development of comprehensive legal standards that would recognize the risk of forcible subjection to FGM as a valid basis for asylum, but within certain limits and guidelines. Its brief, filed in February 1996, set forth a proposed framework, generally favorable to such claims, for analyzing FGM cases and similar applications based on cultural practices.49 But INS argued against an outright grant of asylum, favoring instead a remand for further factual inquiry once the BIA had spelled out the legal doctrine in a manner more hospitable to Kasinga’s claim than that which Judge Ferlise had considered. The BIA set the matter for oral argument – something that happens only a handful of times each year, out of the tens of thousands of cases the BIA decides – to be held before the 12-member Board sitting en banc.

While that appeal was pending, Kasinga’s case began to receive media attention. A few weeks before her appeal was argued at the BIA, in the New York Times ran a page-one story.50 Over the next several weeks, dozens of major news outlets, both print and broadcast, covered her case. Several accounts were harshly critical of Judge Ferlise’s alleged insensitivity in finding that the claim lacked rationality. The BIA had to make unprecedented arrangements for media presence in the courtroom and for a bank of cameras outside the building to film comments of the parties immediately after the argument. Ted Koppel devoted his entire Nightline show on the evening after the BIA hearing to an interview with Kasinga, a graphic background piece on FGM, and a review of the legal arguments in the case. She also appeared on CBS and CNN, and was interviewed by dozens of newspapers.51

Why did her case have claim such attention? In part the interest derived from sympathy for an appealing young woman who had endured humiliation and suffering during 16 months of
detention, including detention at the grossly mismanaged Esmor facility. But the media fascination probably resulted more from the total unfamiliarity of most Americans – and probably a great many journalists – with the very existence of FGM. Kasinga personalized the story for Americans in a way that human rights activists trying to abolish the practice had never been able to accomplish. She faced a possible fate that most Americans simply could not imagine. Could it really be that 80 million women had been subjected to a cutting of their genitalia?

In the glare of this publicity, INS belatedly reversed its earlier detention decision. (The INS General Counsel’s office had urged her release months earlier in internal agency discussions, without success.52) On April 25 the New York Times reported, again on page one, Kasinga’s release from the York jail.53 She attended the BIA’s oral argument in metropolitan Washington on May 23.

B. The legal difficulties

Why did asylum claims based on FGM present difficult legal issues? Classic refugee law, as embodied in the 1951 Convention relating to the Status of Refugees, was initially designed to address state-sponsored persecution of political opponents or of populations targeted because of hatred for their race or religion. Nonetheless the Convention’s words could be interpreted more expansively. As a practical matter, the main limit on that expansion derives from concern about the numbers of people who might then come to qualify. But as a doctrinal matter, there were three main obstacles to finding that FGM amounts to cognizable persecution.

First, FGM is rarely imposed directly by the government. Instead, it is practiced by members of the community, usually specially designated older women, as part of a religious or cultural rite. (This was clearly the fact pattern presented in Kasinga and the literature, rather than the FGM-as-punishment scenario set forth in Abankwah.) In some haven countries, nongovernmental persecution is not recognized as giving rise to a valid refugee claim under the Convention.54 But U.S. refugee law had firmly accepted in the 1980s that refugee claims could be based on the risk of private persecution, if the claimant could show that the government was unable or unwilling to control the persecutor.55 This acceptance left only a factual question, as in Abankwah, over the government’s attitude and capabilities.

Second, could FGM really be considered persecution? After all, parents willingly sought to have their young girls circumcised, and in many locations, young women old enough to make the decision for themselves also chose to have the act performed. Professor Karen Musalo, the attorney who argued Kasinga’s case at the BIA and a pioneer in working to expand protections in gender-related asylum cases, stated that she was often “asked what right I had to judge or condemn the cultural practices of polygamy and FGM. I was sometimes accused of being a ‘cultural imperialist’ by imposing my Western concept of human rights on a very different culture and country.”56 BIA case law posed this obstacle in a slightly different form. One of the Board’s earliest landmark decisions on asylum, Matter of Acosta, spoke of persecution in ways

http://law.bepress.com/uvalwps/uva_publiclaw/art28
that equated it with intentional punishment imposed because of “a belief or characteristic a persecutor seeks to overcome.” Many judicial decisions employed similar formulations. But the direct practitioners of FGM ordinarily did not intend to punish. They thought, under the precepts of their own culture, that they were doing something deeply beneficial for the girl or woman involved – as is the case with male circumcision in Western societies.

Third, even if the practice is considered persecution, despite the subjectively benign intent of the practitioners, can it be said to be inflicted based on one of the five covered grounds? “Membership in a particular social group” seems the most relevant category, but exactly what is the group? Is it all women? All women of a particular tribe? All who oppose the practice? Moreover, a strong strand of refugee doctrine, both in the United States and elsewhere, has resisted defining a PSG solely on the basis of the persecutory act or practice itself, lest the nexus requirement become circular or redundant.

C. The BIA decision

The BIA, in an opinion written by Board Chairman Paul Schmidt, ruled overwhelmingly in favor of Kasinga, granting asylum without remand. Exercising a power it then had to reconsider the factual findings de novo, the Board found Kasinga to be credible. The majority went out of its way to say that it “specifically reject[ed] the Immigration Judge’s findings” on certain matters and his conclusion that the testimony was irrational, unpersuasive, or inconsistent. Addressing the second doctrinal issue mentioned above, the Board distinguished earlier decisions and held that a “subjective ‘punitive’ or ‘malignant’ intent [on the part of the actor inflicting the harm] is not required for harm to constitute persecution.” FGM, the Board wrote, is a severe bodily invasion lacking any legitimate reason.

The majority then provided this description of the particular social group involved: “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” Invoking PSG standards set in earlier precedents, the BIA stated that this is a group “defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. . . . The characteristic of having intact genitalia is . . . fundamental to the individual identity of a young woman . . . .” The nexus requirement was satisfied because the record showed that “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM.” Because Togo was a small country with a poor human rights record, the Board also concluded that Kasinga could not find refuge elsewhere in that country.

III. Decision and Appeals for Abankwah

A. The immigration judge’s ruling

The BIA’s Kasinga ruling had cleared away many possible legal disputes regarding
asylum claims based on FGM, but Judge Livingston still found several difficult issues with which he had to wrestle in Abankwah. He announced his conclusions in the courtroom on October 8, 1997, denying asylum and ordering that Abankwah be deported.

The judge first discussed Abankwah’s credibility. He noted that she had initially misrepresented her identity and that identity questions persisted. Developing a point not addressed by either party, the judge noted that the passport and visa spell her first name as “Adelaide,” but in numerous court filings she signed or spelled her name “Adeliade.” The judge had asked her whether she ever used any other name, but she then mentioned only the name Kukwa Norman. “On the basis of these factors, the Court finds that the question of the applicant’s identity is somewhat cloudy; however, the Court does not find her testimony given at the hearing to be incredible. Quite frankly, the Court is somewhat mystified as to these inconsistencies.”

After comprehensively summarizing the evidence, Judge Livingston then addressed the elements of the claim. Asylum requires both a subjectively genuine fear and a finding that the fear is reasonable. “She is clearly very fearful of returning to Ghana. . . . [It is] an intense fear.” But the evidence shows that the Ghanaian government has outlawed the practice of FGM and “people have been prosecuted and convicted.” Moreover, NGOs in Ghana have established shelters, and “the applicant may be able to take advantage of this resource. The Court believes that the applicant sincerely was not aware of these resources and these factors prior to leaving Ghana. . . . Accordingly, . . . the Court cannot find that [her subjective] fear qualifies as a reasonable fear.”

Judge Livingston also addressed the risk of other possible harm, besides FGM, based on “her refusal to assume the position of queen mother.” She initially seemed to be able to avoid these consequences by going to Accra, but after the incident where she was accused of stealing, this option was no longer available, and she could not go to other villages, in his view, for fear of being reported to her home village. “So the Court does not accept that there is a complete internal flight alternative which would solve the applicant’s problems.” Nonetheless, on nexus grounds, he ruled, this branch of the asylum claim was insufficient. Counsel for Abankwah had argued that the harm qualifies, using a social group defined as “candidates for the queen mother position who are unable or unwilling to accept that position.” In the judge’s view, this social group was “too narrowly drawn to be cognizable under the Immigration Law. Rather, I think that the applicant is faced with something that’s properly characterized as an individual predicament. She has a problem which is more kin to a personal problem than a problem relating to social groups or other organizations.”

Finally, he found the case distinguishable from Matter of Kasinga. Kasinga faced FGM “practiced routinely in her village, and imposed uniformly on a particular class of people. In this case, it appears that the practice of FGM is basically abolished in the applicant’s area, . . . [but] would be imposed as a matter of individual punishment rather than a matter of a general practice imposed upon a particular social group.”
B. Proceedings at the Board of Immigration Appeals

Though Olga Narymsky filed Abankwah’s appeal on October 29, for some reason the record, including the IJ opinion, was not transcribed until the following March. BIA briefing schedules are not normally established until that transcript becomes available. Briefing continued through early May, 1998. The briefs reiterated and refined most of the points made in the parties’ closing arguments, but Narymsky did add one new element. She objected to the IJ’s characterization of the PSG and advocated a different formulation. It should be considered “women from the Nkumssa tribe who lost virginity prior to marriage,” a characterization that, she argued, was close to the PSG defined in Kasinga.

A three-member panel of the BIA dismissed the appeal in a four-page nonprecedent decision, written by member Lauren Mathon. After a concise recounting of the evidence in the record and the IJ’s ruling, which duly noted that the judge found Abankwah credible, the Board discussed the various strands of the case. “We first find the applicant’s claim that she will be killed because she fled from her village to avoid becoming the Queen Mother is unbelievable. The applicant has offered no evidence that the punishment for refusing to become the Queen Mother is death,” nor did the evidence show any negative consequences from refusing such an honor. On the central FGM claim, “we do not find that she has established that the failure to remain a virgin would result in punishment amounting to persecution.” The panel also discounted Victoria Otumfuor’s testimony. She did not have specific knowledge about Abankwah’s tribe and could not support the claim that the Nkumssa “practiced FGM as punishment.” None of the reports Abankwah had offered gave any indication that FGM is used as punishment. The specific report on practices in southern Ghana, written by Professor P.A. Twumasi, listed multiple reasons why FGM was imposed, but “[t]here is no indication that FGM was ever used as punishment for lack of virginity.” In the end, “we find that the applicant has failed to meet her burden of proof.”

This opinion was issued July 30, 1998, nine and a half months after the IJ’s ruling. By then, Abankwah had been detained for 16 months. The BIA’s action meant that she would stay at Wackenhut while her lawyers appealed to the U.S Court of Appeals for the Second Circuit. Almost a year would pass before that court ruled.

C. The publicity campaign

While her lawyers prepared their briefs, Abankwah’s supporters opened another front in the battle. Following a pattern similar to the Kasinga case, they began to generate publicity about her plight. Leonard Glickman, executive vice president of the Hebrew Immigrant Aid Society, for which Olga Narymsky worked, published an op-ed piece in the Washington Times on Christmas day, 1998, decrying her suffering in detention at a time when most Americans would be indulging in holiday celebrations. “Her crime? Seeking asylum on U.S. shores to escape female circumcision in her home country.” The Village Voice highlighted her as the longest-held detainee in the women’s unit at Wackenhut, as part of a longer article condemning the grim
conditions of INS detention. The New York-based human rights group, Equality Now, which had helped to publicize Kasinga’s case while she was detained, took up Abankwah’s cause, enlisting celebrities in the effort. Feminist leader Gloria Steinem and later Fauziya Kasinga visited Abankwah in jail. The actors Julia Roberts and Vanessa Redgrave voiced support, and First Lady Hillary Clinton reportedly also weighed in quietly in internal government deliberations. “There is no length that we would not go to free Adelaide,” Steinem said. “We have met her, and there is a human bond between us.”

Equality Now organized a visit to Abankwah at Wackenhut for two prominent members of Congress, Sen. Charles Schumer and Rep. Carolyn Maloney, in April, about two weeks before the scheduled oral argument in the Second Circuit, followed by a news conference on the plaza in front of the INS offices in Manhattan. The lawmakers sent a letter to the INS Commissioner and the Attorney General calling for her release and a change in the way INS deals with cases of this sort, asserting heatedly that INS failed to follow its own guidelines for gender asylum cases. “If we do not step in to right the wrongs of our own actions,” Schumer’s letter said, “Ms. Abankwah may die.” In May, Marie Claire, the Hearst Corporation fashion magazine with extensive worldwide circulation, featured an article on Abankwah titled “Why are Women Who Escape Genital Mutilation Being Jailed in America?”

D. The Court of Appeals

For the appeal to the Second Circuit, Abankwah’s supporters enlisted the pro bono services of experienced appellate lawyers from the New York firm of Orrick, Herrington & Sutcliffe. Jon W. Rauchway conducted the oral argument. In light of Kasinga, there was no significant dispute over the governing substantive law. Instead, Abankwah’s attorneys basically needed to persuade the court that the administrative findings were wrong. In this respect, they had their work cut out for them. Supreme Court doctrine prescribes extraordinary deference to BIA factual findings in asylum cases. In INS v. Elias-Zacarias, the Court held that one who “seeks to obtain judicial reversal of the BIA’s determination . . . must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” Abankwah’s brief, however, wove a well-constructed argument that subtly sought to shift the burden to the Board. Initially, the brief noted that the BIA did not rely on what it called the IJ’s erroneous arguments that Abankwah had failed to articulate a cognizable social group, and that she could have sought the protection of the Ghanaian government. Instead it based its decision “upon entirely different grounds than that of the Immigration Judge,” namely, “that she had not presented sufficient evidence to demonstrate a well-founded fear of persecution.” The Board had not rejected the IJ’s finding that Abankwah was credible, but it still insisted on greater corroboration. In doing so, the brief contended, the BIA was seemingly demanding a document that spoke in detail of FGM practices among the Nkumssa. Such a document “may not – and probably does not – exist. . . . Ms. Abankwah is from a small tribe in a rural area of Ghana. Furthermore, the practice of FGM in Ghana is particularly secretive [citing to the record].” The
documents introduced into evidence, including State Department reports that confirmed the presence of FGM in Ghana, provide “as much corroboration for Ms. Abankwah’s testimony as could conceivably and reasonably be expected. In fact, the Board’s determination begs the question: what sort of documentation could an asylum applicant supply that would satisfy this impossible standard, especially without the benefit of counsel, as is frequently the case?” The section closed with a final, carefully framed passage, perhaps meant to remind the judges of themes that they might remember from news accounts of the publicity campaign: “Ms. Abankwah has demonstrated a well-founded fear that she will be subjected to horrific persecution if she is returned to Ghana. She has no criminal record of any kind, she has an exemplary record of behavior during her two years of detention in this country, and she is not in good health.”

The brief of the government’s lawyer, Assistant U.S. Attorney Meredith Kotler, was far more businesslike and comprehensive, thoroughly reviewing the evidence in the record and highlighting inconsistencies in Abankwah’s reasons for fearing return. Abankwah never produced ID documents other than the admittedly false passport, and she “was unable to explain . . . how she was able to buy a passport from someone with the same name as her.” Though the Board noted the IJ’s positive credibility finding, it had specifically labeled one part of her testimony “unbelievable” – the portion relating to her claim that she would be killed for her actions. The rest of the testimony in support of her claim was entirely conclusory, “too attenuated to constitute a basis for reversing the BIA” under the Elias-Zacarias standard of review. The brief closed by contrasting Abankwah’s evidence with that in Kasinga, where the applicant’s personal story was corroborated in detail by State Department information about FGM and human rights conditions in Togo and by an expert witness. Abankwah had only the “tepid testimony” of Victoria Otumfuor.

The Second Circuit ruled within two months of the argument, adopting the approach urged in Abankwah’s brief and reversing the BIA. Although an early passage dutifully recited the Elias-Zacarias standard, the rest of the opinion reflected a different orientation. “The BIA was too exacting,” the court ruled, “both in the quantity and quality of evidence that it required. As an initial matter, INS regulations do not require that credible testimony . . . be corroborated by objective evidence.” The IJ had found Abankwah credible, and the BIA did not disturb this finding. To be sure, it expressly found one part of her story “unbelievable,” but, the court stated, “this is a rejection of merely one aspect of Abankwah’s asylum claim.” That ruling did not affect the underlying IJ finding of credibility, which covered the FGM portion of the claim. And “[h]aving established that Abankwah is credible, we accept as fact her assertion that Nkumssa custom includes FGM as a punishment for premarital sex. Abankwah’s position is particularly compelling in light of the general conditions present in Ghana,” noting that 15-30 percent of the women had been subjected to FGM. The government’s efforts to criminalize the practice were labeled “insignificant.”

The BIA was also too quick, in the court’s view, to discount Otumfuor’s testimony because of her lack of familiarity with the Nkumssa tribe. In fact, her affidavit did state that
FGM was sometimes inflicted as punishment and that Abankwah’s account was consistent with her knowledge of the situation in Ghana. “This evidence is sufficient to support Abankwah’s claim.” The court concluded with this passage:

Without discounting the importance of objective proof in asylum cases, it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation. In this case, Abankwah has presented . . . strong evidence to demonstrate that her fear of FGM is objectively reasonable.

Abankwah’s fear of FGM is thus sufficiently "grounded in reality" to satisfy the objective element of the test for well-founded fear of persecution. Given the customs of the Nkumssa tribe, a reasonable person who knew that she had disobeyed a tribal taboo and knew that discovery by the tribe of her disobedience was imminent would share Abankwah’s fears.86

Evidence “sufficient to support” her claim and “grounded in reality” thus constituted enough to overturn the BIA’s factual conclusions. Having found Abankwah eligible for asylum, the court remanded the case to the Board.

IV. Aftermath

Although remand proceedings were still under way, INS paroled Abankwah from Wackenhut ten days later, on July 19, 1999, after 27 months in detention. Victoria Otumfuor took her in to her home. A few weeks later, the BIA formally granted her asylum. She then appeared at a celebratory news conference held at the Marie Claire offices on West Broadway, flanked by Gloria Steinem and other supporters. “I am so happy to be free. I don’t have to worry about being deported or dying in jail.”87 She began to work part-time selling French beauty products and also took up studies to obtain her high-school equivalency diploma.

Abankwah proved a poor prophet about her worries. Seventeen months later, and nearly two years to the day after Glickman’s op-ed opened her publicity campaign, the Washington Post broke a stunningly different story on its front page. An INS investigation, confirmed by the Post’s own inquiries, had found that Abankwah was an impostor. There was a real Adelaide Abankwah, a Ghanaian whose passport had been stolen in Accra in 1996 and who had been living illegally in the United States for four years, but who had now surfaced, she said, to reclaim her name. The asylum applicant’s real name was Regina Norman Danson. A hotel-owner in Biriwa, Danson’s home town, had records showing that Danson had worked several years as a cook there. Birriwa’s chief, Nana Kwa Bonko V, said to a Post reporter that there had been only one queen mother of the tribe in the last 70 years, and only for a brief period. Danson was not part of the royal family. Moreover, he said, FGM was not part of his tribe’s tradition and refusal to become queen mother would not provoke punishment. According to the INS investigative report, Ghanaian police had found Danson’s mother buying fish in Biriwa, and she had picked...
out her daughter from a photo spread.88 Having seen the INS report, but not revealing that fact, the *Post* had interviewed Danson in a New York coffee shop. She recounted her story, then disputed Bonko’s version of tribal practices. The *Post* article continued: “Informed that police reportedly had found her mother alive in Biriwa, her eyes widened and she fell silent. After a lengthy pause, she reaffirmed her story, . . . [then] declined to discuss the matter further.”89

INS’s chief press officer, Russell Bergeron, commented: “The attorneys and advocates for the alleged Adelaide Abankwah used this case to lambaste the I.N.S. by charging that we opposed the concept of a woman gaining asylum based on female genital mutilation. The fact of the matter is, that was hype and spin and a smoke screen to conceal what was fundamentally a weak case.”90 In this respect, the case could not have been more different from Kasinga’s. After the BIA’s ruling there, the *New York Times* had sent a reporter to Togo to investigate the facts and the family’s reaction to the outcome.91 The resulting 5000-word story had confirmed Kasinga’s account in detail.

Surprisingly, after unfuted public revelations that “Abankwah” was really someone else, nothing further happened for over 20 months. On September 9, 2002, however, on the final day permitted by the statute of limitations, Regina Norman Danson was indicted for perjury, false statements, and passport fraud. She pleaded not guilty and was released on $200,000 bond.92

At trial the following January, the government presented several witnesses brought from Ghana, the kind of eyewitness testimony not possible to marshal in the thousands of asylum cases heard each year. They confirmed her identity as Regina Norman Danson, and that she had never been known as Adelaide Abankwah.93 An official of the marriage registrar’s office in Accra produced a copy of her marriage certificate and testified that Danson was married in Ghana in September 1996 – contradicting the “correction” to her asylum application and of course undercutting a key part of the foundation for her claim of risk. Chief Bonko spoke at length from the witness stand, confirming his statements to the *Washington Post* two years earlier. Danson, he said, was definitely not a member of the royal family, and he had never seen any notice that her mother had died. His appearance in the New York courtroom was covered with interest in the Ghanaian press, including an article titled “We Are Not Savages – Chief Nana Kwa Bonko

**It also contained intriguing insights into how the family and the local community were reacting to the intense global interest in the case:

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

"Don't say I'm a bad person," he pleaded. "This practice came from my forefathers." He said he would summon family elders to a council, where he said he would argue that genital cutting should end so that no more girls run away.
That article included the reaction of one Ghanaian from Biriwa then residing in New York, who had followed the trial closely: “I am proud of my chief, and today, I feel exonerated because tenants in my apartment complex have been teasing me and asking me whether I have a human head under my bed. . . . You have no idea how shameful we felt as Ghanaians when this woman’s story broke, . . . but today, they will all eat their words.”

One other witness at the trial betrayed some of this same emotion. It was Professor Patrick Twumasi, author of the study on FGM in southern Ghana that Abankwah’s attorney had entered into the record at the asylum hearing. The elegantly loquacious professor was obviously proud of the scientific rigor of his studies and of the extensive efforts the Ghanaian government and NGOs had made to combat FGM in his home country. FGM, he testified, is simply not practiced by the ethnic group to which Danson belongs, and in those areas where it is practiced, it is never used as punishment. He thus confirmed one persistent doubt that had nagged at Judge Livingston after his review of the FGM literature five years earlier, and that probably also played a role in the BIA’s rejection of the asylum claim – though neither tribunal directly rested the denial of asylum on this ground.

In closing arguments, the prosecutor framed the case in this way: “By using FGM, by lying about FGM, . . . [Danson] delegitimized the very real danger, that very real victims of FGM face. Regina Danson’s lies were a slap in the face to the people who truly are at risk of this brutal practice.” Her attorney countered by focusing on Danson’s naivete, as “a frightened young woman who is trying to tell the truth. . . . [T]he name here is not a significant issue. . . . I submit to you that . . . whatever name she used, she was still eligible for asylum.”

The jury quickly found, on a special verdict form, that Danson had lied when she made all the statements underlying the nine counts the judge allowed them to consider. She faced a possible 10 years’ imprisonment, but in August 2003 the judge sentenced her to the time she had already served in INS detention, plus a small fine and two years of supervised release. After the verdict, her attorney offered an unintentionally ironic comment to reporters: “Her biggest fear is deportation. . . . There may be people in Ghana who feel angry about her being found to have slandered Ghana.”

The verdict did not itself terminate Danson’s asylum status, however, and she apparently has continued living and working in New York. INS did file with the BIA a motion to reopen the asylum proceedings in order to rescind the grant of asylum and enter a removal order, relying on the proof of fraud in the criminal case. But the BIA remanded the matter to the immigration court for further factual proceedings. In keeping with the epic delays that marked every stage of this ill-fated case, no hearing had yet been scheduled as of January 2005.

V. Lessons

Danson apparently fabricated her story based on what she heard during her first few weeks in the detention facility about the most highly publicized asylum case of the decade,
Matter of Kasinga. But she added some twists that simply did not comport with the way FGM is practiced in the world. Her embellishments, designedly or not, tapped into an apparent willingness of many in the United States to believe that developing countries are brutal places of primitive customs uncomplicated by any modern developments. The Second Circuit’s pronouncement that “Abankwah’s position is particularly compelling in light of the general conditions present in Ghana”\textsuperscript{101} unfortunately reflects what Susan Akram has labeled, in a slightly different context, “orientalism” – a form of negative stereotyping about source countries that may be well-intended but ultimately damages the cause of asylum seekers.\textsuperscript{102} Jean Allman, professor of African history at the University of Illinois, who had lived in Ghana off and on for 23 years, wrote a letter of protest to \textit{Marie Claire} after its coverage of the case, complaining about such glibness:

Let me make it clear that my response to your coverage is not motivated by support for the antiquated and racist immigration policies of the United States government, but from a long-term association with and love for Adelaide’s home country. . . . I am disgusted that your magazine has made Adelaide into a cause celebre when there is every indication that her story is contrived. Female genital mutilation is not only NOT practised in the area of Ghana from which Adelaide claims to come, but NEVER has been. . . . Nowhere in Ghana and, in fact, nowhere on the African continent, is [FGM] used as a punishment against those who have lost their virginity. Her claims are preposterous and any glance at any relevant literature . . . would have made this clear.\textsuperscript{103}

Danson also persisted in claiming that the name on the passport was really hers, when she probably would have raised fewer suspicions by giving her real name once the photo substitution was discovered. Perhaps she feared that INS would be able to investigate and expose her falsehoods if she provided that lead. If so, she was overly concerned. James Paoli, the INS trial attorney, testified at the criminal trial: “Just for an asylum hearing I wouldn’t have an [overseas] investigation done. And additionally, there are thousands of asylum applications that are received in New York alone and we don’t have the resources to send investigators out to investigate every single asylum case.”\textsuperscript{104} The 1999 inquiry in Ghana was triggered only because some veteran INS officers felt they had little other recourse after the Second Circuit’s decision, which accepted factual claims they had regarded from the beginning as blatantly false.\textsuperscript{105}

That limited governmental investigative capacity leads to a real weakness of the asylum system, one that has sometimes been exploited by organizers who craft false claims by the dozens that are more sophisticated than Danson’s home-made tale, and who reap large fees as a result.\textsuperscript{106} This feature also spotlights the crucial role in asylum proceedings of credibility determinations – at best a highly inexact science.

The \textit{Abankwah} record, viewed in retrospect, presented abundant signals that the asylum seeker was an unreliable witness. The reported reluctance of several attorneys to take the case after speaking with her now seems far more understandable, for example. But any such doubts
were, at least in formal terms, downplayed or ignored. The immigration judge, who had even spotted Danson’s consistent misspelling of her own alleged first name, stated that her identity was “somewhat cloudy” and that he was “mystified as to these inconsistencies.” Yet he still ruled that he would not find her testimony “incredible.” Perhaps Judge Livingston was spooked by the public pillorying that Judge Ferlise had encountered in the press the year before, with special focus on his rather insensitive dismissal of Kasinga’s credibility. The BIA did expressly find “unbelievable” Danson’s story that she would be killed for refusing the queen mother position. But it never clearly connected that finding with a ruling on her credibility in general.

Both administrative tribunals ruled against her claim, to be sure, but framed holdings that savor more of legal rulings than rejection of the factual account. In this respect, the case is representative of a great many asylum cases. Credibility is crucial, but many judges seem more comfortable accepting the alleged facts, at least arguendo, and then rejecting the claim as a matter of law – often relying on insufficient nexus to the five grounds, but sometimes on the definition of persecution, or on a rather mechanical application of the BIA’s corroboration rules. Immigration judges in asylum cases often appear, whenever they smell a falsehood, to apply stringent versions of these legal doctrines. But why not own up more often to a negative credibility ruling? Perhaps it is simply a daunting and unpleasant task to issue a ruling that essentially calls the asylum seeker a liar, particularly when the judgment must be rendered in the applicant’s presence in a small courtroom. After all, asylum cases offer few solid guideposts to the truth or falsity of the claimant’s account, which concerns events in a distant country and an unfamiliar culture. It is more comfortable to stay on the familiar terrain of legal rulings.

The federal courts also bear some responsibility for this administrative timidity. Several circuits impose daunting burdens on the BIA to justify a negative credibility finding. The Second Circuit here did essentially what the Supreme Court forbade in Elias-Zacarias, second-guessing the BIA’s findings, merely because it found that Danson’s claims were “grounded in reality.” Sometimes such an appellate ruling is at least understandable, when the court is confronted with a record (unfortunately not a rare event) that reveals an insensitive IJ or obvious mistakes that thwarted the applicant’s chance to make out her asylum claim. But Abankwah is not such a case. Judge Livingston was polite and solicitous, always careful to give Danson and her attorney a full opportunity to present the claim. Nevertheless, the Second Circuit panel seemed so determined to find the applicant credible that it bulldozed the one solid statement about credibility that the BIA issued. After essentially agreeing with the BIA that Danson was “unbelievable” when she said she would be killed, the court then confined that ruling to its narrowest possible compass, saying that this finding “is a rejection of merely one aspect of Abankwah’s asylum claim.” In any other sort of litigation, a proven lie of this magnitude would be more than enough to cast major doubt on the entire testimony.

The system’s susceptibility to fraud and stereotyping deserves greater attention, from refugee advocates as much as from government officials. But overreaction is also a danger. After all, Kasinga too was disbelieved. Yet she persevered in her claim, later amply vindicated,
and thereby provided INS and the BIA the occasion to develop sound new doctrine to deal with issues that the drafters of classic refugee law did not foresee. The *Washington Post* story that first publicly revealed the Abankwah fraud nicely captured both the delicate balance that our political asylum system requires and the ongoing dilemmas it faces:

With a forged passport, an innocent demeanor and her startling tale, Danson managed to exploit the weaknesses inherent in U.S. asylum policy. That policy is designed to accommodate people fleeing political persecution abroad, often with false documents or no papers at all. Over the years, it has allowed thousands of genuine refugees to start new lives here, but it is vulnerable to abuse by people whose stories are difficult, if not impossible, to verify.115
1. The author would like to thank Jon W. Rauchway and Meredith Kotler, the lawyers who argued the Abankwah case in the Second Circuit, for their help in obtaining the central records of the administrative and judicial proceedings. Kent Olson of the University of Virginia Law Library provided considerable assistance and encouragement in obtaining other needed information, and Thomas Wintner contributed timely research assistance and a useful perspective on the narrative.

2. The primary reported cases are Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999), and Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996).

3. Her name is properly spelled Fauziya Kassindja. One of the first U.S. inspectors she encountered at JFK airport misspelled the family name on an interview form, and the misspelling persisted throughout the immigration proceedings. See Fauziya Kassindja and Layli Miller Bashir, Do They Hear You When You Cry 165 (1998). Because the case has become so well-known globally under the name of “Kasinga,” however, this chapter will use that spelling here.

4. The practice is also known as female circumcision or female genital cutting; the nomenclature itself provokes heated controversy. The former term is sometimes thought to impart an undeserved aura of legitimacy to the practice as a valid religious ritual, whereas the FGM appellation is viewed by some as needlessly insulting to those women who have been subjected to it in the past, willingly or unwillingly. “Female genital cutting” is thus sometimes offered as a middle ground, simply descriptive of the practice. This chapter, with some reservations, will usually use the FGM terminology because of its heavy predominance in both the litigation and the public discussion of the Abankwah and Kasinga cases. For general discussions, see World Health Organization, Female Genital Mutilation: Information Pack, available at <http://www.who.int/docstore/frh-whd/FGM/infopack/English/fgm_infopack.htm>; Haseena Lockhat, Female Genital Mutilation: Treating the Tears (2004); Anika Rahman & Nahid Toubia, Female Genital Mutilation: A Practical Guide to Worldwide Laws and Policies (2000); Ellen Gruenbaum, The Female Circumcision Controversy: An Anthropological Perspective (2000).


8. Abankwah arrived three days before “expedited removal” took effect, a system that allows for speedy issuance, in many port of entry cases, of a removal order by an immigration officer, without the involvement of an IJ, when an arriving alien presents false or improper documents. Had she arrived later, she would have undergone preliminary screening by an asylum officer and would have gone on to immigration court only if that screening determined that she had a “credible fear of persecution.” INA § 235(b)(1), 8 U.S.C. § 1225(b)(1). It should also be noted that in March 2003, INS was abolished and its functions were taken over by the Department of Homeland Security (DHS). For convenience, this chapter will generally use a reference to INS, the operative agency during most of the time relevant to these stories, even when speaking generically of immigration functions that are now handled by DHS.

9. Joint Appendix, Abankwah v. INS, No. 98-4304, 2d. Cir. 1998, at 80 (‘J.A.’). This joint appendix contains the full record of the case, including transcripts of the proceedings at all master calendar hearings and the merits hearings, Abankwah’s asylum application and affidavit, plus all supporting materials and other exhibits, the IJ and BIA decisions, and counsel’s briefs before the BIA. Citations here will refer only to the J.A., but the text generally makes clear what transcript or document is being cited. Quotations in this chapter are set forth exactly as printed in the Joint Appendix, usually without effort to note or correct misspellings or grammatical mistakes.


15. J.A. 133.

16. J.A. 123.

17. J.A. 143-44.


20. See, e.g., Matter of M–D–, 21 I&N Dec. 1180, 1182-83 (BIA 1998) (“where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided . . . [or] an explanation should be given as to why such information was not presented”). Most courts have found this more demanding corroboration requirement to be valid as a general statement of doctrine, but many decisions have reversed BIA rulings based on what they have seen as an overly severe application. The Ninth Circuit appears to go further and generally reject the imposition of a corroboration requirement, but the case law is not wholly clear on these points. See Thomas Alexander Aleinikoff, David A. Martin, & Hiroshi Motomura, Immigration and Citizenship: Process and Policy 975-76 (5th ed. 2003).


25.J.A. 185, 186.


27.J.A. 165.


29.J.A. 403.

30.J.A. 172-75.

31.J.A. 175-76. From later proceedings, it appears that “born on a rainy day” may have been a mistranscription by the court reporter. The name means “born on a Wednesday.” Danson transcript at 445, 622, 624, 652 (cited in note 6).

32.J.A. 176-77.

33.J.A. 396. The full passport, with visa, appears at J.A. 397-401.

34.J.A. 177-78.

35.J.A. 189.
Because only 15 percent of IJ rulings are appealed, the dictating of oral decisions saves considerable time and resources, while still giving the parties immediate information about both outcome and reasons. Executive Office for Immigration Review, FY 2003 Statistical Yearbook at Y1 (April 2004). The 15 percent figure is a bit misleading, however, because it includes cases that are essentially uncontested and so are resolved at master calendar. A significantly higher percentage of cases that have gone to a merits hearing results in a BIA appeal.


This account draws on the statement of facts in the BIA decision, id., and also on Celia W. Dugger, Woman’s Plea for Asylum Puts Tribal Ritual on Trial, N.Y. Times, April 15, 1996, at 1 (‘Woman’s Plea’), from which the quote is taken.

See Ashley Dunn, U.S. Inquiry Finds Detention Center was Poorly Run, N.Y. Times, July 22, 1995, at 1.

Quoted in Woman’s Plea (cited in note 45).

The INS Office of International Affairs had issued a progressive set of “gender guidelines” for asylum officers in May 1995, widely praised by NGOs and refugee advocates. Considerations for Asylum Officers Adjudicating Claims from Women (Memorandum from Phyllis Coven, May 26, 1995), reprinted in 72 Interpreter Releases 771 (1995). The guidelines had stated in general terms that rape, sexual abuse, domestic violence, and FGM “are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds,” but they did not provide a detailed legal analysis for FGM cases. The INS General Counsel’s office undertook that task in preparing the agency’s brief in Kasinga.

The wider framework of analysis offered by INS is summarized in the concurring opinion of Board Member Lauri Steven Filppu, 21 I& N Dec. at 370-72. The Board stated that it did not need to consider most of the INS proposal because the framework went well beyond the facts of
this particular case. (The author of this chapter was General Counsel of INS at the time of the Kasinga case. He played a significant role in developing the brief, and he argued the case for INS at the BIA.)

50. Woman’s Plea (cited in note 45). The newspaper coverage had begun in the Washington Post, which ran a column by Judy Mann in January, 1996, followed by a news account by Linda Burstyn in March – but it was the New York Times article in April that stimulated nationwide attention. Do They Hear You When You Cry 429, 454-55, 463-64 (cited in note 3).

51. Celia W. Dugger, Roots of Exile: A Special Report: A Refugee’s Body is Intact but Her Family Is Torn, N.Y. Times, Sept. 11, 1996, at 1 (‘Roots of Exile’). After she won her case at the BIA, book publishers clamored for her story. She eventually she received a $600,000 advance and produced, with a co-author, a highly engaging account of her life in Togo, her escape, detention, and eventual triumph in the legal process. Do They Hear You When You Cry (cited in note 3).

52. This effort is reported in the Reply Brief for the Respondent, at 3, Matter of Kasinga, 21 I&N Dec. 357 (No. A73 476 695) (BIA 1996); and in Do They Hear You When You Cry 454 (cited in note 3).


60. Id. at 365-67.

61. Id. One member dissented without opinion – a rather baffling stance on such a significant and hotly contested issue. Board member Lory Rosenberg concurred specially, arguing that the PSG was improperly described; the woman’s opposition to the practice was “surplusage.” The applicant’s attitude or intent “is not relevant to our definition of the group to which she belongs, but rather to whether the harm or abuse she faces constitutes persecution.” Id. at 376. The INS brief had offered a similar analysis, arguing that, as with surgery that amputates a limb, serious bodily invasion does not constitute persecution if done with consent. Government’s Brief at 18 (cited in note 57).


63. J.A. 71-73.

64. J.A. 74-76. The judge also ruled against her claim that she faced persecution on account of her Christian religion. She might incur the wrath of the leaders “if she disappoints them by not taking on what they feel is her responsibility of being queen mother. . . Nevertheless, I cannot find that the motive of the village leaders is to punish her on account of her religion.” J.A. 73-74.

65. J.A. 76.

66. J.A. 50.


69. J.A. 2-5 (citations omitted).


74. Sikes (cited in note 7).

75. INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992); see also id. at 481 n.1 (“To reverse the BIA finding we must find that the evidence not only supports [the contrary] conclusion, but compels it”) (emphasis in original). In 1996 Congress enshrined this standard in the statute to govern all review of administrative factfinding in removal cases. INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (2000).

76. Brief for Petitioner-Appellant at 12, Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999) (No. 98-4304).

77. Id. at 11, 14-15.

78. Id. at 22.

79. Id. at 24-25.

80. Id. at 26.


82. Id. at 20, 26.

83. Id. at 39-41, 34.

84. Abankwah v. INS, 185 F.3d 18, 24 (2d Cir. 1999).

85. Id. at 25.

86. Id. at 26 (citations omitted).


89. Id.

90. Dean E. Murphy, I.N.S. Says African Woman Used Fraud in a Bid for Asylum, N.Y. Times, Dec. 21, 2000, at B3.

91. Dugger, Roots of Exile (cited in note 51). Another sympathetic page-one asylum seeker story in the Times the following year, however, had resulted in a rather embarrassing revelation several
weeks later that the profiled Nigerian was an impostor. The revelation, however, ran on page 24. Celia W. Dugger, After a ‘Kafkaesque’ Ordeal, Seeker of Asylum Presses Case, N.Y. Times, Apr. 1, 1997, at 1; Celia W. Dugger, Doubts Cast on Identity of Nigerian Who Says He’s a Political Refugee, N.Y. Times, May 24, 1997, at 24.


93. The real Adelaide Abankwah, who meantime had obtained permanent resident status based on her U.S. employment, Update: Immigrant Gets Permanent Residency, Wash. Post, Jan. 14, 2002, at B2, had been listed as a government witness. But the prosecution learned during the criminal trial that she had gone back to Ghana, in violation of a subpoena. Danson Transcript at 240 (cited in note 6). The reason for her departure and her current whereabouts are unknown.


95. Danson Transcript at 519-23.

96. Id. at 600.

97. Id. at 640-43.

98. Id. at 728-36.


101. 185 F.3d at 25.

102. Susan Musarrat Akram, Orientalism Revisited in Asylum and Refugee Claims, 12 Int’l J. Refugee L. 7 (2000). Her focus is on distorted portrayals depicting a monolithic and repressive Islam, but the article’s insights fit any such stereotyping. She notes that, among other problems, the stereotype “put forward by these refugee advocates can be disproved by government research and expert testimony, thus undermining the credibility of the refugee’s account.” Id. at 10. For a further discussion of the effects of stereotyping and assumptions, see David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U.Pa.L.Rev. 1247, 1273-79 (1990).

The lessons of the Abankwah saga have not penetrated very deeply into U.S. media consciousness. Remarkably, another Ghanaian tried a similar story in 2000 about FGM that would be inflicted because she was “a member of the Ghanian royalty.” The IJ rejected her claim, but she attracted strong local editorial support during her lengthy detention in York, Pennsylvania, while awaiting appeal. Viewpoints, York Daily Record, June 27, 2004, at 3; Woman Says She Fled Mutilation, id., June 24, 2004, at 1, 14. The Ghanaian Chronicle ran the York news story verbatim, but under the caption “Another Ghanaian Woman Try the ‘FGM Trick,’” General News of Friday, 25 June 2004, available at www.ghanaweb.com/GhanaHomePage/NewsArchive/printnews.php?ID=60420.

104. Danson Transcript at 225.

105. Interview of Jan. 12, 2005, with a U.S. official who had been posted to the embassy in Accra during the time of the proceedings.


108. J.A. 4-5. See text above at note 69.


110. See Abovian v. INS, 257 F.3d 971 (9th Cir. 2001) (Kozinski, J., dissenting from the denial of rehearing en banc) (critiquing in detail circuit doctrine that severely limits the bases on which an IJ or the BIA can make an adverse credibility finding). See generally Immigration and Citizenship: Process and Policy 972-77 (cited in note 20).

111. 185 F.3d at 26.

112. For an example of such a case, wherein the court of appeals reversed a questionable denial of asylum through a careful application of the substantial evidence standard, see Mukamusoni v. Ashcroft, 390 F.3d 110 (1st Cir. 2004).
113. Id. at 24.

114. Judge Kozinski’s opinion in *Abovian* builds the case that his court has set forth evidentiary rules “that ha[ve] no ready analogue outside the immigration context.” They leave virtually “nothing the BIA or the IJ can do to insulate its exercise of discretion from reversal by our court. The petitioner will be entitled to spin a tale that bears no resemblance to reality, and his most implausible explanations have to be accepted.” 257 F.3d at 977, 979-80.

115. Asylum Impostor (cited in note 88 supra).