

Article

Not peer-reviewed version

---

# Legal Interpretations of Persecution and Trauma: The U.S. Circuit Court of Appeals and Gender-Based Asylum Claims

---

[Connie Oxford](#) \*

Posted Date: 28 November 2023

doi: 10.20944/preprints202311.1715.v1

Keywords: trauma; asylum; gender-based persecution; U.S. Circuit Court of Appeals



Preprints.org is a free multidiscipline platform providing preprint service that is dedicated to making early versions of research outputs permanently available and citable. Preprints posted at Preprints.org appear in Web of Science, Crossref, Google Scholar, Scilit, Europe PMC.

Copyright: This is an open access article distributed under the Creative Commons Attribution License which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

*Article*

# Legal Interpretations of Persecution and Trauma: The U.S. Circuit Court of Appeals and Gender-Based Asylum Claims

Connie Oxford

State University of New York, Plattsburgh, oxfordcg@plattsburgh.edu

**Abstract:** This article focuses on the variation of how the U.S. Circuit Court of Appeals uses the language of trauma in gender-based asylum claims. Gender-based asylum claims include female genital mutilation (FGM), domestic violence, forced marriage, coercive population control (CPC) in the form of forced abortions and forced sterilizations, and rape. The Circuit Courts have reviewed appeals from petitioners with asylum claims since 1946, yet the language of trauma did not appear in the Court's decisions until 1983. From 1983-2023 only 385, 3.85% or less, of the over 10,000 asylum cases before the Circuit Courts used the language of trauma in its legal interpretation of persecution. I have identified 101 gender-based asylum cases that were reviewed by one of the eleven U.S. Circuit Court of Appeals that apply the language of trauma in its legal interpretation of persecution for this analysis. This study found that U.S. Circuit Courts use the language of trauma in four ways: precedent cases, psychological trauma, physical trauma, and policies and reports when reviewing gender-based asylum claims.

**Keywords:** trauma; asylum; gender-based persecution; U.S. Circuit Court of Appeals

## 1. Introduction

This article is an analysis of how the U.S. Circuit Court of Appeals uses the language of trauma in gender-based asylum claims. Gender-based asylum claims include female genital mutilation (FGM), domestic violence, forced marriage, coercive population control (CPC) in the form of forced abortions and forced sterilizations, and rape. After an immigration judge adjudicates a case, the applicant or the U.S. government, through the office of the U.S. Immigration and Customs Enforcement (USICE), may appeal the judge's decision to the Board of Immigration Appeals (BIA). If an applicant or USICE appeals a BIA decision, the case is heard in the U.S. Circuit Court of Appeals that the immigration court that initially ruled on the case is located. While immigration law in the United States is federal law, the appellate court system allows for regional variation based on Circuit Court decisions. This study draws from the literature on trauma studies to show the variation among the U.S. Circuit Courts and how they use the language of trauma in four ways: precedent cases, psychological trauma, physical trauma, and policies and reports when reviewing gender-based asylum claims.

### 1.1. Persecution and Trauma

To gain asylum in the United States, asylum seekers must show that they have a "well-founded fear of persecution" as outlined in the U.S. Refugee Act of 1980 [1]. This Act draws from the language of international legal documents such as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol [2,3]. Persecution is continuously being redefined in the legal system as immigration officials and judges adjudicate asylum claims [4]. Asylum seekers must show that they were persecuted or fear persecution. They do so through their written declarations and other materials in their asylum application as well as in their oral testimony before an immigration official. Asylum

seekers narrate physical injury and psychological harm that they have either experienced or fear will happen if returned to their country.

It is paramount that asylum seekers demonstrate that they were persecuted and/or that they will be persecuted to receive a favorable decision [5]. This task is insurmountable at times as asylum seekers must marshal evidence to support their claim of persecution. During the asylum interview or immigration court hearing, asylum officers and immigration judges expect applicants to be credible which means conveying their story in a way that is believable. Testimony is expected to be linear, detailed, and have internal consistency [6]. Credibility includes the story itself that asylum seekers tell as well as how they tell it [7]. Persuading immigration officials that they have been or fear that they will be persecuted is the cornerstone of the asylum process. The conundrum for asylum seekers is that as a population that has experienced traumatic events, their ability to remember details and articulate harm is challenging. The effects of trauma are the antithesis of the expectations of credibility [8]. This is due in part to how trauma affects memory and the ability to recall events [9,10].

Trauma studies is rich with scholarship that showcases two competing camps, one being that traumatic events make one more likely to remember what happened and the other that trauma acts to suppress memories [11–13]. The significance of how immigration law in general and Circuit Court judges in particular use the term trauma is that it is overwhelmingly linked to establishing credibility [14]. One means of establishing credibility is to include expert reports and testimony in asylum applications and proceedings by medical professionals who document the physical and psychological effects of persecution. In 1999, the UN adopted the Istanbul Protocol, a set of international guidelines for documenting torture [15]. The Protocol was a result of the integration of healthcare professionals and legal advocates who bridged the medical and legal professions using a human rights framework [16,17]. The Protocol standardized how trauma is documented that ushered in both praise and criticism from the medical community; some welcomed the directives, but others were cautious of the victim narrative that it demanded [18].

The term trauma is not found in the 1951 and 1967 UNHCR legal documents or the 1980 Congressional Act. As this article shows, the language of trauma did not appear in asylum claims under review in the U.S. Circuit Court of Appeals until 1983 in the Eleventh Circuit case *Jean v. Nelson*, 711 F.2d 1455 [19]. This case dealt with Haitian immigrants held in detention and their discriminatory treatment compared to other groups such as Cubans who had been recently paroled into the country. The heart of the case dealt with voluntary withdrawal or voluntary departure which allows asylum seekers to withdraw their claim and return to their country. Investigations into the treatment of Haitians in detention found that the experience of temporary incarceration caused “emotional trauma” resulting in them withdrawing their asylum claims. This case was reviewed just three years after Post-Traumatic Stress Disorder (PTSD) became a mental health diagnosis and was listed in the Diagnostic and Statistical Manual (DSM) III [20]. PTSD was updated in the DSM IV in 1994 and classified as an anxiety disorder and again in 2013 in the DSM V when it was classified as a Trauma and Stressor-related disorder [21].

While there are several ways that trauma is referenced in legal proceedings, PTSD is among the most common among discussions of psychological trauma. Its major significance is that it locates the cause of the disorder in external events rather than individual pathology [22]. General criteria for diagnosis are exposure to a traumatic event, persistently reexperiencing the event, avoidance of stimuli associated with the event, and increased arousal [23]. The first population under study were Vietnam Veterans who were diagnosed based on symptoms of “shell shock” [24,25]. The general population has a rate of around 6% and refugees from war-torn countries have rates as much as ten times higher [26]. Not only is PTSD high for asylum seekers, but among the asylum-seeking population, PTSD rates are even higher for those who wait extended periods of time between interviews [27], have failed claims [28], and are held in detention [29].

This was most likely true of refugees and asylum seekers before PTSD was understood as psychological studies of refugees after World War II referred to them having “concentration camp syndrome” [30]. The DSM III defined trauma as “outside the range of usual human experience” which is quite different from the experiences of asylum seekers where trauma is integrated into so

many aspects of their lives [31]. One reason that asylum seekers have high rates of PTSD is that it is determined by intensity and duration of the traumatic event which is elevated for this group. Yet when questioned about traumatic events, some asylum seekers deny them since violence is a “normal part of daily life in a war zone” [32].

Not everyone who experiences trauma develops PTSD and PTSD is not the only reaction to trauma. Approximately 20% of people exposed to trauma develop PTSD [33]. Yet it has become the “dominant construct” of western psychiatry for diagnosing trauma [34–37]. Most studies have been with populations that are middle class, white, and who are not refugees leading some to deem it a pathology entrenched in western ideas [38]. Some question if PTSD is found in other cultures and time periods [39,40]. Health care providers who work with asylum seeking and asylee populations have developed culturally specific techniques for working with patients from a range of backgrounds [41].

To the benefit of asylum seekers, current training materials for USCIS asylum officers instruct them to consider the “effects of trauma” during an asylum interview [42]. PTSD is briefly addressed in the current USCIS training materials that cite it as a “common condition” in response to trauma. It directs asylum officers to be aware of the seemingly contradiction between intrusive memories and the defenses one uses, such as sensory reliving, to deflect them. It emphasizes that for those with PTSD, they are doing more than simply recounting the facts [43]. While these educational modules explain why and how asylum seekers narrate stories of persecution in a particular fashion, asylum seekers are still expected to tell a consistent and highly detailed story. Those who do not are suspected of fabricating their account of the events as immigration officials believe that stories that have fewer details are fictitious [44,45].

### *1.2. U.S. Circuit Court of Appeals and Asylum Cases*

In the United States, migrants seeking relief from harm apply for asylum through two bureaucratic organizations that are the United States Citizenship and Immigration Services (USCIS) and the immigration court of the Executive Office for Immigration Review (EOIR). Prior to March 1, 2003, the asylum office of the Immigration and Naturalization Service (INS) processed asylum applications that have since been done by USCIS which explains the references to the INS in cases that were adjudicated prior to 2003. These two bureaucracies are independent of each other; each with its own set of internal policies, the implementation of which is required only within each agency. However, adjudicators in both the USCIS asylum office and the EOIR immigration courts are required to implement immigration laws created by the U.S. Congress, the Board of Immigration Appeals (BIA), the appellate court for all immigration courts in the United States, U.S. Circuit Court of Appeals, and the Supreme Court of the United States.

The USCIS asylum office receives affirmative asylum applications which are claims that an asylum seeker initiates before an order or deportation has been issued by the government. Asylum officers adjudicate asylum claims under USCIS. If the asylum officer is unable to reach a decision about a claim, it is referred to immigration court. Asylum claims in immigration court include referred cases from the USCIS asylum office and new claims by migrants in United States Immigration and Customs Enforcement (ICE) detention facilities. Immigration judges adjudicate cases in immigration court. After the judge rules on a case, the applicant or USICE (those representing the government in appellate court) may appeal the judge’s decision to the BIA. The BIA relies on court transcripts and documentation filed in immigration court (by both USICE and the applicant) when upholding or overruling an immigration judge’s decision. There is no oral testimony from applicants or USICE during BIA adjudication. If an applicant or USICE appeals the BIA’s decision, the case is heard in the U.S. Circuit Court of Appeals that the immigration court that initially ruled on the case is located.

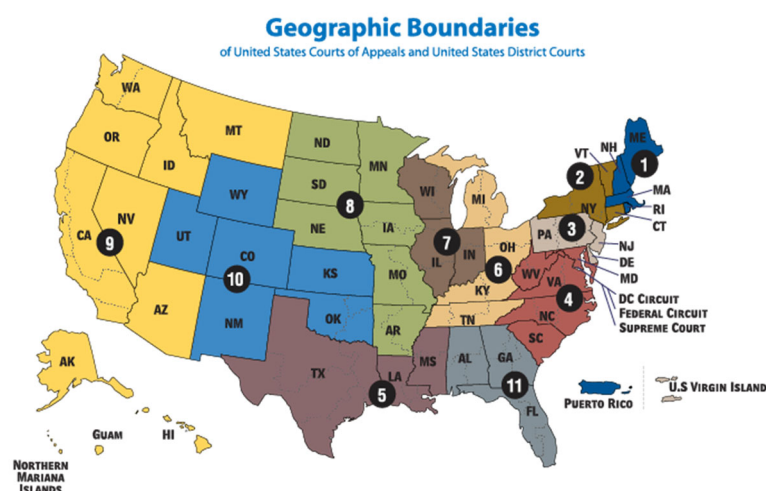
All immigration laws are federal laws, and published federal law cases are precedent cases and therefore legally binding. When an immigration case is published by the BIA, it is legal precedent for the entire country, and when a U.S. Circuit Court of Appeals case is published, it is legal precedent for that Circuit. When BIA cases are overturned by a U.S. Circuit Court, those cases are only legally



binding for those Circuits. This is why many U.S. Circuit of Appeals rulings remand a case to the BIA and request that they rule on it so that the issue will be resolved for the entire country and not only a particular Circuit. The outcome of a Circuit Court decision includes Denial (the Circuit Court is denying the appeal, and the lower court finding will be legally binding), Granted (the Circuit Court is granting the appeal), Affirmed (the Circuit Court is agreeing with the lower court's decision), or Remanded (the case is returned to either the BIA or immigration court with instructions on ruling). Some cases include a combination of these four outcomes for particular aspects of the case.

Asylum seekers are routinely denied asylum if they do not file their application within one year of arriving in the United States as outlined under section 208(a)(2)(B) of the Immigration and Nationality Act (INA) [46,47]. Exceptions include extraordinary circumstances such as serious abuse and serious illness including those associated with Post Traumatic Stress Disorder (PTSD). Other reasons for denial include credibility which include issues of memory such as recall and ability to remember dates. Consequently, the legal justification for denying a claim may be for "gender-neutral" reasons while the outcome disproportionately affects women with gender-based persecution claims [48,49].

There are eleven U.S. Circuit Courts, and they are organized geographically. Consequently, there is regional variation in the decision of the Courts [50–52]. Yet each Circuit Court draws from federal law that all immigration laws in the U.S. must follow [53]. Immigrant advocacy organizations provide materials to prepare immigration attorneys for the appeals process [54]. Circuit Courts review appeals from all lower courts in the U.S. so many cases are not about immigration. The backlog of cases at each stage from an immigration court hearing to the BIA to the Circuit Court is growing and can take years for a case to make its way through the system [55,56]. Figure 1 shows the geographic boundaries of the U.S. Circuit Courts.



**Figure 1.** U.S. Circuit Court of Appeals. Source: United States Courts [57].

## 2. Materials and Methods

### 2.1. Data Collection

The database Nexus Uni produced results using key words to identify cases. Keywords "Asylum" and "Board of Immigration Appeals" yield over 10,000 results dating from 1946-2023. Using these keywords together eliminates cases about asylum related to mental health facilities rather than immigration. When a third term, "trauma" is added, the result is 385 cases from 1983-2023. This shows that a small percentage (3.85% or less) of asylum cases that use the language of trauma reach the U.S. Circuit Court of Appeals. To identify gender-based persecution cases that use the terminology of trauma, a fourth term was added to produce multiple lists of specific types of gender-based cases. These terms were "Female Genital Mutilation" or "Female Circumcision," "Domestic

Violence,” “Rape” or “Sexual Assault,” “Coercive Family Planning” or “Forced Sterilization” or “Forced Abortion,” “Forced Marriage,” and “Honor Crime” (which resulted in no cases). Some cases were eliminated from the analysis if the content of the case was not directly related to the category. For example, the key word “forced marriage” includes a case that is not about forced marriage, but instead references other legal cases about forced marriage and country reports, and therefore, was not included in the sample. Using this key word search method, the sample size was 101 cases.

2.2. Data Analysis

Once a list of cases was generated from the key word searches, I analyzed all 101 case summaries and coded each case by the various uses of the term trauma. The result was four categories coded accordingly: 1 = Precedent Case, 2 = Psychological Trauma, 3 = Physical Trauma, 4 = U.S. Government Policies/Reports or International Reports. The first (coded 1) are precedent cases. This includes appeals that mention a precedent case that references trauma. The second (coded 2) are cases that refer to trauma in terms of psychological trauma. The third (coded 3) are cases that refer to trauma in terms of physical trauma. The fourth (coded 4) are cases that reference U.S. government policies and reports such as the USCIS Asylum Adjudicator’s Manual and INS Guidelines or International Reports such as United Nations Reports. The coding method is not mutually exclusive; some cases have two or more codes. Across all 101 cases, the use of the term trauma appeared thirty-one times in precedent cases, fifty-eight times when referring to psychological trauma, eighteen times when referring to physical trauma, and four times when referencing U.S. Government Policies or International Reports.

The following table categorizes 101 U.S. Circuit Court of Appeals cases that deal with gender-based asylum claims and the language of trauma. Cases are organized by type of harm and U.S. Circuit Court of Appeals. In some instances, there are multiple cases listed for one petitioner (counted as one case for a total of 101); prior and subsequent cases are listed when applicable and chronologically. Included are the final decision and date. Among gender-based asylum cases it is common for claimants to have experienced multiple types of harm. For example, a woman who has experienced domestic violence may also have been sexually assaulted. I have separated cases of combined harm when the substance of the case focused on more than one type of persecution. The most common type of combined harm was rape. The categories of gender-based asylum claims are Female Genital Mutilation (N=23, including combined cases with forced marriage and rape), Domestic Violence (N=4, including combined cases with rape), Coercive Population Control (N=23, including combined cases with rape), and Rape (N=51) for a total of 101 cases.<sup>1</sup>

Table 1. Gender-Based Persecution Cases in the U.S. Circuit Court of Appeals, Total Cases (N=101).

Case, Type, and Outcome	Circuit Court	Trauma Coding
<b>Female Genital Mutilation, Total (N=23)</b>		
<b>Female Genital Mutilation, only (N=16)</b>		
Abankwah v. INS, 185 F.3d 18		
Abankwah v. Lynch, 632 Fed. Appx. 670	2	1
Persecution: Fear of Future		
Decision: Denied, 2015		
Jalloh v. Lynch, 662 Fed. Appx. 97		
Persecution: Fear of Future (daughters)	2	3
Decision: Denied, 2016		

<sup>1</sup> Cases in the data set are not included in the references as the citation is in the data set. The citation for cases that are not part of the data set but are discussed in the article are in the references.

Bah v. Mukasey, 529 F.3d 99		
Bah v. Mukasey, 281 Fed. Appx. 26	2	1
Persecution: Past		
Decision: Denied (non-FGM claim) and Granted (FGM claim), 2008		
Moshud v. Blackman, 68 Fed. Appx. 328		
Persecution: Fear of Future	3	1
Decision: Reversed Denial and Remanded 2003		
Mazzi v. Lynch, 662 Fed. Appx. 227		
Persecution: Fear of Future	4	1
Decision: Remanded, 2016		
Mame Fatou Niang v. Gonzales, 492 F.3d 505		
Persecution: Fear of Future (daughter)	4	1,3
Decision: Affirmed Denial, 2007		
Abay v. Ashcroft, 368 F.3d 634		
Persecution: Fear of Future (daughter)	6	1
Decision: Reversed Denial and Remanded, 2004		
Kone v. Holder, 620 F.3d 760		
Persecution: Fear of Future (daughter)	7	2
Decision: Vacated BIA decision, Remanded, 2010		
Olowo v. Ashcroft, 368 F.3d 692		
Persecution: Fear of Future (daughters)	7	1
Decision: Denied, 2004		
Nwaokolo v. INS, 314 F.3d 303		
Persecution: Fear of Future (petitioner and daughters, one a U.S. Citizen)	7	1
Decision: Motion to Stay Granted, 2002		
Kipkemboi v. Gonzales, 211 Fed. Appx. 530		
Kipkemboi v. Holder, 587 F.3d 885		
Persecution: Fear of Future (self and daughter)	8	2
Decision: Affirmed BIA decision, 2009		
Abebe v. Ashcroft, 379 F.3d 755		
Abebe v. Gonzales, 400 F.3d 690		
Abebe v. Gonzales, 432 F.3d 1037	9	1
Persecution: Fear of Future (daughter)		
Decision: Remanded, 2005		
Mohammed v. Gonzales, 400 F.3d 785		
Persecution: Past	9	1
Decision: Granted and Remanded, 2005		
Azanor v. Ashcroft, 364 F.3d 1013		
Azanor v. INS, 1999 U.S. App. LEXIS 12789	9	2
Persecution: Fear of Future (daughter, U.S. citizen)		
Decision: Denied Asylum, Granted CAT, 2004		

Niang v. Gonzales, 422 F.3d 1187		
Persecution: Past	10	1
Decision: Reversed Denial and Remanded, 2005		
Seck v. United States AG, 663 F.3d 1356		
Seck v. United States AG, 816 Fed. Appx. 315	11	1
Persecution: Fear of Future (daughter, U.S. Citizen)		
Decision: Denied, 2020		
<b>Female Genital Mutilation and Rape (N=4)</b>		
Sene v. United States AG, 679 Fed. Appx. 463		
Bijou Sene v. Sessions, 2017 U.S. App. LEXIS 11614	6	2
Persecution: Fear of Future (daughter)		
Decision: Denied, 2017		
Sene v. Gonzales, 168 Fed. Appx. 61		
Sene v. Gonzales, 180 Fed. Appx. 551		
Mame Mbengue Sene v. Gonzales, 453 F.3d 383	6	2,3
Persecution: Past		
Decision: Denied, 2006		
Diallo v. Mukasey, 2007 U.S. App. LEXIS 29641		
Diallo v. Mukasey, 268 Fed. Appx. 373	6	1
Persecution: Past		
Decision: Affirmed BIA, 2008		
Bah v. Gonzalez, 230 Fed. Appx. 547		
Persecution: Past	6	1
Decision: Denied, 2007		
<b>Female Genital Mutilation and Forced Marriage (N=3)</b>		
Haoua v. Gonzales, 472 F.3d 227		
Persecution: Fear of Future	4	1
Decision: Remanded to BIA, 2007		
Gomis v. Holder, 571 F.3d 353		
Persecution: Fear of Future	4	1
Decision: Denied, 2009		
Manani v. Filip, 552 F.3d 894		
Persecution: Fear of Future (daughters)	11	3
Decision: Denied, 2009		
<b>Domestic Violence, Total (N=4)</b>		
<b>Domestic Violence, only (N=1)</b>		
Martinez-Martinez v. Sessions, 743 Fed. Appx. 629		
Persecution: Past and Future	6	2
Decision: Denied, 2018		
<b>Domestic Violence and Rape (N=3)</b>		
De Pena-Paniagua v. Barr, 957 F.3d 88		
Persecution: Past and Future	1	3
Decision: Remand to BIA, 2020		
Ferreira v. Lynch, 831 F.3d 803	7	2,3



Ferreira v. Lynch, 2016 U.S. App. LEXIS 14607		
Persecution: Past and Future		
Decision: Granted, 2016		
Gasparian v. Holder, 707 F.3d 1130		
Persecution: Past and Future	9	2
Decision: Denied, 2016		
<b>Coercive Population Control, Total (N=23)</b>		
<b>Coercive Population Control, only (N=21)</b>		
Hong Mei Zhang v. Gonzales, 469 F.3d 51		
Persecution: Past (forced abortion)	1	2
Decision: Dismissed, 2006		
Lin v. Holder, 570 Fed. Appx. 4		
Persecution: past (wife forcibly sterilized)	1	2
Decision: Denied, 2014		
Wensheng Yan v. Mukasey, 509 F.3d 63		
Persecution: Future (fear of forcible sterilization)	2	2,3
Decision: Denied, 2007		
Shi Liang Lin v. United States DOJ, 494 F.3d 296		
Zhen Hua Dong v. DOJ, 2008 U.S. LEXIS 4223		
Zhen Hua Dong v. DOJ, 2008 U.S. LEXIS 4223 (SC)	2	1
Persecution: Past (forced abortion for unmarried partners)		
Decision: Denied, 2008		
Hui Chen v. Gonzales, 190 Fed. Appx. 75		
Persecution: Past	2	1
Decision: Denied, 2006		
Lian v. Holder, 405 Fed. Appx. 524		
Persecution: Past (wife, forced abortion)	2	3
Decision: Denied, 2010		
Bing Shui Lin v. Gonzales, 232 Fed. Appx. 54		
Persecution: Past (parents targeted)	2	2
Decision: Denied, 2007		
Zhao v. Barr, 791 Fed. Appx. 265		
Persecution: Past (forced abortion)	2	2
Decision: Denied, 2019		
Xian Gui Chen v. Gonzales, 157 Fed. Appx. 430		
Persecution: Past and Future (forced abortion, fear of sterilization)	2	2
Decision: Denied, 2005		
Chen v. Ashcroft, 376 F.3d 215		
Persecution: Past (wife forced abortion and sterilization)	3	3
Decision: Denied, 2004		
Zhang v. AG United States, 632 Fed. Appx. 680		
Persecution: Past (forced abortion)	3	2
Decision: Denied, 2015		
Yuqing Zhu v. Ashcroft, 382 F.3d 521	5	1

Yuqing Zhu v. Gonzales, 493 F.3d 588		
Persecution: Past (forced abortion)		
Decision: Denied (asylum) Granted (withholding), 2007		
Zhang v. Gonzales, 434 F.3d 993		
Persecution: Past (wife, forced abortion)	7	1
Decision: Granted, 2006		
Zhang v. Gonzales, 408 F.3d 1239		
Persecution: Past (child of forcibly sterilized parent)	9	2
Decision: Remanded, 2005		
Zhongxiang Zhou v. Lynch, 618 Fed. Appx. 907		
Persecution: Past (wife forced abortion)	9	1
Decision: Denied, 2015		
Zi Zhi Tang v. Gonzales, 489 F.3d 987		
Persecution: Past (wife forced abortion)	9	1
Decision: Granted and Remanded, 2007		
Qili Qu v. Gonzales, 399 F.3d 1195		
Persecution: Past (wife forcibly sterilized)	9	1,2,3
Decision: Granted, 2005		
Ming Dai v. Sessions, 884 F.3d 858		
Dai v. Barr, 916 F.3d 731		
Dai v. Sessions, 2018 U.S. App. LEXIS 17286		
Ming Dai v. Barr, 940 F.3d 1143	9	4
Barr v. Ming Dai, 2020 U.S. LEXIS 3705		
Garland v. Ming Dai, 141 S. Ct. 1669		
Persecution: Past (wife forced abortion)		
Decision: Granted and Remanded, 2022		
Qin Liu v. United States AG, 252 Fed. Appx. 964		
Persecution: Past (wife forced abortion and sterilization)	11	2
Decision: Denied, 2007		
Biru Chen v. United States AG, 181 Fed. Appx. 951		
Persecution: Past (wife sterilized)	11	1
Decision: Denied, 2006		
Shijie Huang v. United States AG, 330 Fed. Appx. 871		
Persecution: Past (wife forced abortion)	11	3
Decision: Denied, 2009		
<b>Coercive Population Control and Rape (N=2)</b>		
Meishan Zhao v. AG of the United States, 388 Fed. Appx. 135		
Persecution: Past (forced abortion)	3	2
Decision: Denied, 2010		
Han v. Garland, 2022 U.S. App. LEXIS 16753		
Persecution: Past (forced abortion)	9	2
Decision: Denied, 2022		
<b>Rape, Total (N=51)</b>		
Ixcuna-Garcia v. Garland, 25 F.4th 38	1	2

Persecution: Past		
Decision: Granted and Remanded, 2022		
Rivera-Medrano v. Garland, 47 F.4th 29		
Persecution: Past	1	2
Decision: Granted and Remanded, 2022		
Zeru v. Gonzales, 503 F.3d 59		
Persecution: Past	1	2
Decision: Affirmed BIA decision, 2007		
Mukamusoni v. Ashcroft, 390 F.3d 110		
Persecution: Past	1	2
Decision: Remanded, 2004		
Amicy v. Gonzales, 133 Fed. Appx. 745		
Persecution: Past	1	2
Decision: Denied, 2005		
Olmos-Colaj v. Sessions, 886 F.3d 168		
Persecution: Past (relatives raped)	1	1
Decision: Denied, 2008		
Kaweesa v. Ashcroft, 345 F. Supp. 2d 79		
Kaweesa v. Gonzales, 450 F.3d 62	1	2
Persecution: Past		
Decision: Remanded, 2006		
Longwe v. Keisler, 251 Fed. Appx. 718		
Persecution: Past	2	1
Decision: Remanded to BIA, 2007		
Jalloh v. Gonzales, 498 F.3d 148		
Persecution: Past (wife raped)	2	1
Decision: Denied, 2007		
Dia v. Ashcroft, 353 F.3d 228		
Persecution: Past (wife raped)	3	1
Decision: Remanded to BIA, 2007		
Bravo v. AG United States, 2021 U.S. App. LEXIS 32305		
Bravo v. AG of the United State, 21 F.4th 236		
Persecution: Past (relatives)	3	2
Fear of Future (self)		
Decision: Remanded, 2021		
Mikhail v. Ashcroft, 78 Fed. Appx. 187		
Persecution: Past (attempted rape)	3	2
Decision: Denied, 2003		
Fiadjoe v. AG, 411 F.3d 135		
Persecution: Past	3	2,4
Decision: Remanded, 2005		
Sapunzhiu v. AG of the United States, 148 Fed. Appx. 131		
Persecution: Past (sister raped)	3	2
Decision: Denied, 2005		

Plumbay v. AG of the United States, 213 Fed. Appx. 144		
Persecution: Past	3	2
Decision: Denied, 2007		
Siauwan Lan Tjin v. AG of the United States, 191 Fed. Appx. 144		
Persecution: Fear of Future	3	2
Decision: Denied, 2006		
Ilunga v. Holder, 777 F.3d 199		
Persecution: Past (he and wife were raped)	4	2
Decision: Remanded, 2015		
Tchaya v. Ashcroft, 106 Fed. Appx. 174		
Persecution: Past	4	2
Decision: Denied, 2004		
Gandziami-Mickhou v. Gonzales, 445 F.3d 351		
Persecution: Past	4	2
Decision: Denied, 2006		
Lopez v. Garland, 852 Fed. Appx. 758		
Persecution: Past	5	2
Decision: Remanded, 2021		
Kompany v. Gonzales, 236 Fed. Appx. 33		
Persecution: Past	5	2
Decision: Denied, 2007		
Harmon v. Holder, 758 F.3d 728		
Persecution: Past	6	2
Decision: Denied, 2014		
Lleshi v. Holder, 460 Fed. Appx. 520		
Lleshi v. Holder, 542 Fed. Appx. 511	6	3
Persecution: Past		
Decision: Denied, 2013		
Perlaska v. Holder, 361 Fed. Appx. 655		
Persecution: Past	6	2
Decision: Denied, 2010		
Nikolajuk v. Holder, 527 Fed. Appx. 439		
Persecution: Past	6	3
Decision: Denied, 2013		
Slyusar v. Holder, 740 F.3d 1068		
Slyusar v. Holder, 2014 U.S. App. LEXIS 11088		
Slyusar v. Sessions, 2018 U.S. App. LEXIS 27878	6	2
Persecution: Past		
Decision: Denied, 2019		
Marouf v. Lynch, 811 F.3d 174		
Marouf v. Lynch, 648 Fed. Appx. 572	6	3
Persecution: Past (attempted)		
Decision: Granted, 2016		
Mansare v. Holder, 383 Fed. Appx. 522	6	2

Persecution: Past		
Decision: Denied, 2010		
Angoucheva v. INS, 106 F.3d 781		
Persecution: Past (attempted rape)	7	2
Decision: Remanded, 2007		
Tolosa v. Ashcroft, 384 F.3d 906		
Persecution: Past (sister raped)	7	2
Decision: Remanded, 2004		
Weiwei Chen v. Holder, 549 Fed. Appx. 567		
Persecution: Past (attempted rape)	7	2
Decision: Granted, 2013		
Bobo v. Holder, 344 Fed. Appx. 269		
Persecution: Past (sister raped)	7	3
Decision: Denied, 2009		
Holmes v. Garland, 37 F.4th 520		
Persecution: Past	8	2
Decision: Denied, 2022		
Yakovenko v. Gonzales, 477 F.3d 631		
Persecution: Past	8	3
Decision: Denied, 2007		
Mambwe v. Holder, 572 F.3d 540		
Persecution: Past	8	2
Decision: Denied, 2009		
Redd v. Mukasey, 535 F.3d 838		
Persecution: Past (wife raped)	8	2
Decision: Denied, 2008		
Kaur v. Wilkinson, 986 F.3d 1216		
Persecution: Past (attempted rape)	9	4
Decision: Remanded, 2021		
Lopez-Galarza v. INS, 99 F.3d 954		
Persecution: Past	9	2,4
Decision: Granted, 1996		
Munyuh v. Barr, 2020 U.S. App. LEXIS 6377		
Munyuh v. Garland, 11 F.4th 750	9	2,3
Persecution: Past		
Decision: Remanded, 2021		
Rusak v. Holder, 734 F.3d 894		
Persecution: Past (mother raped)	9	2
Decision: Granted, 2013		
Katyal v. Gonzales, 204 Fed. Appx. 661		
Persecution: Past (mother raped, petitioner attempted rape)	9	1
Decision: Remanded, 2006		
Marenco-Hernandez v. Garland, 2021 U.S. App. LEXIS 20669	9	2
Persecution: Past		



Decision: Remanded, 2021		
Morgan v. Mukasey, 529 F.3d 1202		
Persecution: Past (husband and wife raped)	9	2
Decision: Remanded, 2008		
Zhu v. Mukasey, 537 F.3d 1034		
Persecution: Past	9	2
Decision: Remanded, 2008		
Birru v. Barr, 2020 U.S. Dist. LEXIS 68132		
Birru v. Barr, 2020 U.S. Dist. LEXIS 83782	9	2
Persecution: Past		
Decision: Denied, 2020		
Narayan v. Gonzales, 220 Fed. Appx. 691		
Persecution: Past	9	3
Decision: Denied, 2007		
Lugo v. Garland, 2022 U.S. App. LEXIS 12562		
Merino v. Garland, 2023 U.S. App. LEXIS 15797	9	2
Persecution: Past		
Decision: Denied, 2023		
Kabba v. Mukasey, 530 F.3d 1239		
Persecution: Past (wife raped)	10	2
Decision: Remanded, 2008		
Alvizuriz-Lorenzo v. United States AG, 791 Fed. Appx. 70		
Persecution: Past	11	1,2
Decision: Denied, 2019		
Liana Tan v. United States AG, 446 F.3d 1369		
Persecution: Past (attempted rape)	11	2
Decision: Remanded, 2006		
Mbi v. United States AG, 348 Fed. Appx. 486		
Persecution: Past	11	2
Decision: Denied, 2009		

### 3. Results

The cases are categorized by type of persecution, Circuit Court, and use of the term trauma. The categories of gender-based asylum claims are Female Genital Mutilation (N=23, including combined cases with forced marriage and rape), Domestic Violence (N=4, including combined cases with rape), Coercive Population Control (N=23, including combined cases with rape), and Rape (N=51). The number of cases for each Circuit Court are: First Circuit (N=10), Second Circuit (N=12), Third Circuit (N=11), Fourth Circuit (N=7), Fifth Circuit (N=3), Sixth Circuit (N=13), Seventh Circuit (N=9), Eighth Circuit (N=5), Ninth Circuit (N=21), Tenth Circuit (N=2), and Eleventh Circuit (N=8). The number of cases by trauma coding are precedent cases (trauma Coding =1) (N=31), psychological trauma (trauma coding =2) (N=58), physical trauma (trauma coding =3) (N=18), and cases that reference other U.S. policy or reports or international reports (trauma coding =4) (N=4). Please note that several cases have multiple trauma codes (trauma codes are not mutually exclusive) and the number is more than the total cases.

### 3.1. Type of Persecution and U.S. Circuit Court

The number of FGM cases (N=23) for each Circuit Court are: First Circuit (N=0), Second Circuit (N=3), Third Circuit (N=1), Fourth Circuit (N=4), Fifth Circuit (N=0), Sixth Circuit (N=5), Seventh Circuit (N=3), Eighth Circuit (N=1), Ninth Circuit (N=3), Tenth Circuit (N=1), and Eleventh Circuit (N=2). There were only four Circuit Court cases with a Domestic Violence claim. The First, Sixth, Seventh, and Ninth Circuit Court had one case each. The number of CPC cases (N=23) for each Circuit Court are: First Circuit (N=2), Second Circuit (N=7), Third Circuit (N=3), Fourth Circuit (N=0), Fifth Circuit (N=1), Sixth Circuit (N=0), Seventh Circuit (N=1), Eighth Circuit (N=0), Ninth Circuit (N=6), Tenth Circuit (N=0), and Eleventh Circuit (N=3). The number of rape cases (N=51) for each Circuit Court are: First Circuit (N=7), Second Circuit (N=2), Third Circuit (N=7), Fourth Circuit (N=3), Fifth Circuit (N=2), Sixth Circuit (N=7), Seventh Circuit (N=4), Eighth Circuit (N=4), Ninth Circuit (N=11), Tenth Circuit (N=1), and Eleventh Circuit (N=3).

### 3.2. Type of Persecution and use of the term Trauma

The number of cases when a precedent case (Trauma Coding =1) is referenced by type of persecution are as follows: FGM (N=16), CPC (N=8), and rape (N=7). The number of cases when psychological trauma (Trauma Coding =2) is referenced by type of persecution are as follows: FGM (N=5), DV (N=3), CPC (N=12), and rape (N=38). The number of cases when physical trauma (Trauma Coding =3) is referenced by type of persecution are as follows: FGM (N=4), DV (N=2), CPC (N=5), and rape (N=7). There were only four cases that referenced other U.S. policies or reports or international reports, one for a CPC case and three for rape cases.

### 3.3. Circuit Court and use of the term Trauma

The number of cases when a precedent case (Trauma Coding =1) is referenced for each Circuit Court are: First Circuit (N=1), Second Circuit (N=6), Third Circuit (N=2), Fourth Circuit (N=4), Fifth Circuit (N=1), Sixth Circuit (N=3), Seventh Circuit (N=3), Eighth Circuit (N=0), Ninth Circuit (N=7), Tenth Circuit (N=1), and Eleventh Circuit (N=3). The number of cases when psychological trauma (Trauma Coding =2) is referenced for each Circuit Court are: First Circuit (N=8), Second Circuit (N=4), Third Circuit (N=8), Fourth Circuit (N=3), Fifth Circuit (N=2), Sixth Circuit (N=7), Seventh Circuit (N=5), Eighth Circuit (N=4), Ninth Circuit (N=12), Tenth Circuit (N=1), and Eleventh Circuit (N=4). The number of cases when physical trauma (Trauma Coding =3) is referenced for each Circuit Court are: First Circuit (N=1), Second Circuit (N=3), Third Circuit (N=1), Fourth Circuit (N=1), Fifth Circuit (N=0), Sixth Circuit (N=4), Seventh Circuit (N=2), Eighth Circuit (N=1), Ninth Circuit (N=3), Tenth Circuit (N=0), and Eleventh Circuit (N=2). There were only four cases that referenced other U.S. policies or reports or international reports, one of which was in the Third Circuit and three were in the Ninth Circuit.

## 4. Discussion

### 4.1. Female Genital Mutilation (FGM)

In 1996 the BIA granted Fauziya Kassindja asylum based on her fear of being subjected to the practice of FGM [58]. Her case, *Matter of Kasinga*, set a precedent for FGM being a form of persecution [59]. It established the legal basis for extending protection to any immigrant woman claiming asylum for herself based on a fear of FGM (future persecution), the occurrence of FGM (past persecution), or the fear that her daughters would experience FGM in the future. The description of FGM outlined in *Matter of Kasinga* stated that:

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.

It is this description of “psychological trauma” that contains the only use of the term trauma in the precedent case.

Of the twenty-three FGM cases analyzed, sixteen reference the term trauma when quoting the *Matter of Kasinga* case (trauma coding = 1) with fifteen of the cases only using the term trauma from *Matter of Kasinga* and not in the context of the case that was under appeal. For the thirteen cases that were denied, judges reasoned that FGM was in decline or illegal in the country the applicant fled, that parents who objected could intervene, or that it was not a reasonable fear. Those who had been subjected to the practice and/or feared it happening to their daughters condemned it and recounted memories of fear, anguish, and betrayal when describing their own experiences of FGM. Several cases upheld the legal reasoning that FGM could not be repeated making it impossible to argue that women should not be returned to a country that would harm them as the persecution was in the past.

A Ninth Circuit case, *Mohammed v. Gonzales*, 400 F.3d 785, changed this logic when the Court granted and remanded it arguing that FGM is a “permanent and continuing act of persecution” using the language of a forced sterilization case, *Qili Qu v. Gonzales*, 399 F.3d 1195, that the same Circuit Court decided just two days prior. Fear of future persecution can include the applicant and/or the applicant’s daughters, even when the children are U.S. citizens. In *Mohammed v. Gonzales*, 400 F.3d 785 the Court found that:

Like forced sterilization, genital mutilation permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life. The World Health Organization reports that even the least drastic form of female genital mutilation can cause a wide range of complications such as infection, hemorrhaging from the clitoral artery during childbirth, formation of abscesses, development of cysts and tumors, repeated urinary tract infections, and pseudo infibulation. Many women subjected to genital mutilation suffer psychological trauma. In addition, it “can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.” Thus, “in addition to the physical and psychological trauma that is common to many forms of persecution [female genital mutilation] involves drastic and emotionally painful consequences that are unending.” Therefore, our precedent compels the conclusion that genital mutilation, like forced sterilization, is a “permanent and continuing” act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.

While U.S. citizen children are not under threat of deportation, those in mixed-status families – families comprised of members with varying immigration statuses – either migrate with their deported parents or are left with relatives or others in the U.S. In the Seventh Circuit case *Nwaokolo v. INS*, 314 F.3d 303, a claimant from Nigeria who feared her two U.S. citizen daughters would be subjected to FGM, the Circuit granted a stay (halting deportation actions against the petitioner) because “a stay promotes the public’s compelling interest in ensuring that minor United States citizens are not forced into exile to be tortured.”

The one case that referenced *Matter of Kasinga* and trauma of the applicant was a Fourth Circuit case, *Mame Fatou Niang v. Gonzales*, 492 F.3d 505. In this case, the petitioner argued that she would experience psychological harm if her U.S. citizen daughter were forced to undergo FGM. Her own experience of FGM was characterized as physical trauma:

Niang also asserted that her psychological development was “considerably hampered,” by the physical trauma that she experienced as a young girl. She stated that “[t]he pains that I went through and the blood that was shed on [the day she was mutilated] keeps on revisiting me up until today.”

In this example, the applicant’s retelling of her own experience focused on physical trauma and the fear of future persecution for her daughter was rooted in the psychological realm that had not yet occurred.

Of the twenty-three FGM cases, five referenced psychological trauma (trauma coding =2). In the Seventh Circuit case *Kone v. Holder*, 620 F.3d 760, the petitioners were a mother and two daughters, the oldest of whom had undergone FGM without the parents’ knowledge or consent and the youngest – a U.S. citizen – whom the parents feared would be cut if they were forcibly returned to Mali. In her immigration court hearing, Kone testified that she would feel “emotional trauma” if FGM were performed on her daughter against her will. Here the emotional trauma was not the daughter’s

– the one subjected to FGM – but rather the mother’s trauma who was powerless as she could not prevent it. In the Eighth Circuit case *Kipkemboi v. Gonzales*, 211 Fed. Appx. 530, Kipkemboi argued that she and her daughter would be subjected to FGM if returned to Kenya and that the “emotional trauma associated with witnessing the pain and suffering of the child would constitute persecution.” In the Ninth Circuit case *Azanor v. Ashcroft*, 364 F.3d 1013, the petitioner Azanor outlined how she had been subjected to FGM against her will when she was four months pregnant by her boyfriend’s relatives resulting in a premature birth. The following describes the trauma of FGM.

The declaration recounts the events surrounding Azanor's FGM and describes the physical discomfort and psychological trauma she has endured as a result of this procedure. According to the declaration, Azanor still experiences regular pelvic pain, urinary tract infections, and rashes due to her FGM. Memories of the procedure continue to haunt her thoughts, triggering recurring nightmares and panic attacks. A letter from her physician confirms this medical history and indicates further that she has received treatment for Post-Traumatic Stress Disorder and Depressive Disorder associated with her FGM.

The next two cases include FGM and rape as forms of gendered harm. In the Sixth Circuit case *Sene v. United States AG*, 679 Fed. Appx. 463, the petitioner described racial and other forms of persecution she and her family endured in Mauritania. At the age of ten she was raped by military personnel when her family was detained, just five years after she had undergone FGM. In her dissent decision, Justice Donald wrote:

this continuing and permanent effect of female genital mutilation is clearly supported by the facts of this case, and many more like it, where the victim suffers from emotional and psychological trauma stemming from the mutilation well into her adulthood.

Rape and FGM as combined forms of harm appear in other cases too. In the Sixth Circuit case *Sene v. Gonzales*, 168 Fed. Appx. 61, Mame Sene was kidnapped and tortured by Senegalese security forces. She was gang raped and the soldiers cut her labia minor and majora. The petitioner submitted medical records that indicated both physical and psychological trauma.

Petitioner's psychologist, Adeyinka M. Akinsulure-Smith, wrote “in my clinical and professional opinion, [Petitioner] displays significant symptoms associated with Depression and Post-Traumatic Stress Disorder. These findings are consistent with the severe physical and emotional trauma that she reports experiencing in the past.

In this example, trauma from FGM and the rape are inextricably linked.

Of the twenty-three FGM cases, four referenced physical trauma (trauma coding =3). In the Second Circuit case *Jalloh v. Lynch*, 662 Fed. Appx. 97, the petitioner, a father of daughters whom he feared would undergo FGM, had been beaten during the civil war in Sierra Leone from which he suffered physical trauma to his nose and mouth area causing him to lose several teeth. In this case, the physical trauma is not about FGM but the beating the applicant endured. Unfortunately, his testimony was inconsistent and he also said that he did not remember how he hurt his nose and that his problems with his teeth were due to routine dental issues. In the Sixth Circuit case *Diallo v. Mukasey*, 2007 U.S. App. LEXIS 29641, Cherif Diallo was detained and raped for her political activities in Guinea. Diallo had also undergone FGM at the age of six. Like Diallo, Bah also had FGM when she was young, at the age of seven. In the Sixth Circuit case *Bah v. Gonzalez*, 230 Fed. Appx. 547, Bah outlined how she had been politically active and was raped in her home and later in prison. Three of the four cases of FGM and rape (all except the Sixth Circuit case *Sene v. Gonzales*, 168 Fed. Appx. 61) are of women who experienced FGM at a young age and were later raped. During their testimony, they articulated how their motivation for leaving their country was tied to the harm of rape, not FGM.

Three cases include the harm of FGM and forced marriage. In the Fourth Circuit case *Haoua v. Gonzales*, 472 F.3d 227, the petitioner, Haoua Mahaman feared returning to Niger as her parents had arranged a forced marriage that required she have FGM before the wedding. In the Fourth Circuit case *Gomis v. Holder*, 571 F.3d 353, Francoise Anate Gomis sought relief from deportation as she too feared being subjected to FGM and a forced marriage in Senegal. Her father had written to her that “I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the

circumcision." In these cases, the applicants fled because their families required that they be circumcised so that they could marry. In the Eleventh Circuit case *Manani v. Filip*, 552 F.3d 894, a woman from Kenya who had experienced FGM as a child and was fleeing a forced marriage by her late husband's brother after his death. The Court denied her claim and stated that "While Manani stated in her application for asylum that she was "circumcised" as a child and testified before the IJ [immigration judge] that FGM is a "very, very painful" procedure, she did not introduce her personal trauma as an affirmative claim for relief." Here, the Court referred to the applicant's trauma as "personal" (meaning FGM) and chastised her for not having it as a central part of her claim implying that the forced marriage component was not sufficient to gain asylum.

#### 4.2. Domestic Violence

The number of domestic violence cases that use the language of trauma is small; a total of four cases made their way to the appellate courts. Two of the domestic violence cases refer to psychological trauma, one referenced physical trauma, and one referenced both psychological and physical trauma. Three of the four include rape as part of the claim. In the Sixth Circuit case *Martinez-Martinez v. Sessions*, 743 Fed. Appx. 629, the psychological evaluation indicated that Martinez suffered psychological trauma from the physical and emotional abuse of her husband. This was the only domestic violence case that did not also involve sexual assault. In the Ninth Circuit case *Gasparyan v. Holder*, 707 F.3d 1130, Gasparyan fled Armenia from an abusive husband. She testified that she suffered from "nightmares and other psychological trauma related to the domestic violence she endured." She lived with her husband's family in the U.S. and they promised not to reveal to him her whereabouts. She told an immigration judge that her "mental health quickly deteriorated because the trauma she suffered as a consequence of the domestic violence resurfaced while living with her husband's family." A forensic psychologist examined her, diagnosed her with anxiety disorder, and documented her PTSD symptoms.

The First Circuit case *De Pena-Paniagua v. Barr*, 957 F.3d 88 only referenced trauma in the context of physical harm. Evidence included "medical records from the hospital visit indicated that she had "bruised trauma of the face, chest, and right arm." De Pena reported this attack to the local police, who labeled the incident, "Death Threat & Attempted Homicide." This was the only reference to trauma even though she had been raped multiple times, including while pregnant. In the Seventh Circuit case *Ferreira v. Lynch*, 831 F.3d 803, trauma was used to refer to both psychological and physical aspects. Ferreira, a citizen of the Dominican Republic, fled her common-in-law husband who beat and sexually assaulted her. One medical report documented "the physical and psychological trauma she sustained as a result of the 2007 sexual assault." The report was among other evidence from a physician that revealed that "bruises and scratches on Jimenez's body, as well as "visible signs and marks of a strangulation attempt" and a "torn inner and outer labia of the vagina, evidencing penetration by force or with resistance on the part of the victim"; and a psychologist's report that states that Jimenez "presents signs and symptoms of tension, worry, fear for her life and the lives of her family" and recommends "[t]hat she be referred immediately to group therapy" to "help her overcome the trauma."

#### 4.3. Coercive Population Control (CPC)

In 1996, the U.S. Congress passed the Illegal Immigration Reform and Responsibility Act (IIRRA). While IIRRA overwhelmingly made immigration to the U.S. more restrictive, it provided an opening for migrants from China fleeing coercive population control measures such as forced abortions and forced sterilizations. The Act defined political opinion as the ground on which the persecution was linked. Soon after, several immigration cases made their way to the BIA, challenging how IIRRA was being implemented. In the 1997 case *Matter of C-Y-Z*, the BIA ruled that spouses were eligible for asylum if their wife or husband had been subjected to CPC, even if they had not [60]. A Ninth circuit case, *Ma v. Ashcroft*, found that this extended to those whom the Chinese government did not recognize as legally married, typically for those who wed without the Chinese government's approval [61]. A Third Circuit case, *Chen v. Ashcroft*, a Fifth Circuit case, *Zhang v. Ashcroft*, and *Matter*



of C-Y-Z, upheld the trend that unmarried partners such as boyfriends and finances were not eligible for asylum [62–64].

Of the twenty-three CPC cases, eight reference the term trauma in the context of precedent cases (trauma coding = 1). Six of these cases reference the *Qili Qu v. Gonzales*, a Ninth Circuit case, including the case itself. Qu and his wife were denied a birth permit because of their political affiliation with an organization that was a Christian group that supported pre-communist government policies. They defied the Chinese government by having a child without permission for which their punishment was to have Qu's wife forcibly sterilized. The Court found that Qu was eligible for asylum based solely on his wife's persecution (he was not sterilized). The Ninth Circuit found that:

In addition to the physical and psychological trauma that is common to many forms of persecution, sterilization involves drastic and emotionally painful consequences that are unending: The couple is forever denied a procreative life together.

It continued by quoting the BIA's decision, *Matter of Y-T-L*, from 2003:

As the BIA explained, The act of forced sterilization should not be viewed as a discrete onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them [65].

The Ninth Circuit expanded this logic to forced abortion and stated the following about psychological trauma in a footnote "Forced abortion, as a form of persecution, possesses similar unusual characteristics. Again the pain, psychological trauma, and shame are combined with the irremediable and ongoing suffering of being permanently denied the existence of a son or daughter."

Three other cases were granted that referenced *Qu*. In *Zi Zhi Tang v. Gonzales*, 489 F.3d 987, the Ninth Circuit found that "Both forced abortion and forced sterilization share "unusual characteristics" including the "pain, psychological trauma, and shame" resulting from a forced procedure." In *Zhang v. Gonzales*, 434 F.3d 993, the Seventh Circuit granted a case referencing the psychological trauma the Ninth Circuit used in *Qu*. In *Yuqing Zhu v. Ashcroft*, 382 F.3d 521, the Fifth Circuit quoted a Ninth Circuit case, *Zi Zhi Tang v. Gonzales*, 489 F.3d 987 that portrayed CPC practices as creating psychological trauma for both forced abortion and sterilization claims.

Forced abortion and forced sterilization share unusual characteristics including the pain, psychological trauma, and shame resulting from a forced procedure. Both forms of persecution have serious, ongoing effects. A woman who has had a forced abortion has experienced unwanted governmental interference into one of the most fundamental and personal of decisions: whether she will have a child. The effects of that intrusion last a lifetime. There is no way to distinguish between the victims of forced sterilization and the victims of forced abortion for withholding of removal eligibility purposes. There is no reasoned basis for distinguishing between these two recognized forms of persecution in the context of withholding of removal. Thus, the presumption of future harm applies equally to forced abortions.

Three cases were denied, two of which referenced *Qu* and one other case. In *Zhongxiang Zhou v. Lynch*, 618 Fed. Appx. 907, the Ninth Circuit denied a case when it cited its own precedent case, *Qu*, and used the language of trauma to describe CPC practices as "physical and psychological trauma that is common to many forms of persecution." In *Zhang v. Gonzales*, 434 F.3d 993, the court also quoted *Qu* regarding the "psychological trauma" and continued with:

In fact, an even stronger argument may exist that the presumption is necessarily rebutted in involuntary abortion cases, because the applicant may still face additional persecution in the future in the form of more forced abortions, involuntary sterilization, and other coercive population control practices.

In *Shi Liang Lin v. United States DOJ*, a case of multiple petitioners all of whom were unmarried partners of women who had been forced to abort a pregnancy, the Second Circuit debunked the logic of the BIA and the Ninth Circuit that the harm of CPC practices was as much to the partner as the one who had experienced the forced abortion or sterilization, denied the three petitioners and acknowledged the split between the Circuit Courts. A Ninth Circuit case, *Hui Chen v. Gonzales*,

referenced a precedent case from its own Circuit other than *Qu, Zhang v. Gonzales*, 408 F.3d 1239, and denied the petitioner as the Court determined that he was not “subjected to the severity of trauma” that Zhang experienced.

A fifth Circuit case, *Yuqing Zhu v. Ashcroft*, 382 F.3d 521 that was dismissed due to jurisdictional issues quoted a Ninth circuit case, *Zi Zhi Tang v. Gonzales*, 489 F.3d 987 that compared the psychological trauma of forced abortions and sterilizations. In the Eleventh Circuit case *Biru Chen v. United States AG*, 181 Fed. Appx. 951, the court cited a case from the Ninth Circuit, *Singh*, 292 F.3d at 1023, to address trauma that may occur when migrants interact with government officials.

The decisions cited by Chen stand generally for the proposition that airport interviews should be viewed with caution when making credibility determinations because (1) it is unknown what the circumstances of the interrogation were; (2) linguistic problems result in questions not being understood and translations being misinterpreted; (3) the nature of the interrogation is different than the opportunity afforded to explain an asylum application; and (4) the potential trauma that may prevent an alien from disclosing the information surrounding his asylum claim because of previous abusive interrogations by government officials in his home country.

Similar to FGM cases, the Court may grant or deny an appeal even when referencing a precedent case that recognized the harm as persecution.

Of the twenty-three CPC cases, twelve reference the term trauma when discussing psychological trauma (trauma coding = 2). Only three of which were granted an appeal or remanded, including the precedent case *Qili Qu v. Gonzales*. Themes of how the language of psychological trauma was part of CPC cases include traumatic memory, trauma from others being harmed, such as a relative, and trauma that does not rise to the level of persecution. In several cases, the court considered CPC practices inherently traumatic. In the Second Circuit case *Xian Gui Chen v. Gonzales*, 157 Fed. Appx. 430 the appeal was denied, in part by upholding the BIA’s justification that Chen did not provide enough detail of his wife’s abortion even though the court stated that “the trauma of a forced abortion might well cause any wife to avoid discussing any details with her husband.” In the Third Circuit case *Zhang v. AG United States*, 632 Fed. Appx. 680, Zhang was denied an appeal because she did not corroborate her claim that she was persecuted but instead “focused on the emotional trauma that she had suffered in China, and that her “great trauma and pain” should excuse her lack of corroboration.”

The language of trauma is often linked to memory. In the First Circuit case *Hong Mei Zhang v. Gonzales*, 469 F.3d 51, Zhang did not mention her forced abortion in her application because “she could not face a resumption of the psychological trauma which that memory triggered.” In the Second Circuit case *Zhao v. Barr*, 791 Fed. Appx. 265, Zhao testified that she was unfamiliar with paperwork documenting her forced abortion. When a copy of her medical visit was presented to the Court Zhao “explain[ed] that she suffered a “memory lapse” not uncommon among trauma victims and posits that she might have “thr[own] [the abortion certificate] in a pile of papers and never looked at it.” In the Ninth Circuit case *Han v. Garland*, 2022 U.S. App. LEXIS 16753, the applicant was denied based on inconsistent testimony about “when her pregnancies and alleged forced abortions occurred, when she was allegedly arrested for her religion, how many times and where she was sexually assaulted, and who found her and transported her to the hospital following her alleged suicide attempt.” While her “faulty memory due to the passage of time, and trauma” was considered, the case was denied.

In the Third Circuit case *Meishan Zhao v. AG of the United States*, 388 Fed. Appx. 135, Zhao argued that corroborating her claim was traumatic. Zhao was taken away by family planning officials and subjected to a forced abortion. She was also involved in a Christian church and while being interrogated she was beaten and raped by a police officer. She argued that “she has post-traumatic stress disorder and that requiring her to corroborate her claims is unreasonable as it would cause her to relive the trauma that she suffered.” The Court ruled that “While Zhao was undoubtedly traumatized by the events she described, we have not held that such trauma relieves a petitioner of the requirement to proffer reasonably available evidence that corroborates her claim,” and cited a Third Circuit case, *Fiadjoe v. Att’y Gen.*, 411 F.3d 135, noting that “the petitioner, whom, for eleven years was held by her father as a slave and subjected to physical beatings and frequent rape,

corroborated her claim with United States Department of State Country Reports and a report by a psychologist who treated her for trauma" implying that even a child can talk about traumatic events [66].

Two cases use the language of trauma when the petitioner's trauma was due to a family member's persecution. In the Ninth Circuit case *Zhang v. Gonzales*, 408 F.3d 1239, the applicant discussed "the trauma of witnessing her father's forcible removal from her home" to be forcibly sterilized. In the Eleventh Circuit case *Qin Liu v. United States AG*, 252 Fed. Appx. 964, Liu claimed that "his wife's forced abortion and sterilization resulted in his emotional trauma and psychological persecution." Both cases were denied.

Two cases did not consider the harm to rise to the level of persecution. In the First Circuit case *Lin v. Holder*, 570 Fed. Appx. 4, Lin argued that his wife was forcibly sterilized and that he was beaten in front of his daughter. The Court found that "there is no reason to infer that Lin's psychological trauma was any greater than that of petitioners in two other First Circuit cases where "the effect of watching his father be beaten as a young child, although traumatic, did not amount to persecution" [67,68]. In the Second Circuit case *Bing Shui Lin v. Gonzales*, 232 Fed. Appx. 54, the Court ruled that Lin's "harassment by Chinese family planning officials and resulting trauma did not constitute severe abuse or rise to the level of persecution because the officials targeted his parents when [he] was a child." In both cases the Court considered trauma not to rise to the level of persecution.

Of the twenty-three CPC cases, five reference the term trauma when discussing physical trauma (trauma coding = 3). All were denied except the precedent case *Qili Qu v. Gonzales*, discussed earlier and all had a male petitioner. In the Second Circuit case *Lian v. Holder*, 405 Fed. Appx. 524, that also referenced psychological trauma, family planning officials "pushed him and caused him to hit his head" resulting in "head trauma" but that this was only "physical mistreatment" and not persecution. In the Eleventh Circuit case *Shijie Huang v. United States AG*, 330 Fed. Appx. 871, the Court stated that "Huang's detention and beating do not rise to the level of persecution. It does not appear that Huang required medical treatment following the beating, and there is no evidence that he suffered any lasting effects or other mistreatment" and that his experiences were not the same "level of severity" as others, such as those who experienced "trauma from torture."

The other two cases reference trauma in the context of credibility. In the Third Circuit case *Chen v. Ashcroft*, 376 F.3d 215, the Court found that Chen's testimony was not credible stating that his:

wife had an IUD inserted on the same day she had an abortion as "not only incredible but also implausible." The IJ [immigration judge] reasoned that "due to the physical trauma of an abortion, the Court finds that it is unlikely and most likely physically impossible to insert an IUD in an individual who has earlier that day suffered an abortion."

In the Second Circuit case *Wensheng Yan v. Mukasey*, 509 F.3d 63, the Court referenced the physical and emotional trauma that accompanies a forced abortion. It stated that:

Any reasonable person would understand why the IJ [immigration judge] here concluded that it is implausible that a man whose wife had just undergone the physical and emotional trauma of a forced abortion would, only days later, travel alone to another country to participate in a vacation with a tour group for no asserted purpose other than pleasure.

In both cases, the Court found the petitioner non-credible given the traumatic physical experience of a forced abortion and what is reasonable regarding other procedures (inserting an IUD) or taking a pleasure trip rather than consoling your wife.

Of the twenty-three CPC cases, only one refers to a U.S. government document (trauma coding = 4) that is the USCIS Asylum Adjudicator's Manual [69]. In the Ninth Circuit case *Ming Dai v. Sessions*, 884 F.3d 858, the Court cited the USCIS Asylum Adjudicator's Manual section on "Points to Keep in Mind When Conducting a Non-Adversarial Interview" that stated:

If the interviewee is a survivor of severe trauma (such as a battered spouse), he or she may feel especially threatened during the interview. As it is not always easy to determine who is a survivor, officers should be sensitive to the fact that every interviewee is potentially a survivor of trauma.

#### 4.4. Rape

Of the fifty-one rape cases, seven reference the term trauma in the context of precedent cases (trauma coding = 1). Unlike FGM and CPC cases that tend to coalesce around a single precedent case, none of the seven rape cases cite the same case. Only one case, *Longwe v. Keisler*, 251 Fed. Appx. 718, from the Second Circuit, references a case that substantively deals with both rape and trauma, *Fiadjoe v. AG*, 411 F.3d 135, a Third Circuit case which is listed in the table above. This case cites INS Guidelines that explains how "trauma caused by sexual abuse may influence ability to present testimony." In *Longwe*, the Second Circuit remanded the case and admonished the lower courts because:

the fact that Longwe failed to provide a specific date for her alleged rape did not undermine her credibility. Although the record reflects that Longwe's testimony regarding her alleged rape was minimal, there was nothing in the record to support the IJ's [immigration judge] speculation that "one normally doesn't forget" the date of such a "traumatic event."

One case from the Third Circuit, *Dia v. Ashcroft*, 353 F.3d 228, references a case that is about rape in the context of repression of traumatic memory. The Court referenced a case from its own Circuit to explain partial memory recall when it stated that:

Another barrier to understanding the demeanor of petitioners who have experienced trauma is the likely repression of traumatic memories. Such repression only adds to the difficulty of answering questions. Their "detachment when recounting tragic events, sometimes perceived as an indication of fabrication, may reflect psychological mechanisms employed to cope with past traumatic experiences, rather than duplicity [70].

Both of these cases were remanded to the BIA.

The remaining five cases reference other cases that take up the subject of trauma but not rape as a form of harm. Two were granted or remanded: *Rusak v. Holder*, 734 F.3d 894 and *Katyal v. Gonzales*, 204 Fed. Appx. 661, both Ninth Circuit cases; three were denied: *Olmos-Colaj v. Sessions*, 886 F.3d 168, *Alvizuriz-Lorenzo v. United States AG*, 791 Fed. Appx. 70, and *Jalloh v. Gonzales*, 498 F.3d 148 a First, Eleventh, and Ninth Circuit case, respectively. In *Rusak v. Holder*, 734 F.3d 894, the petitioner's mother had been raped when Rusak was a child. The Ninth Circuit referenced a case from its own Court about children that stated that "As Hernandez-Ortiz held, "a child's reaction to injuries to his family is different from an adult's. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting" [71]. In *Katyal v. Gonzales*, 204 Fed. Appx. 661, the petitioner was threatened with rape and her mother was raped. In this case, the Ninth Circuit referenced a case from its own Circuit to support the position that the fear of persecution can be traumatic even if more severe harm came to other family members when it stated that "emotional and psychological trauma, as well as harm to family members, can rise to the level of persecution" [72]. In *Katyal v. Gonzales*, 204 Fed. Appx. 661, the Court remanded the case to the BIA as it disagreed with the BIA finding that Katal's experiences did not rise to the level of persecution.

Katyal's father was arrested and beaten severely on two occasions, one of which resulted in a two-week hospitalization. In addition, during the arrest of Katyal and her mother, the police sexually harassed Katyal, raped her mother, and threatened Katyal herself with rape. Because the cumulative effects of the harm rise to the level of persecution, we conclude that substantial evidence does not support the BIA's finding.

The Court cited *Mashiri v. Ashcroft* again finding that "emotional and psychological trauma, as well as harm to family members, can rise to the level of persecution" [73].

Three cases were denied. In the First Circuit case *Olmos-Colaj v. Sessions*, 886 F.3d 168 the immigration judge denied the case because the petitioners did not meet the threshold of war-time trauma in Guatemala as the petitioners in a case from the same Circuit had done, even though Olmos-Colaj had relatives who were raped during the civil war when they were children because the harm had not been done to them. [74] In *Alvizuriz-Lorenzo v. United States AG*, 791 Fed. Appx. 70 and *Jalloh v. Gonzales*, 498 F.3d 148, the Eleventh and Second Circuit, respectively, referenced an Eighth Circuit case and a BIA case to show how part of determining persecution was "evidence of psychological trauma resulting from the harm" [75,76].



Of the fifty-one rape cases, thirty-nine reference the term trauma when discussing psychological trauma (trauma coding = 2). Twenty-one were denied on appeal. Psychological trauma was referenced in the context of medical evaluations and reports, issues of credibility and memory recall, and the rape itself as a form of trauma. It is common for medical experts to testify in immigration court and submit medical affidavits that document asylum seekers' physical and psychological health. Of the cases examined in this study, there were more of these for petitioners with a rape claim than any other type of harm. In several cases the petitioner was diagnosed with PTSD: *Ixcuna-Garcia v. Garland*, 25 F.4th 38, *Mukamusoni v. Ashcroft*, 390 F.3d 110, and *Zeru v. Gonzales*, 503 F.3d 59, all First Circuit cases, *Mikhail v. Ashcroft*, 78 Fed. Appx. 187, a Third Circuit case, *Ilunga v. Holder*, 777 F.3d 199 and *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, both Fourth Circuit cases, *Mansare v. Holder*, 383 Fed. Appx. 522, a Sixth Circuit case, *Angoucheva v. INS*, 106 F.3d 781, a Seventh Circuit case, and *Morgan v. Mukasey*, 529 F.3d 1202, a Ninth Circuit case.

In addition to a PTSD diagnosis, medical professionals routinely documented trauma as a reason why applicants did not file within the one-year deadline and omitted rape and sexual assault in the application materials, as well as the inconsistencies in their testimony. In *Ixcuna-Garcia v. Garland*, a clinical nurse explained that "past trauma prevented Ixcuna-Garcia from speaking about her history of persecution in Guatemala, particularly her rape, and from seeking assistance in applying for asylum within the first year of her entering the United States." In *Mukamusoni v. Ashcroft*, 390 F.3d 110, Mukamusoni was documented as having a "restricted range of emotion, which is typical of trauma victims." When describing the flashbacks that Natasha Angoucheva experienced after being assaulted during an interrogation in Bulgaria, her social worker described how "the smell of cigarette smoke, which reminds Angoucheva of Major Beltchev, can cause a flashback, and that Angoucheva will then experience the same numbness in her hands and feet that she experienced in the days following the assault." The social worker emphasized that "it would be nearly impossible [for someone] to fake the symptoms which [Angoucheva] has described, in the manner in which she seems to describe them, with emotion and detail" in the case *Angoucheva v. INS*, 106 F.3d 781. Many reports, such as that submitted by a psychologist in the Eleventh Circuit case *Mbi v. United States AG*, 348 Fed. Appx. 486, indicated that the petitioner's "psychological symptoms were "consistent with those commonly found in survivors of trauma, and in particular, survivors of persecution and torture."

Memory and recall were also issues that were raised in appeals for applicants with a rape claim. Some petitioners, such as Hermase Amicy, in the First Circuit case *Amicy v. Gonzales*, 133 Fed. Appx. 745, could not remember the assault and "claimed that her inability to remember the events surrounding her persecution was the result of significant psychological trauma" and the case was denied. Others, like, Essa Kabba, in the Tenth Circuit case *Kabba v. Mukasey*, 530 F.3d 1239, "did not always know the exact dates of certain events, [and as the immigration judge noted] Kabba's trauma and his limited education explained the lack of precision in the testimony." In the Fifth Circuit case, *Lopez v. Garland*, 852 Fed. Appx. 758, Morales Lopez was repeatedly raped in front of her family by members of a gang that later killed her husband. The immigration judge quoted her psychological assessment that stated "[Morales Lopez] may have difficulty accessing specific details of the trauma she has suffered due to her [post-traumatic stress disorder] diagnosis. These symptoms substantiate rather than undermine, the credibility of her account of traumatic experience."

Other petitioners had partial memory of their rape that led to inconsistent testimony. In the Ninth Circuit case *Munyuh v. Barr*, 2020 U.S. App. LEXIS 6377, there was a discrepancy between Munyuh's declaration and oral testimony about the distance a police truck had travelled before it broke down and she was able to escape from the officers who had had "brutally attacked, beaten multiple times, [and] raped [the petitioner] within a span of less than about 24 hours." Her counsel argued that "It is reasonable and plausible that the trauma caused by multiple physical and sexual assaults would impair Ms. Munyuh's focus at the time on peripheral matters and therefore on her memory of those matters. Her counsel argued that "considering the harm and trauma that [she] suffered, it w[ould] be highly unlikely that [she] would remember precisely everything that happened to her."



In the Third Circuit case *Plumbay v. AG of the United States*, 213 Fed. Appx. 144, the Court acknowledged that Plumbay's inconsistent documents and testimony about whether she was raped during an attempted abduction "resulted primarily from her continuing discomfort discussing the attack" and that it is plausible that the inconsistencies "can be explained by trauma and confusion." However, the Court acknowledged that it is also plausible that the inconsistencies were instead "the result of fabrication" and ultimately denied the case. In *Zeru v. Gonzales*, 503 F.3d 59, the First Circuit found the inconsistencies incredible. In the lower court's ruling, the immigration judge "pointed out that Zeru claimed on different occasions to have been raped once, twice, or three times." Even though the psychological report indicated that "what can sometimes happen with trauma patients is that they may dissociate" and that their memories "may be repressed" the judge responded with "it would not be unusual for a victim of trauma to confuse dates or sequences of events, but it would be very unusual . . . to simply forget that an event occurred." Yet the medical community often argues that in fact it is quite common to have no memory or partial memory of the event itself.

In other cases, such as *Slyusar v. Holder*, 740 F.3d 1068, the Sixth Circuit reprimanded laws that punish asylum seekers who cannot recall details, such as the REAL ID Act, citing a Ninth Circuit case that dealt with this issue by stating "as the Ren Court recognized, 'victims of abuse often confuse the details of particular incidents, including the time or dates of particular assaults and which specific actions occurred on which specific occasion; thus, the ability to recall precise dates of events years after they happen is an extremely poor test of how truthful a witness's substantive account is' [77]. In the Eighth Circuit case *Redd v. Mukasey*, 535 F.3d 838, the petitioner testified that he was home the night his wife was raped while his wife testified that he was not. Redd explained this discrepancy "by arguing that his wife's testimony was confusing and incomprehensible because of the trauma from the rape, and, thus, the IJ [immigration judge] should not have considered her testimony in determining Redd's credibility."

Other aspects of credibility include affect and how asylum seekers tell their stories of persecution. In the Fourth Circuit case *Ilunga v. Holder*, 777 F.3d 199, the Court recognized that Ilunga was "forced to revisit the trauma" of her rapes while being detained and that emotional retelling such as crying made her more - not less - credible as "the ability to testify in a cool and collected manner about an experience of torture would arguably raise greater credibility concerns" due to from "traumatic memory." For some petitioners, such as Renee Labib Mikhail, in the Third Circuit case *Mikhail v. Ashcroft*, 78 Fed. Appx. 187, a "detached emotional state" and "gaps in her recollection" compounded the Court's rejection of her claim as she reported some instances of persecution to the Egyptian police such as the "burning of her car" but not "the more serious incidents of assault and rape." Moreover, having not included the rape as part of her application led the Court to rule against her. In the Eighth Circuit case, *Mambwe v. Holder*, 572 F.3d 540, the petitioner did not "seek medical treatment for symptoms of psychological trauma" leading the Court to believe the sexual assaults were not severe enough to merit humanitarian relief even though she testified that she was raped in a refugee camp. In the Third Circuit case *Siauw Lan Tjin v. AG of the United States*, 191 Fed. Appx. 144, the immigration judge noted that the petitioner "had not provided any medical evidence to corroborate her testimony that she suffered and continues to suffer from mental trauma, even though that evidence could have reasonably been obtained from a psychologist."

The language of trauma is also used to refer to the rape itself and the emotional toll it takes on those who have been assaulted. In the Eleventh Circuit case *Liana Tan v. United States AG*, 446 F.3d 1369, Tan was sexually assaulted and her friend was raped (the transcript does not detail why different language was used) and she "suffered from nightmares and emotional trauma as a result of the event." The immigration judge denied the case and reasoned that if Tan could not file the application within the one year due to the "trauma from the sexual assault" she should not have been able to marry during that same timeframe. In the Ninth Circuit case *Zhu v. Mukasey*, 537 F.3d 1034, the psychiatrist's evaluation stated that she "re-experience[ed] the trauma of being raped" and Zhu testified that she "finds it difficult to maintain normal sexual relationships with men because of her rape." The language of trauma included cases of an attempted rape, such as *Weiwei Chen v. Holder*, 549 Fed. Appx. 567, a Seventh Circuit case. Here, the Court remanded the case to the BIA because "the

Board incorrectly discounted the trauma of a sexual assault by reasoning that, because Chen fought off her assailant before he inflicted more harm, she was merely harassed." In a Ninth Circuit case *Marenco-Hernandez v. Garland*, 2021 U.S. App. LEXIS 20669, the petitioner who after being raped by members of a gang was forced to carry a pregnancy to term by doctors who sedated her for several months causing "lasting mental trauma."

Of the fifty-one rape cases, seven reference the term trauma when discussing physical trauma (trauma coding = 3). Only one of these cases, *Munyuh v. Barr*, 2020 U.S. App. LEXIS 6377, a Ninth Circuit case that was discussed earlier, references physical trauma related to the rape of the petitioner. Three cases, *Lleshi v. Holder*, 460 Fed. Appx. 520 and *Marouf v. Lynch*, 811 F.3d 174, both Sixth Circuit cases, and *Bobo v. Holder*, 344 Fed. Appx. 269, a Seventh Circuit case, reference physical trauma in the context of a family member (husband or brother) experiencing head trauma or trauma related to a deviated septum because of physical attacks by police or security officers. Two cases, *Nikolajuk v. Holder*, 527 Fed. Appx. 439 and *Yakovenko v. Gonzales*, 477 F.3d 631, a Sixth and Eighth Circuit case, respectively, detail petitioners' experiences with medical reports from hospitals that documented physical trauma such as kidney disease and routine medical issues. In *Narayan v. Gonzales*, 220 Fed. Appx. 691, the Ninth Circuit referenced physical trauma related to Narayan's children's illnesses. All cases but one, *Marouf v. Lynch*, 811 F.3d 174, a Sixth Circuit case, were denied.

Of the fifty-one rape cases, three cases referenced trauma in policies and reports such as INS Guidelines, a Human Rights Report, a United Nations Report, and a report on Rape Trauma Syndrome (trauma coding = 4). In a Third Circuit case *Fiadjoe v. AG*, 411 F.3d 135, The INS Guidelines entitled "Consideration for Asylum Officers Adjudicating Asylum Claims from Women" were referenced that stated that:

Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma can be suffered by any applicant, regardless, of gender, and may have a significant impact on the ability to present testimony. The demeanor of traumatized applicants can vary. They may appear numb or show emotional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling. [78]

The intention of the INS Guidelines was to help adjudicators understand how trauma can explain behaviors that may make them seem noncredible. In a Ninth Circuit case *Kaur v. Wilkinson*, 986 F.3d 1216, the UNHCR, Handbook for the Protection of Women and Girls was referenced that stated that "sexual and gender-based violence" of all forms leads to "emotional and psychological trauma." [79] In *Lopez-Galarza v. INS*, 99 F.3d 954, also a Ninth Circuit case, the Court acknowledges trauma from rape and references a journal article about Rape Trauma Syndrome [80]. In all three of these cases, the use of these documents and reports links to the case at hand to emphasize the trauma of the petitioner. All three cases were granted or remanded.

## 5. Conclusion

This study shows that the U.S. Circuit Court of Appeals uses the language of trauma in four ways when reviewing gender-based asylum cases that are precedent cases, psychological trauma, physical trauma, and in policies and reports. References to precedent cases were in approximately one-third (N=31) of the 101 cases in the data set. Nearly all of these, twenty-eight of the thirty-one cases, exclusively referenced a precedent case with no mention of trauma in the petitioner's case under review. Most cases under appeal referenced only one case. Claims regarding FGM referenced *Matter of Kasinga*, and claims focused on CPC referenced *Qili Qu v. Gonzales*. Of the twenty-four cases that referenced a precedent case for FGM and CPC claims, twenty-one referenced one of these two cases. There were no precedent cases referenced in the context of trauma for domestic violence cases. Rape claims that referenced precedent cases when discussing trauma were a total of seven, all different cases and only one that referenced another case where the petitioner had been sexually assaulted.

Just under one-fifth (N=18) of the cases used the language of physical trauma. This is low given the physical nature of persecution. Many petitioners documented their experiences with torture and human rights abuses. They had been beaten, raped, and harmed in ways that no one should ever experience. Yet the Court made fewer references to the physical aspects of trauma than the psychological ones.

Over half (N=58) of the 101 cases referenced psychological trauma. Of the fifty-eight cases that did reference psychological trauma, nearly two-third (N=38) were from cases where the harm was solely rape. When the combined cases of harm that include rape are included, the total number of cases that reference psychological trauma increase to forty-five (two for combined cases of FGM and rape, three for domestic violence, and two for CPC), representing nearly half of the total 101 cases.

The dearth of cases (N=4) that reference policies and reports was surprising since there have been several U.S. government and international policies on gender-based violence that have been in effect for well over thirty years. The 1991 UNHCR Guidelines on the Protection of Refugee Women and the 1993 INS [now USCIS] Guidelines, each cited once in two cases, laid the foundation for legal arguments about gender-based harm as persecution. That they were referenced only twice in the context of trauma demonstrates that they were perhaps underutilized in the Courts.

Similar themes of how gender-based asylum cases are adjudicated at the immigration court level hold true for how they are reviewed by the Circuit Courts. Most asylum seekers with FGM claims describe their motivation for fleeing persecution based on other forms of harm than FGM, including sexual assault, even if FGM is a central component of their asylum case. [81]. Three of the four domestic violence cases focused on the non-sexual violence aspect of the claim even though they were raped by their spouse. This pattern follows the lower Courts' example in that sexual violence is often eclipsed by other forms of violence in domestic violence cases [82]. Petitioners with a CPC claim are expected to align their argument of how they experienced persecution with U.S. reproductive politics that are anti-abortion and support pro-life discourse of how not being able to reproduce is devastating, and therefore traumatic [83]. Petitioners who were sexually assaulted were among the highest who were diagnosed with PTSD. Traumatic memory is a common reason given why petitioners who were sexually assaulted are not seen as credible [84]. These themes mirror the responses of other vulnerable populations who seek justice in the aftermath of trauma [85].

The U.S. Circuit Court of Appeals is charged with reviewing asylum cases and evaluating them based on whether petitioners meet the legal definition of persecution. The sparse number of cases before the Circuit Courts that use the language of trauma (N=385) over a forty-year span shows that the ways in which trauma and persecution are intertwined is rarely part of the Court's rationale. Yet within this modest sample size, one in four claims that use the language of trauma (101 or 26%) are gender-based asylum claims. This study shows the variation of how the U.S. Circuit Court of Appeals uses the language of trauma in gender-based asylum claims. It does so by focusing on how the language of trauma informs Circuit Court judges' reasoning about whether and how petitioners with gender-based asylum claims have been persecuted. The analysis for the data set created in this research seeks to contribute to the literature on trauma studies by exploring how trauma informs legal interpretations of persecution.

**Funding:** This research received no external funding.

**Institutional Review Board Statement:** Not applicable.

**Informed Consent Statement:** Not applicable.

**Data Availability Statement:** U.S. Circuit Court Cases are available to the public. Databases such as Nexis Uni allow access to the cases used in the data set created for this study. The citation for all cases in the dataset is provided in Table 1.

**Conflicts of Interest:** The author declares no conflict of interest.

## References

1. Refugee Act of 1980, PL 96-212, 94 Stat. 102 (1980).
2. UN General Assembly, Convention Relating to the Status of Refugees, United Nations, 28 July 1951.

3. UN General Assembly, Protocol Relating to the Status of Refugees, United Nations, 31 January 1967.
4. Puumala, E., R. Ylikomi, and H. Ristimäki. Giving an Account of Persecution: The Dynamic Formation of Asylum Narratives. *Journal of Refugee Studies*. 2018, 31, 197-215.
5. AILR. AILA's Asylum Primer. In *A Practical Guide to USA Asylum Law and Procedures*, 8th ed.; American Immigration Lawyer's Association: Washington, DC, USA, 2019.
6. Bohmer, C.; Hill, A. *Political Asylum Deceptions: The Culture of Suspicion*; Palgrave MacMillan: New York City, NY, USA, 2018.
7. Holland, M. Stories for Asylum: Narrative and Credibility in the United States' Political Asylum Application. *Refuge* 2018, 34, 85–89.
8. Gerken, C. Credibility, Trauma, and the Law: Domestic Violence-Based Asylum Claims in the United States. *Feminist Legal Studies*. 2022, 30, 255-280
9. Herlihy, J. and S. Turner. Memory and Seeking Asylum. *European Journal of Psychotherapy and Counseling*. 2007, 9, 267-276.
10. Rogers, H., S. Fox, J. Herlihy. The Importance of Looking Credible: The Impact of the Behavioral Sequelae of Post-Traumatic Stress Disorder on the Credibility of Asylum Seekers. *Psychology, Crime, and Law*. 2015, 21, 139-155.
11. McNally, R. *Remembering Trauma*. Harvard University Press: Cambridge, MA, U.S., 2003.
12. van der Kolk, B. *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*. New York City, NY, U.S.: Penguin Books. 2014.
13. Herman, J. *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror*. New York City, NY, U.S.: Basic Books. 1992, 1997, 2015.
14. . Saadi, A. et al. Associations between Memory Loss and Trauma in US Asylum Seekers: A Retrospective Review of Medico-Legal Affidavits. *PLOS One*. 2021, 16, 1-12.
15. UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004.
16. Wilson, J.P. and B. Droždek (eds). *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims*. Brunner-Routledge: New York, NY, U.S. 2004.
17. Butler, L., F.M. Critelli, and J. Carello (eds.). *Trauma and Human Rights: Integrating Approaches to Address Human Suffering*. Palgrave Macmillan: New York City, NY, U.S., 2019.
18. Fassin, D. and R. Rechtman. Translated by R. Gomme. *The Empire of Trauma: An Inquiry into the Condition of Victimhood*. Princeton University Press: Princeton, NJ, U.S., 2009.
19. *Jean v. Nelson*, 711 F.2d 1455, 1983 U.S. App. LEXIS 28911 (United States Court of Appeals for the Eleventh Circuit April 12, 1983 ).
20. van der Kolk, B. *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*. New York City, NY, U.S.: Penguin Books. 2014.
21. Herman, J. *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror*. New York City, NY, U.S.: Basic Books. 1992, 1997, 2015.
22. Matsakis, A. *I Can't Get Over It: A Handbook for Trauma Survivors*. 2nd ed; New Harbinger, Oakland, CA, U.S., 1996.
23. Matsakis, A. *I Can't Get Over It: A Handbook for Trauma Survivors*. 2nd ed; New Harbinger, Oakland, CA, U.S., 1996.
24. Herman, J. *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror*. New York City, NY, U.S.: Basic Books. 1992, 1997, 2015.
25. Matsakis, A. *I Can't Get Over It: A Handbook for Trauma Survivors*. 2nd ed; New Harbinger, Oakland, CA, U.S., 1996.
26. McDonald, T. W. and J. N. Sand. *Post-Traumatic Stress Disorder in Refugee Communities: The Importance of Culturally Sensitive Screening, Diagnosis, and Treatment*. New York City, NY, U.S.: Nova Science Publishers. 2010.
27. Suzuki, C. Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder. *Hastings Race and Poverty Law Journal*. 2007, 4, 235-280.
28. Mueller, J. et al. Mental Health of Failed Asylum Seekers as Compared with Pending and Temporarily Accepted Asylum Seekers. *European Journal of Public Health*. 2010. 21:184-189.



29. Keller, A. et al. Mental Health of Detained Asylum Seekers. *The Lancet*. 2003. 362:1721-1723.
30. Kinzie, J.D. and J.M. Jaranson. Refugees and Asylum Seekers. In *The Mental Health Consequences of Torture*. E. Gerrity, T.M. Keane, and F. Tuma, Eds. Kluwer Academic: New York City, NY, U.S. 2001, pp.111-120.
31. Herman, J. *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror*. New York City, NY, U.S.: Basic Books. 1992, 1997, 2015.
32. Nieves-Grafals, S. Brief Therapy of Posttraumatic Stress Disorder in Refugees. In *Trends in Posttraumatic Stress Disorder Research*, T. A. Corales, Ed. New York City, NY, U.S.: Nova Science Publishers. 2005, pp. 185-205, p. 187.
33. Hinton, D.E. and B.J. Good. *Culture and PTSD: Trauma in Global and Historical Perspective*. Philadelphia, PA, U.S.: University of Philadelphia Press. 2017.
34. Weine, S. M. and S. W. Henderson. Rethinking the Role of Posttraumatic Stress Disorder in Refugee Mental Health Services. In *Trends in Posttraumatic Stress Disorder Research*, T. A. Corales, Ed. New York City, NY, U.S.: Nova Science Publishers. 2005, pgs. pp. 157-183.
35. McDonald, T. W. and J. N. Sand. *Post-Traumatic Stress Disorder in Refugee Communities: The Importance of Culturally Sensitive Screening, Diagnosis, and Treatment*. New York City, NY, U.S.: Nova Science Publishers. 2010.
36. Droždek, B. and J. P. Wilson. Wrestling with the Ghosts from the Past in Exile: Assessing Trauma in Asylum Seekers. In J. P. Wilson and C. S. Tang, Eds. *Cross-Cultural Assessment of Psychological Trauma and PTSD*. New York City, NY, U.S.: Springer. 2007, pp. 113-131.
37. Watters, E. *Crazy Like Us: The Globalization of the American Psyche*. New York City, NY: U.S.: Free Press. 2010.
38. McDonald, T. W. and J. N. Sand. *Post-Traumatic Stress Disorder in Refugee Communities: The Importance of Culturally Sensitive Screening, Diagnosis, and Treatment*. New York City, NY, U.S.: Nova Science Publishers. 2010.
39. Hinton, D.E. and B.J. Good. *Culture and PTSD: Trauma in Global and Historical Perspective*. Philadelphia, PA, U.S.: University of Philadelphia Press. 2017.
40. Watters, E. *Crazy Like Us: The Globalization of the American Psyche*. New York City, NY: U.S.: Free Press. 2010.
41. Nieves-Grafals, S. Brief Therapy of Posttraumatic Stress Disorder in Refugees. In *Trends in Posttraumatic Stress Disorder Research*, T. A. Corales, Ed. New York City, NY, U.S.: Nova Science Publishers. 2005, pp. 185-205, p. 187.
42. USA Citizenship and Immigration Services. *Reasonable Fear of Persecution and Torture Determinations*; USCIS: Washington DC, USA, 2017.
43. U.S. Citizenship and Immigration Services. *Interviewing Survivors of Torture and Other Severe Trauma*. Washington DC, U.S.: USCIS. 2019.
44. Suzuki, C. Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder. *Hastings Race and Poverty Law Journal*. 2007, 4, 235-280.
45. Graham, B., J. Herlihy, and C. Brewin. Overgeneral Memory in Asylum Seekers and Refugees. *Journal of Behavioral Therapy and Experimental Psychiatry*. 2014., 45, 375-380.
46. Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101) <https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links> (accessed on 1 August 2023).
47. Schrag, P. et al *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*. *William and Mary Law Review*, 2010, 52: 651-804
48. Freedman, J. *Gendering the International Asylum and Refugee Debate*, 2nd ed.; Palgrave Macmillan: New York, NY, USA, 2015.
49. Crépin, M. *Persecution, International Refugee Law and Refugees: A Feminist Approach*; Routledge: New York City, NY, USA, 2021.
50. D, Frederick. *Rugged Justice: the Ninth Circuit Court of Appeals and the American West, 1891-1941*. University of California Pres: Berkely, CA, U.S., 1994.
51. Morris, J. *Establishing Justice in Middle America: a history of the United States Court of Appeals for the Eighth Circuit*. University of Minnesota Press: Minneapolis, MN, U.S., 2007.



52. Cross, F. Decision Making in the U.S. Court of Appeals. Stanford University Press: Stanford, CA, US. 2007.
53. Law, A. The Immigration Battle in American Court, Cambridge University Press: New York City, NY, U.S., 2010.
54. Catholic Legal Immigration Network. Representing Clients in Immigration Court. American Immigration Lawyers Association: Washington DC, U.S., 2021.
55. U.S. Government Accountability Office. U.S. Immigration Courts see a Significant and Growing Backlog. 19 October 2023, <https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog> (Accessed on 18 November 2023).
56. Congressional Research Service. U.S. Immigration Courts and the Pending Cases Backlog. Congressional Research Service: Washington DC, U.S., 25 April 2022.
57. United States Courts (<https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>) (Accessed on 1 August 2023).
58. Kassindja, F. and L. Miller Bashir. Do They Hear You When You Cry? New York: Delta, 1998.
59. Matter of Kasinga, 21 I. & N. Dec. 357 (BIA, 1996).
60. In re C-Y-Z, 21 I.&N. Dec. 915, 917, 919 (1997).
61. Ma v. Ashcroft, 257 F.3d 1095 (2001).
62. Chen v. Ashcroft, 376 F.3d 215 (2004).
63. Zhang v. Ashcroft, 102 Fed. Appx. 361 (2004).
64. In re C-Y-Z, 21 I.&N. Dec. 915, 917, 919 (1997).
65. In re Y-T-L 23 I&N Dec. 601 (BIA 2003).
66. Fiadjo v. Att'y Gen., 411 F.3d 135 (2005).
67. Attia v. Gonzales, 477 F.3d 21 (2007).
68. Rodriguez-Ramirez v. Ashcroft, 398 F.3d 120 (2005).
69. U.S. Citizenship and Immigration Service. Adjudicator's Field Manual - Redacted Public Version, Washington DC, U.S. <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf>.
70. Zubeda v. Ashcroft, 333 F.3d 463 (2003).
71. Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (2007).
72. Mashiri v. Ashcroft, 383 F.3d 1112 (2004).
73. Mashiri v. Ashcroft, 383 F.3d 1112 (2004).
74. Ordonez-Quino v. Holder, 760 F.3d 80 (2014).
75. Haregwoin Abrha v. Gonzales, 433 F.3d 1072 (2006).
76. In re N- M A , 22 I. & N. Dec. 312 (1998).
77. Yaogang Ren v. Holder, 648 F.3d 1079 (2011).
78. United States Immigration and Naturalization Service (INS) Considerations for Asylum Officers Adjudicating Asylum Claims from Women ("INS Gender Guidelines"). United States Bureau of Citizenship and Immigration Services.: Washington DC, U.S. 26 May 1995.
79. UN High Commissioner for Refugees (UNHCR), Guidelines on the Protection of Refugee Women, July 1991
80. A.W. Burgess & L.L. Holstrom, "Rape trauma syndrome," Am. J. Psychiatry, 131:981-86 (1974)
81. Oxford, C. Protectors and Victims in the Gender Regime of Asylum. Nat. Women's Stud. Assoc. J. 2005, 17, 18–38.
82. Oxford, C. The Gory Details: Asylum, Sexual Assault, and Traumatic Memory. Sexes. 2023, 4, 188-221.
83. Oxford, C. Coercive Population Control and Asylum in the U.S., " Social Sciences. Special Issue: Women, Gender, and Politics: An International Overview, 2017, 6: 137-166.
84. Oxford, C. The Gory Details: Asylum, Sexual Assault, and Traumatic Memory. Sexes. 2023, 4, 188-221.
85. Herman, J. Truth and Repair: How Trauma Survivors Envision Justice. Basic Books: New York City, NY, U.S., 2023

**Disclaimer/Publisher's Note:** The statements, opinions and data contained in all publications are solely those of the individual author(s) and contributor(s) and not of MDPI and/or the editor(s). MDPI and/or the editor(s) disclaim responsibility for any injury to people or property resulting from any ideas, methods, instructions or products referred to in the content.